HB
297

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

PUBLIC DEFENDER AGENCY

333 K STREET
ANCHORAGE 99501
PHONE: 907-~~279-0455~~ 279-7541

March 16, 1977

Walter Carpeneti
Assistant Public Defender
Pouch AE
Juneau, Alaska 99811

Re: Senate Bill 206

Dear Bud:

As I discussed with you on the telephone today, this agency has been requested to testify on the subject of Senate Bill 206: The so-called "presumptive sentencing" bill. Unfortunately, I am beginning a two-count murder trial on Monday, and I will not be able to come to Juneau to testify, even though I think the bill is important enough to justify such action. I have asked you to substitute for me and to be the representative of this agency at the hearings on the bill. I hope that you will submit this letter as a part of your testimony, as it gives my views on the bill and outlines what I would say.

First, I am generally in favor of any attempt to clean up, simplify, make more efficient and rational the criminal law. The present Alaska Statutes dealing with this subject are frequently poorly conceived and badly drafted; undoubtedly, they need revision. However, a comprehensive revision of Alaskan criminal law is currently underway. This approach is a better idea than piecemeal legislation.

The presumptive sentencing bill is a major change in the law. It follows closely upon another major policy change imposed by the Attorney General's ban on plea bargaining. Although we cannot yet evaluate the effects of no plea bargaining on our system, I feel safe in saying that a tremendous impact has already been felt, including a large increase in trials, an even larger increase in appeals, and an increase in the expense of processing criminal cases.

I anticipate an unquantifiable, but probable, financial effect on this agency, the court system, prosecution, and the taxpayers of this state from yet another major policy change. Almost certainly we will see an increase of

litigation caused by this very complicated bill. As I told Duncan Fowler of the State Criminal Justice Planning Agency (see letter attached), the bill is a litigator's dream, and I foresee much litigation merely to determine how the Alaska Supreme Court will construe it.

I do not know precisely what statistics upon which Mr. Rubinstein based the sentencing figures in his statute. I certainly hope that the legislature has required an adequate analysis of backup statistics. I asked Mr. Rubinstein for these figures, but he could not provide them for me on short notice.

I suppose my major problem with the bill is precisely that of short notice. It was submitted late, and appropriate opportunity has not been had to solicit well-prepared responses to the bill from all segments of the system. The Criminal Code revision has included input from all segments: Court System, prosecution, defense, and public. It would not appear that the same equality of response has been provided with regard to Senate Bill 206.

Very truly yours,

Brian Shortell

Brian Shortell
Public Defender

BS:jd

Enclosures

House Judiciary
March 30, 1977

The meeting was called to order at 3:10 p.m. by Chairman, Gardiner. Members present were Gardiner, Miles, Dankworth, Eliason and Specking. Mr. Brown came late. Mrs. Rudd was absent.

HB 297 Sentencing

HB 297

Bud Carpenetti from the Public Defender's Office in Juneau was here on behalf of Brian Shortell (head of the Public Defender's Office in Anchorage). He indicated that they have some problems with this bill in that some references don't coincide with the system being proposed by the Criminal Code Revision Subcommission. The feel that the timing of this legislation is bad- that it may be premature. He indicated that the bill is based on the premise that judges can't be trusted.

Commissioner Burton from the Department of Public Safety was here to testify in support of the bill. He said that the law enforcement people that he knows and has spoken with are in support of this bill.

Dan Hickey from the Dept. of Law was here to speak to the fiscal note that had been drawn up by the Dept. of Health and Social Services. Mike Rubenstein from the Judicial Council also spoke about the fiscal note. The committee's feeling seemed to be that they found the fiscal note to be troublesome.

There were further comments on the bill by both Dan Hickey and Mike Rubenstein. Mr. Rubenstein said that he didn't feel that Mr. Carpenetti's statement that this bill is based on the premise that judges can't be trusted is correct.

This bill will be considered again later.

The meeting was adjourned at 4:45 p.m.

House Judiciary
March 19, 1977

The meeting was called to order at 1:30 p.m. Members present were Gardiner, Miles, Brown, Rudd, Specking and Dankworth. Mr. Eliason was absent.

HB 297 Sentencing HB 297

Testimony on HB 297 was continued from Friday, starting with "mitigating circumstances" on page 9. Further testimony was heard from Mike Rubenstein and Dan Hickey.

The meeting was adjourned at 3:00 p.m.

(907) 272-5522

UNIVERSITY OF ALASKA
CRIMINAL JUSTICE CENTER
3211 PROVIDENCE AVENUE
ANCHORAGE, ALASKA 99504

March 18, 1977

Representative Terry Gardiner
Pouch V
Juneau, AK 99811

Dear Rep. Gardiner:

This will respond to your request for comments regarding S.B. 206, the presumptive sentencing bill. In the nature of comments upon short consideration, this letter will tend to raise questions rather than answer them. I am sure that satisfactory answers compatible with the ultimate adoption of S.B. 206 can be made available. In general, at the philosophical level, I believe all of the staff here believe that presumptive sentencing in some form is a progressive step in making our justice system fairer and more understandable.

1. PURPOSE CLAUSE. Proposed AS 12.55.005 of the Act would appear to throw down a constitutional gauntlet unnecessarily. It is not clear what purpose the declaration of purpose clause serves since the scheme seems to speak for itself.

As you know, the Alaska Constitution states:

> "Penal administration shall be based on the principle of reformation and upon the need to protect the public."

We believe a presumptive sentencing scheme is compatible with this constitutional goal. Both the prospect for reformation and the need to protect the public require that the penal law have a deterrent effect proportionate to the offense.

The purpose clause offers a fruitful field for litigation respecting the extent to which the Legislature intends to depart from the constitutional prescription. Possibly the draftsmen believe that the sentencing process is something different from "penal administration."

We do not understand why the draftsmen felt compelled to proclaim the primary purpose of the act to be to "punish" - which Webster defines as "to cause to undergo pain, loss or suffering for a crime or wrongdoing." The dictionary notes "punish... generally connotes retribution rather than correction..." c.f. Chaney v State.

This tone problem is exacerbated slightly by the reference to "an non-criminal member of society" in (a) (6) with its suggestion that criminality is a question of status not conduct.

The declaration of purpose is not only philosophical in tone but it is comprehensive in scope. Yet is applies to certain enumerated crimes. No statement is made regarding the justification for applying the scheme to some crimes but not others...Does this create a constitutional classification problem?

2. SENTENCING ALTERNATIVES. AS 12.55.007 (6) (3) Does this mean the specific offender (O.K.) or the general offender? (problems)

There is some question regarding how the court is to interpret AS 12.55.007 (c) in relation to the presumptive sentencing provisions of the bill. A judge is bound by the presumptive sentence. He weighs specified aggravating and mitigating circumstances in departing from that sentence and presumably in imposing sentence he reviews those circumstances. At what point does he go back to the philosophy of sentencing set forth in AS 12.55.005? What bearing will each of those factors have on the presumptive sentence?

3. CLASSIFICATION OF FELONIES. AS 12.55.033(a). While each crime considered individually may be constitutionally firm, does the sentencing bill open up a new basis of attack by describing the elements of each of class A and class B felonies? For instance, suppose a person commits a class A felony, but there was not, in fact, a great risk of violence in the conduct. Can he then charge an arbitrary classification as to his specific offense?

4. THE PRESUMPTIVE TERMS OF YEARS. AS 12.55.035. Two of the basic tests of any sentencing scheme are whether it incarcerates the most "relevant" persons - those who pose the greatest danger to the public - and its effect on the overall prison capacity of the system.

Are some people being "squeezed out" as others are put in? What changes will take place in the character of the prison population and how should correctional facilities and programs be designed to meet these characteristics?

Unfortunately, it is impossible to provide even tentative answers to these kinds of questions without carefully review-

ing the background data which went into the development of each presumptive sentence and predictive analysis of the effect of the aggravating and mitigating factors on actual terms served. It is my understanding that the establishment of presumptive terms was based upon "average" experience but that for some offenses the draftsmen chose to depart from those sentences. How hard is the initial data? Does it come from court records of sentences imposed or correctional data on time served? What was the justification for picking "averages"? What is the justification in departing from it in some cases and what are the effects of those departures on capacity issues?

5. DESIGN OF PRESUMPTIVE SENTENCE STRUCTURE. AS 12.55.035(d) establishes "physical injury" as a major distinguishing factor in determining eligibility to opt out of the system. Has any thought been given to defining this crucial phrase - whether physical injury can be a bruise from an accidental bump on the head when the victim stepped back under a low light or an intentional gunshot wound. How do you decide whether a defendant "employed" a firearm? Does it include a co-defendant's use of a firearm with the knowledge of the defendant?

Under 35(b)(2) suppose the prior offense is an offense which includes all, or substantially all of the elements of the offense charged but also includes several other elements - e.g., an a.d.w. which was charged under a special statute involving the use of fire or poison. The elements of the prior crim are not identical. Would it count as a prior conviction under this language?

Under AS 12.55.041(c), here assuming the burden of going forward with "substantial evidence" may be placed on the defendant, isn't he entitled to a jury trial on the issue once he meets that burden and the state is obliged to prove the prior conviction beyond a reasonable doubt?

In the aggravating factors listed in AS 12.55.042(b) are "cruelty", "dangerous weapon" and "physical injury" of a sufficiently precise meaning to be readily applicable? For instance, does cruelty include mental cruelty?

In 12.55.042(c) does the proposed law inadvertently create by statute defenses of "coercion", "threat" or "compulsion" which may or may not be defenses at common law?

What does "youthful" mean in 042(c)(4)? To what age does it reference? May a more "Mature" person be younger?

What is an infirmity resulting from age? (042(c)(4)) Does it mean advanced age or can the mental infirmities of youth mitigate? How about infirmities of a young crippled person? Is the classification stated a rational one? Isn't

the existence of an infirmity alone the more appropriate standard alone? How is "infirmity" to be defined?

Under 042(c)(3), partial proof of certain specified defenses is allowed as a mitigating factor. Why were these particular defenses chosen and not others? For instance, the existence of mental illness not found by a jury to be a complete defense is frequently considered now as a mitigating factor by a sentencing judge.

How do you treat a "period of incarceration" under (f)(2) (and elsewhere) when the incarceration was not the result of a conviction sustained on appeal?

Under 12.55.043(c) does the term "punishment" mean something different from "presumptive term" as used elsewhere in the bill?

Does the language in proposed AS 12.55.042(d) mean that many weapons cases and a goodly number of assault cases will never involve aggravation on grounds listed in 042(b)(1)-(3)? Is there a risk that judges will sentence with aggravation in assault cases involving weapons, where weapons are an element in the offense until an appeal settles the issue?

6. PROCEDURAL DUE PROCESS. In proposed AS 12.55.042(e) are counsel bound by the trial record, or may they introduce factors which are not presented at trial? Does this create problems? (e.g., collateral use of inadmissable evidence?)

Can you constitutionally create "majority" sentencing as proposed in AS 12.55.044(c) or must the decision of the review panel be unanimous? Could a dissenter file a dissenting opinion? If there is a dissent, should there be an automatic appellate review by the Supreme Court?

Can you constitutionally deny "future" good time as is contemplated under proposed AS 33.20.010(b)? Can the denial be in excess of 30 days? What "due process" standards should be required by legislative action, as opposed to rule or regulation? No mention of A.P.A. Should there be?

A final point. Proposed AS 12.55.035(a)(2)(3) may not be written dearly enough to comply with Supreme Court holding in Davenport.

These thoughts are offered in conformity with your request for immediate comment. We are sending a copy to Representative Dankworth who made essentially the same request.

It is likely that on reflection, we might wish to withdraw some observations, elaborate on others or offer new comments. I should also observe that we have not had time to confer with any of the draftsmen on these matters. It would have been helpful if the bill had been accompanied by a careful explanatory commentary as is the case, for instance, with the criminal code revision. We are concerned that every sentence under this bill will be the

occasion for appeals since so many questions are left open by the text alone. Our comments are not prepared with the care we would use if this were to be entered as part of a formal record. If you have any inclinations in that regard, we would prefer to consult with the draftsmen before entering any formal comments.

Sincerely,

John E. Havelock
Director

JEH/sl

cc: Rep. Dankworth

Superior Court
State of Alaska
FIRST JUDICIAL DISTRICT
415 MAIN STREET, ROOM 402
KETCHIKAN, ALASKA 99901

Chambers of
THOMAS E. SCHULZ, Judge

March 29, 1977

The Honorable Robert Boochever
Chief Justice
Supreme Court of Alaska
Pouch U
Juneau, Alaska 99811

Re: H. B. 297
S. B. 206

Dear Chief Justice:

The committee appointed to consider presumptive sentencing has held two meetings, the last one being on March 23, 1977, when specific attention was given to H.B. 297 and S.B. 206. These two bills are identical and are designed to implement presumptive sentencing in Alaska at least as to Class A felonies.

As defined in the bills, Class A felonies include felonies "characteristically involving aggravated violence against a person, or great risk of aggravated violence against a person." The bills list second degree murder, manslaughter under A.S. 11.15.040, forcible rape under A.S. 11.15.120, mayhem under A.S. 11.14.140, shooting, stabbing or cutting with intent to kill, wound or maim under A.S. 11.15.150, assault with intent to kill or commit rape or robbery under A.S. 11.15.190, poisoning under A.S. 11.15.210, assault with a dangerous weapon under A.S. 11.15.220, aggravated assault under A.S. 11.15.225, robbery under A.S. 11.15.240, kidnapping under A.S. 11.15.260, burglary in a dwelling when occupied by another under A.S. 11.20.080 and assault on a correctional officer under A.S. 11.30.140 or A.S. 11.30.160. The committee is of the view that first and second degree arson fit the definition of Class A felony under the bills

and that first and second degree arson ought to be included as Class A felonies.

The three committee members, Judge Buckalew, Judge Taylor, and the undersigned are unamimously in favor of the concept of the bill. In the First District, I believe it is accurate to say that the Superior Court judges favor the concept of the bill, but there is some concern that the presumptive sentences set forth in the bill are too high in some instances, for the average case.

In the Fourth District, the Superior Court judges apparently favor the concept of presumptive sentencing. Only one comment was reported to your committee and that was that the presumptive sentence for forcible rape was too low.

In the Third District, the reaction appears to be more mixed. Some of the Superior Court judges in the Third District favor wide judicial discretion in sentencing as it presently exists while others favor the concept of the presumptive sentencing bills. There is also some feeling in the Third District that the presumptive sentences in the bills as they are today are too high for the average case while others in the Third District feel they are too low.

While we are unable to report, at this time, concerning the views of other judges, the committee members were in agreement with the relatively wide discretion still available to the sentencing judge in first offender cases. In fact, we feel that this is a particularly unimportant feature of the bill as it presently exists. While the sentencing judge has large discretion on the lenient side in first offender cases, it is the understanding of the committee that only a three judge panel could impose a sentence in excess of the maximum presumptive sentence (the presumptive sentence plus 50%) in first offender cases. That provision is an important safeguard against abuse of judicial discretion and we urge that it be retained.

The committee members are not particularly anxious to offer comment on the particular presumptive sentences set forth in the bills, but we certainly believe that they are high enough.

If I may offer my own view, I think the presumptive sentences in many instances are simply too high and that adoption of the bill with those sentences will lead to a substantial number of mitigation hearings which, in turn, will tend to consume judicial time and resources. If the idea of presumptive sentencing is to cover the normal average case, then, I think the presumptive sentence in many categories ought to be lowered.

After some rather extended discussion, the committee endorsed adoption of H.B. 297 in this Session of the Legislature. We understand that a thorough revision of the Criminal Code is under way and that much of the work already done on presumptive sentencing will need to be redone in order to correlate this sentencing scheme to a new Criminal Code. However, the committee felt it was important to get at least some experience with presumptive sentencing before it was made generally applicable to all felonies. If either one of these bills could be passed during this Session of the Legislature, both the Judiciary and the Legislature could have the benefit of some experience with the concept of presumptive sentencing in a limited class of felonies in which follow up and study of the results could be accomplished without a whole lot of time and money being spent. If shortcomings developed or some of the procedures set forth in the bills concerning hearings in aggravation or mitigation or the three judge sentencing panel proved too cumbersome, these problems could be resolved before the system bogged down.

As to the three judge sentencing panel provided for in A.S. 12.55.044, I think it is accurate to say that the committee does not believe this panel will or should be involved in very many cases. However, its function will be an important one and consistency would seem to require that the panel be selected on a statewide basis and serve for definite terms and that those terms should be long enough so that some useful guidelines can develop. As we understand the bill, the three judge panel comes into play only when the sentencing judge states that the presumptive sentence called for by the statute is unjust. In other words, neither the prosecution nor the defendant can request consideration by a three judge panel. We believe that this feature ought to be retained in the bill and we would recommend that the bill spell out more clearly than it does that neither party can request a three judge panel; that the panel would be convened only when the sentencing judge felt the presumptive sentence unjust. We would also suggest that the Legislature clarify just what is meant by "relevant mitigating or aggravating factors not specifically included in Section 42 of this chapter" and what is meant by "aggravating or mitigating factors" that "would result in manifest injustice to the defendant or the public" as those terms are used in Section 43.

Section 43 (a) of the bill appears to allow the sentencing judge to either exceed or go below the presumptive sentence without reference to a three judge panel in the case of first offenders. Other provisions of the bill appear to allow the sentencing judge only to go below the presumptive sentence, not exceed it. The committee feels very strongly that a sentencing judge should never be allowed to exceed the applicable presumptive sentence,

without referral to the three judge panel and we recommend that Section 43 be re-written to reflect that limitation. We can conceive of no policy justification for greater discretion on the high side in first offender cases than exists in repeat offender cases, and such a situation would seem to do violence to the whole rationale behind presumptive sentencing.

There are two matters that the committee did not feel were adequately addressed in the bill.

One is rehabilitation. We understand that one of the principal arguments for presumptive sentencing, mandatory minimum sentencing and a variety of other proposals is the argument that the concept of rehabilitation or treatment of the offender has not been a successful endeavor and, in fact, has been the rationale for much abuse in the indeterminate sentencing procedures now in vogue. In short, it is difficult to justify different sentences for the same offense when the available information does not demonstrate that the different sentences, or treatment, were required in any given case, nor than when "required" and ordered or recommended, it is available, and finally when actually available, that it is successful.

However, that does not justify to us the idea of junking rehabilitation altogether. There is evidence that some programs are helpful in meeting some identifiable causes of criminal conduct in some offenders. We feel that the presumptive sentencing legislation ought to address itself more strongly to the area of rehabilitation programs, particularly in the area of drug related offenses, including alcohol. The provisions in the bill as it now exists are nothing more than whitewash and amount to no more than lip service to the mandate of the Alaska Constitution. In addition, it is simply bad policy. It amounts to throwing the baby out with the bath water. Certainly, more discrimination is needed in the use of these rehabilitation programs, but the Legislature should address that problem, not ignore it.

Another area not addressed in the pending legislation is appellate review of sentences. Briefly, one of the very strong arguments for appellate review of sentencing was to provide a check on disparity in sentencing and another was to provide a method of establishing guidelines for the exercise of the wide discretion given to sentencing judges under statutes now in effect in Alaska.

The presumptive sentencing bills provide for a presumptive sentence in each Class A felony, and authorize the sentencing judge to exceed that sentence, or decrease it, by 50% after considering certain enumerated aggravating or mitigating circumstances.

The unusual case in which the sentencing judge feels that the presumptive sentence is too harsh or too lenient is provided for by referral to a three judge court.

Under that scheme, a question arises as to the function of appellate review. Given the sharply increasing workload in the Supreme Court, we recommend that some consideration be given to eliminating appellate review. We cannot articulate any benefit to be gained by the continued expenditure of judicial time and resources on review of sentences if presumptive sentencing becomes the law in Alaska. This, of course, does not mean that no reason exists for continued appellate review, but the committee does feel that the Supreme Court or perhaps, the Judicial Council ought to explore the question and make a recommendation concerning it to the Legislature.

In recommending a review of the necessity for appellate consideration of sentences, we understand that a sentencing court's failure to follow the procedures outlined in the legislation and such new rules as may be necessary to implement it would in itself be grounds for reversal and re-sentencing. I suppose the question we asked ourselves was: "Assuming compliance with the applicable statute and rules, under presumptive sentencing, what would be the function of appellate review?" We couldn't, in the limited time available, come up with any, and so we recommend that the concept of appellate review be re-evaluated in light of presumptive sentencing.

The committee gave consideration to the factors in the bill on mitigation or aggravation. We concluded that the bill, including amendments proposed by Mr. Hickey and Mr. Rubenstein, was probably sufficient in that regard. Although most sentencing judges have undoubtedly considered other factors from time to time, the factors listed certainly seem to cover the normal case.

In conclusion, please accept my apology for indulging an old habit and rambling on for too long a time. I have probably done my cohorts an injustice. The three judges on this committee were unamimous in the view that the bills present a much more rational and fair system of sentencing than that we presently have. We urge its favorable consideration. We note that some of our brothers disagree, and we are confident that they will make their views known, although they have not done so yet to our knowledge.

Respectfully,

S/ Thomas E. Schulz

Thomas E. Schulz
Chairman
Presumptive Sentencing Committee

TES:ri

STATE OF ALASKA

WILLIAM A. EGAN, GOVERNOR
J. S. Hammond

PUBLIC DEFENDER AGENCY

415 Main Room 206
BOX 1296—KETCHIKAN 99901
TEL: 225-6189

March 25, 1977

Honorable Terry Gardiner
Alaska State House
Pouch V
Juneau, Alaska 99811

Dear Representative Gardiner:

The rumor has been fostered, apparently by news reports from the Governor's Office, that a presumptive sentencing bill will pass the legislature this session and it causes some concern. The desire of english speaking peoples for certainity in the criminal law is aged and has much to be commended. However, the proposed legislation in HB 297 is too far reaching for passage absent critical analysis. The bill seems to effectively repeal the "reformation" principal of Alaska Constitution, Art. I, §12.

Please defer passage to preserve opportunity for extensive comment in the next session of the legislature.

Terry, historical antidote may be used to make the point that excessive punishment serves no purpose and the most iron clad of rules can be avoided. A good thing can be overdone. One is reminded of the english mandatory punishment of death by hanging for pick-pockets. A favorite site for pick-pocketing was the gallows where pick pocketers were hung.

The establishing of standards for judges to follow is, of course, necessary as not all judges have the ability or wisdom to dispense "justice." Equally unworkable, however, in my opinion are mechanistic rules requiring certain sentences upon conviction of specified acts. Within the definition of a crime, the act and actor can vary greatly and hard rules can result in cruelty. In medieval times the rules tended to be absolute and hence, interesting ways of avoiding harsh results were developed. An illiterate person to be taken before a judge was frequently given a Bible and taught to memorize certain passages so that it might appear he could read. In adjudicating the case the judge would pick passages from the Bible and, if he wanted to let the man go, the passages

chosen by the judge to be read had been previously memorized by the accused. In those times clerics were not responsible under the criminal law. Of course, clergyman were universally the only literate class. Hence, if one could read it was presumed he was a clergyman and not responsible for his acts.

The Public Defender, Brian Shortell, can state the agency's official criticism in a more erudite and scholarly manner.

Sincerely yours,

James L. Bruce

JLB:eip

cc: Honorable Robert Zeigler
Alaska State Senate
Juneau, Alaska 99811

March 10, 1977

Duncan Fowler
Criminal Justice Planning Agency
Pouch AJ
Juneau, Alaska 99811

Re: Presumptive Sentencing Bill -
Financial Impact on Public Defender
Agency

Dear Duncan:

You have asked me for an account of SB 206's possible fiscal impact on this agency. I have read the statute, discussed it with Michael Rubinstein of the Judicial Council and with some members of this age.

I think there is no question that the statute will result in a substantial increase in the number of trials tried by this agency. Senate Bill 206 takes away the incentive to plead guilty or nolo contendere, since there is really no leeway in the statute.

Additionally, there are so many procedural provisions in the statute to be interpreted, that I know that we can assume a larger number of sentence appeals at least for the first couple of years of the statute. The procedures are so complicated and so extensive that I don't question the need for much litigation to interpret procedural and substantive provisions of the statute. The statute is a litigator's dream.

More than this I can't tell you at this time. I am assuming that the bill as I have read it will be modified in the legislative process.

Any new criminal statute has a spin-off effect of increased litigation; any one as complicated as this statute is sure to increase litigation. I am assuming that this office will need additional people to handle a substantial increase in litigation, as I am assuming that the expense of trials and appeals will be reflected in the budget requests of the District Attorney, the Public Defender Agency, and the court system.

I am also assuming that the system will be willing to pay for any increase in litigation caused by SB 206. More litigation, more cost.

Very truly yours,

Brian Shortell

Brian Shortell
Public Defender

BS:jd

#

TELEGRAM

13003 KETCHIKAN ALASKA 154 03-22 144P PST ACA ALASKA COMMUNICATIONS, INC.
PHONE: 586-6440
JUNEAU, ALASKA 99801

PMS HONORABLE TERRY GARDINER

JUN 1977 MAR 22 PM 2 13

DEAR TERRY; AS SECRETARY OF THE KETCHIKAN BAR ASSOCIATION, I'VE BEEN AUTHORIZED TO GIVE YOU OUR GROUPS FEELINGS WITH REGARD TO THE PRESUMPTIVE SENTENCING BILL. WE FEEL THAT THE BILL IS PREMATURE IN THAT NO ONE HAS REALLY HAD THE OPPORTUNITY TO PROPERLY ANALYZE ITS VARIOUS RAMIFICATIONS AND THE LENGTH OF SENTENCES INVOLVED. IN OTHER WORDS, IT SHOULD NOT BE BROUGHT OUT THIS SESSION - IT SHOULD WAIT UNTIL NEXT YEAR. THIS OPINION HAS NOTHING TO DO WITH THE MERITS OF THE PROPOSAL BUT MERELY ITS TIMELINESS. SECONDLY, IF IN FACT SOME BILL MUST COME OUT, WE WOULD SUGGEST THAT A MINIMUM PERIOD OF ONE YEAR BE ALLOWED BEFORE ITS EFFECTIVE DATE. THIS WOULD GIVE THE COURTS AND BAR TIME TO PREPARE AND PUT FORTH ANY AMMENDMENTS THAT MIGHT BE NECESSARY. IF THE KETCHIKAN BAR CAN FURNISH YOU ANY INFORMATION OR BE OF ANY HELP WITH REGARD TO THIS, PLEASE LET US KNOW.

CLIFFORD H SMITH, SECRETARY, KETCHIKAN BAR ASSOCIATION

Bud Carpenenti — Brian Shortell

1. A lot of litigation —
2. submitted late
3. not balanced input + review

Use own criminal code commission

4. piece-meal approach

— New conflicts — with the proposed revised code would have to be revised
would have to put new crimes →

Plea-Bargaining Abolition → not had time to be implemented

1. No Plea-Bargaining study
2. Sentencing Study

1. Const Problem

"Aggravated violence" — will be litigated as to meaning

Escape clause

1. Rubenstein on council
2. Rec. from Jud Com.

① 005 — most severe sentence → does this mean toward the lower end of the scale

Judges Meeting Thurs.

Taylor
Buckalew
Schultz

② All appeals go to 3 judge panel

③ May be more standards for sentencing not in bill

④ Alcohol & Drugs → institutions don't deal with problems

⑤ Sentences may be to high

⑥ Statute presently provides for sentence review by S.C. — Most States don't have that

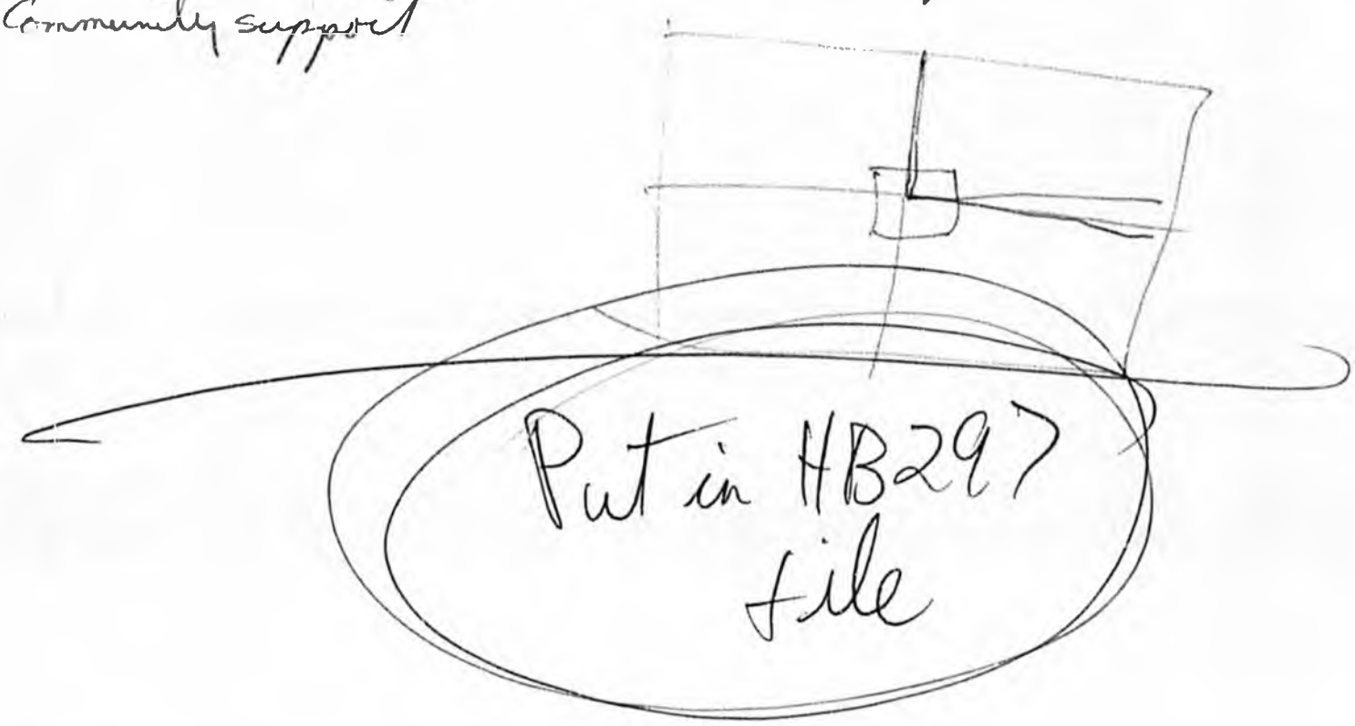
What is S.C. appellate Review function?

⑦ only judge can trigger 3 judge panel
A. Pros or Defense has same right — Preliminary showing
B. have review before deciding · Evidentiary hearing

⑧ Can judge raise an issue without going to 3 judge panel

⑨ Term of office for 3 judge panel

Jail lease back program — Non Profit Corp.
Community support



TELEGRAM

RCA GLOBAL COMMUNICATIONS, INC.

JUNEAU, ALASKA 99801

1977 MAR 22 PM 2 13

13233 KETCHIKAN ALASKA 154 03-22 144P PST

PMS HONORABLE TERRY GARDINER

JUN

DEAR TERRY: AS SECRETARY OF THE KETCHIKAN BAR ASSOCIATION, I'VE BEEN AUTHORIZED TO GIVE YOU OUR GROUPS FEELINGS WITH REGARD TO THE PRESUMPTIVE SENTENCING BILL. WE FEEL THAT THE BILL IS PREMATURE IN THAT NO ONE HAS REALLY HAD THE OPPORTUNITY TO PROPERLY ANALYZE ITS VARIOUS RAMIFICATIONS AND THE LENGTH OF SENTENCES INVOLVED. IN OTHER WORDS, IT SHOULD NOT BE BROUGHT OUT THIS SESSION - IT SHOULD WAIT UNTIL NEXT YEAR. THE OPINION HAS NOTHING TO DO WITH THE MERITS OF THE PROPOSAL BUT MERELY ITS TIMELINESS. SECONDLY, IF IN FACT SOME BILL MUST COME OUT, WE WOULD SUGGEST THAT A MINIMUM PERIOD OF ONE YEAR BE ALLOWED BEFORE ITS EFFECTIVE DATE. THIS WOULD GIVE THE COURTS AND BAR TIME TO PREPARE AND PUT FORTH ANY AMMENDMENTS THAT MIGHT BE NECESSARY. IF THE KETCHIKAN BAR CAN FURNISH YOU ANY INFORMATION OR BE OF ANY HELP WITH REGARD TO THIS, PLEASE LET US KNOW.

CLIFFORD H SMITH, SECRETARY, KETCHIKAN BAR ASSOCIATION

CLASS A

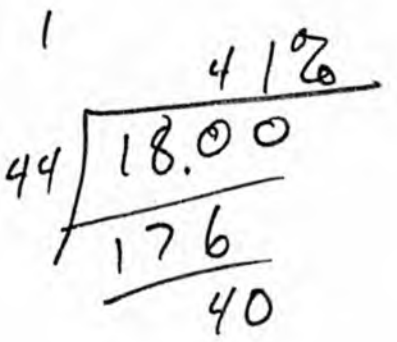
	Second Degree Murder	Manslaughter	Rape	Robbery	Kidnapping	Shooting with intent to kill, wound or maim	Assualt with intent to kill, rape, or rob	Assault with a Dangerous weapon	Burglary in a Dwelling (occupied)	Total
Number of convictions 1974-1976	8	18	23	60	3	6	10	78	16	222 (249)
% of total Class A Felony Convictions	3.6%	8.1%	10.4%	27%	1.4%	2.7%	4.5%	35.1%	7.2%	100%
Mean Sentence imposed over-all1 (months)	A	66.8	95.4	57.6	A	53.1	48.3	15.4	18	43.3
Mean Active sentences im-posed2 (months)	A	75.1	95.4	68.1	A	74.4	53.7	29.5	26.2	57
Number and per-centage of cases receiving proba-tion	0	2(11%)	0	9(15%)	0	2(29%)	1(10%)	26(33%)	5(31%)	45(20%)
ACTIVE TIME										
1-6 months	0	1(6%)	1(4%)	4(7%)	0	0	4(40%)	24(31%)	1(6%)	35(20%)B
7-12 months	0	3(17%)	4(17%)	4(7%)	0	0	1(10%)	6(8%)	3(19%)	21(12%)B
13-24 months	0	1(6%)	1(4%)	7(12%)	0	0	0	7(9%)	4(25%)	20(11.3%)B
25-60 months	0	3(17%)	3(13%)	18(30%)	0	2(29%)	2(20%)	12(15%)	3(19%)	43(24.3%)B
Over 100 months	8(100%)	8(44%)	14(61%)	18(30%)	3(100%)	3(43%)	2(20%)	3(4%)	0	59(33%)B
Highest Sentence (Months)	Life	180	360	180	Life	120	180	120	60	

1. Including probation averaged in as 0 Time
2. Not including sentences of o time

A.mean not computed because some sentences were life imprisonment
B.of setences imposing active time.

62 — 19.4 Mon

44 — 19.2.



POSITION PAPER/Department of Health and Social Services

POSITION PAPER

HOUSE BILL NO. 297

"An Act relating to sentencing."

The Department of Health and Social Services supports the concept of this bill.

The Alaska Judicial Council administrative staff is currently conducting a sentencing study. The preliminary findings, incorporating data gathered on Assault with a Dangerous Weapon during a two year period, 1974-76, indicated 78 counts or 67 people convicted (86 per cent). About 47 per cent of the defendents had at least one prior felony conviction (of any class) or at least one violent/weapon misdemeanor conviction. During this period, 44 people were incarcerated for ADW, for an average of 19.2 months per individual.

Under House Bill No. 297, the same 67 people convicted would be sentenced as follows:

5 would receive probation

62 would receive active time of 2.43 years adjusted by the two-for-one good time provision - actual time served would be 19.4 months per individual.

Since ADW represented about one-third of all Class A crimes for the period, the study indicated that approximately 54 (62-44 x 3 = 54) more people will be incarcerated over a two year period, an increase of 27 per year.

The Division of Corrections' review, using data from 1971-1975 annual recidivism studies, supports the Alaska Judicial Council staff study. The Division of Corrections' information covers a wider spectrum of felonies. The combination of both organizations' data, although not completely refined, offers a reasonable base to determine the approximate impact on Corrections during the next five fiscal years.

Several qualifications and assumptions made to develop conservative projections are:

a. assumption that the effective date of House Bill No. 297 will be July 1, 1977;

b. state population growth is excluded from computations;

c. the frequency or rate of felonies remain constant;

d. a uniform rate of sentencing occurs;

e. all offenders will serve minimum presumptive sentences; and,

f. inflation cost factor equals six per cent.

The charts on pages 3 and 4 display the minimum impact on bed space due to presumptive sentencing.

The estimated dollar impact of the bill on the Division of Corrections is summarized below:

	No. of Beds Needed at Year End	Average Mandays	Institution Costs
First Year	27	5,000	$ 250,000
Second Year	49	13,870	658,000
Third Year	62	20,075	956,000
Fourth Year	76	25,185	1,236,000
Fifth Year	85	29,565	1,522,000

27 million
9 million new jail

Recommended: William H. Huston 3/18/77

William H. Huston, Director
Division of Corrections

Date

Concurrence: for Lois M. Jones 3/18/1977

Francis S.L. Williamson
Commissioner
Department of Health
and Social Services

Date

CHART 1

IMPACT ON BED-SPACE DUE TO PRESUMPTIVE SENTENCING

	Percent	Additional no. of people in 2 years	Additional no. of people in 1 year	Length of Sentence	Total additional beds filled after system stabilizes
ASSAULT	33%	18	9.0	1.6	14.4
ROBBERY	25%	13	6.5	4.4	28.6
BURGLARY	16%	9	4.5	1.5	6.8
MANSLAUGHTER	10%	5	2.5	8.2	20.5
MURDER	8%	4	2.0	20.9	41.8
RAPE	7%	4	2.0	6.1	12.2
KIDNAPPING	1%	1	0.5	13.3	6.7
TOTAL	100%	54	27	-	131.0

Chart 2

	No. of Additional persons/year	Length in years till stabilization	ADDITIONAL BEDS FILLED BY End of year 1	End of year 2	End of year 3	End of year 4	End of year 5
ASSAULT	9.0	1.6	9.0	5.4			
ROBBERY	6.5	4.4	6.5	6.5	6.5	6.5	2.6
BURGLARY	4.5	1.5	4.5	2.8			
MANSLAUGHTER	2.5	8.2	2.5	2.5	2.5	2.5	2.5
MURDER	2.0	20.9	2.0	2.0	2.0	2.0	2.0
RAPE	2.0	6.1	2.0	2.0	2.0	2.0	2.0
KIDNAPPING	0.5	13.3	0.5	0.5	0.5	0.5	0.5
TOTAL			27	21.7	13.5	13.5	9.6
ACCUMLATED IMPACT			27	48.7	62.2	75.7	85.3
PERCENT OF TOTAL IMPACT			21%	37%	47%	58%	65%

111 15% reduction for No. of persons

AVERAGE IMPACT PER YEAR
******* ****** *** ****

CHART 3

PROBATION/PAROLE
********* ******

	No. of persons	Starts at	Length of probation	Year 1	Year 2	Year 3	Year 4	Year 5
ASSAULT	9	1.6	0.8	-	3.6	3.6	-	-
ROBBERY	6.5	4.4	1.5	-	-	-	-	3.9
BURGLARY	4.5	1.5	0.8	-	2.25	-	-	-
MANSLAUGHTER	2.5	8.2	1.5	-	-	-	-	-
MURDER	2.0	20.9	1.5	-	-	-	-	-
RAPE	2.0	6.1	1.5	-	-	-	-	-
KIDNAPPING	0.5	13.3	1.5	-	-	-	-	-
TOTAL			0.0	0	5.85	3.6	0.0	3.9
ACCUMULATED TOTAL			0.0	0	5.85	9.45	9.45	13.35

1) Persons receiving a presumptive sentence are subtracted from the probation figure.

2) Persons getting off of presumptive sentence for good time are added back to the probation figures.

3) Combining 1 and 2 above give the following net change in probation population.

	Year 1	Year 2	Year 3	Year 4	Year 5
CHART 2	-27	-21.7	-13.5	-13.5	- 9.6
CHART 3	+ 0	+ 5.9	+ 3.6	+ 0	+ 3.9
TOTAL	-27	-15.8	- 9.9	-13.5	- 5.7
ACCUMULATED TOTAL	-27	-42.8	-52.7	-66.2	-71.9
AVERAGE IMPACT PER YEAR	-13.5	-34.9	-47.8	-59.2	-72.0

Normal probation/parole workload increases of 6% yearly more than offset the approximate 1% negative effect as shown by chart 3 - Average Impact Per Year.

THE LEGISLATURE OF THE STATE OF ALASKA
TENTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. House Bill No. 297

Title An Act Relating to Sentencing

Requested by The Governor (with the Judicial Council) Date March 3, 1977

II. FISCAL DETAIL

Agency Affected Department of Health & Social Services - Division of Corrections

Program Category Affected Administration of Justice

Budget Request Unit(s) Affected Adult Confinement and Probation/Parole

EXPENDITURES (Thousands of Dollars)

		FY 77	FY 78	FY 79	FY 80	FY 81	FY 82
100	PERSONAL SERVICES		149.6	363.3	503.1	633.3	772.3
200	TRAVEL		1.3	3.7	5.6	7.5	9.3
300	CONTRACTUAL		47.2	138.8	213.1	283.4	352.5
400	COMMODITIES		42.5	125.0	191.9	255.1	317.4
500	EQUIPMENT		2.4	6.9	10.6	14.1	17.6
600	LAND & STRUCTURES						
700	GRANTS, CLAIMS, ETC.		7.0	20.8	31.9	42.4	52.8
	TOTAL		250.0	658.2	956.2	1,235.8	1,521.9

FUNDING (Thousands of Dollars)

GENERAL FUND		250.0	658.2	956.2	1,235.8	1,521.9
FEDERAL FUNDS						
OTHER (Specify)						

POSITIONS

FULL TIME		6	13	17	20	23
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

The Alaska Judicial Council administrative staff study preliminary data, in concert with figures developed by the Division of Corrections, forms the basis for the above computations. (Refer to Position Paper narrative for details.) The cost distributions shown above are patterned from budgeted and experienced costs of the various correctional centers.

A 6 per cent inflation factor was used.

No debt service for capital improvements was included. The impact of this bill hastens the need for additional bed capacity.

IV. DATE March 18, 1977 PREPARED BY Leland T. Dalby, Administrative Officer

AGENCY Dept. of Health & Social Services - Division of Corrections

PHONE 465-3376

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

33-001 (Rev. 10/76)

PROPOSED AMENDMENTS TO SB 206 AND HB 297

p. 1, line 23: after "sentence" delete all material and insert the following "which the offender deserves, considering the following:"

p. 1, line 24: delete all material

p. 1, line 27: delete "nature" and insert "circumstances"

p. 1, line 29: between "the" and "isolation" insert "need for"

p. 2, line 9 and 10: delete all material

p. 2, line 11: delete "(c)" and insert "(b)"

p. 2, line 11: delete "further"

p. 2, line 17: between "(a)" and "In" insert: "Except as provided in sec. 35 of this chapter,"

p. 3, line 9: delete all material and insert "(1) the offender deserves to be imprisoned considering the"

p. 3, line 12: after "offenders" insert ","

p. 3, line 12: delete "due"

p. 3, line 13: after ";" insert "or"

p. 3, line 14: delete "the term of"

p. 3, line 15: delete ";" and insert "."

p. 3, lines 16-18: delete all material

p. 4, line 5: delete all material and insert "aggravated violence against a person."

p. 5, line 20: delete "will" and insert "may"

p. 6, line 18: delete "any other felony," and insert "more than one felony"

p. 7, line 3: delete "must" and insert "shall"

p. 7, line 18: delete "must" and insert "shall"

p. 7, line 21: delete "must" and insert "shall"

p. 7, line 27: delete "must" and insert "shall"

p. 8, line 10: delete "must and insert "shall"

p. 8, line 11: delete "due"

p. 8, line 14: delete "must" and insert "shall"

p. 9, line 2: delete "or"

p. 9, between lines 5 and 6: insert the following:

"(8) the defendant was on release for another felony charge under AS 12.30.020 or 040; or

(9) the defendant was on probation, parole or community supervision for a prior felony conviction."

p. 9, line 6: delete "must" and insert "shall"

p. 9, line 23: delete "or"

p. 9, lines 24-25: delete all material and insert the following:

"(7) the defendant does not have a criminal history of prior convictions other than for minor traffic offenses; or

(8) imposition of the presumptive term would cause great hardship to persons dependant on the defendant for support, which may result in the responsibility for the support passing to the state."

p. 10, line 3: delete "must" and insert "shall"

p. 10, line 6: delete "must" and insert "shall"

p. 10, line 7: delete "must" and insert "shall"

p. 10, line 14: delete "will" and insert "may"

p. 11, line 15: delete "members" and insert "of the judges"

p. 11, line 16: delete "." and insert ";"

p. 11, line 17: delete "superior court"

p. 12, line 16: delete "parole" and insert "community supervision"

p. 12, line 17: after "deduction" insert ", but in no event for more than 18 months,"

p. 12, line 17: delete "rules and"

p. 12, line 18: delete "his parole officer" and insert "the probation/parole officer."

p. 12, line 22: after "," insert "or imprisoned for a violation of probation, parole or community supervision,"

p. 12, line 27: delete "any one subsequent" and insert "an"

p. 12, line 28: after "time" insert "not to exceed 30 days"

p. 13, lines 16-19: delete all material and insert the following:

* Sec. 7. EXISTING REHABILITATIVE PROGRAMS. The Alaska Division of Corrections shall examine existing and alternative rehabilitation programs to determine how the constitutional principle of reformation may best be carried out within the context of the presumptive sentencing provisions of this Act, and annually report their findings and recommendations under this section to the legislature."

p. 14, lines 2-4: delete all material and insert the following:

"(b) The Alaska Judicial Council shall collect and analyze data relating to existing sentencing practices in the state, the impact of legislative enactments affecting sentencing, and trends in sentencing practices in other jurisdictions. The council shall periodically distribute the data and analyses to the legislature, the court system, and other affected or interested agencies.

Rape →
Burglary → 2
6

860 Felony convictions 1974-1976

Statistical Model — segment - is sum of differences from mean

simplified picture of overall picture

Picked 7 classes of crimes

class 2 - violent felonies — Use to compare to criminal code
"A Felonies"

1. Prior Felonies

Use Sentencing Study to right Standards for Pre-Sentence Reports

Not Factors
1. Degree of harm of Victim
2. Use of Firearm

Problems

(1) Page 9, line 24 (7)

Problem of civil offenses & infractions

Versus Moral Traffic offenses

(2) Alcohol

(3.) Judge can't send to Family House

(4.) Change ongoing monitoring

(5) When expanding to all Felonies
Change Aggravating & Mitigating factors

(8.) set Appeals to 3 judge panel
for all Sentencing Appeals

(9.) longer effective Date

(10) Add aggravating factor - Commission of 2nd or More offense in same crime
Robbery & Assault
"A Rotten Case of Double Jeopardy — 2 convictions 1 sentence

HB 297

March 3, 1977

The Honorable Hugh Malone
Speaker of the House
Alaska State Legislature
Juneau, Alaska 99811

Dear Mr. Speaker:

Under the authority of art. III, sec. 18 of the Alaska Constitution, and in accordance with AS 24.30.060(b) and the Uniform Rules of the Alaska State Legislature, I am transmitting a bill designed to alter the present philosophical focus of Alaska law with respect to sentencing practices and to implement a statutory scheme of presumptive sentencing for violent crimes and crimes that have a high potential for violence.

Our present system for imposing sentences upon individuals convicted of criminal offenses is essentially an unstructured exercise of judicial discretion. The legislature has set only the outside limit of a sentencing court's authority, leaving the selection of a specific sentence to each judge on a case-by-case basis. It is true that the Supreme Court does have the statutory authority to review individual sentences and to modify or reduce an excessively harsh sentence or issue an advisory opinion with respect to an excessively lenient sentence. However, this authority has, of necessity, also been exercised on a case-by-case basis and while it is has resulted in the development of some general sentencing guidelines, it has in a larger sense provided little more than a check against individual incidents of abuse. Consequently, the sentencing judge, himself, continues to bear primary responsibility for analysis of the factors which will effect the imposition of a particular sentence.

At present, a sentencing judge in Alaska is required to consider the goals of rehabilitation of the offender; the necessity to isolate an offender from society; deterrence of both the offender and others; and comforms, comdemnation and a reaffirmation of societal norms, or put another way, punishment of the offender.

State v. Chaney, 477 P.2d 441 (Alaska 1970). The judge has been provided with little positive guidance as to which of these goals or which combination of them ought to be afforded significance in a particular case. A judge's decision within this framework has a tendency to vary dependent on the personal characteristics of defendants appearing before him and the judge's own evolving concepts of fairness and justice.

In view of this general lack of guidance, the sentencing process in Alaska has from time to time been the subject of a good deal of criticism. Different judges frequently disagree over the importance to be afforded various aggravating and mitigating factors present in a given case. Indeed, disagreement exists with respect to the essential purpose to be achieved through imposition of sentence in individual cases. The result of this disagreement has been a good deal of disparity in the sentences actually received by similarly situated offenders for similar offenses.

This proposed sentencing legislation is designed to establish a comprehensive statutory system of limited initial application. It is intended as the first step in a substantial restructuring of present sentencing practices to eliminate the unjustified disparity which now occurs. To that end, the bill seeks to provide for the imposition of sentences that are deserved by an offender, that are proportionate to the seriousness of each individual offense and which are to be imposed within a range of specific limitations placed on the exercise of judicial discretion.

The specific sentencing scheme provided for in the bill is one of "presumptive" sentencing. Initial application of this scheme is restricted in the bill to convictions for offenses denominated as Class A felonies and include the following offenses: second degree murder; manslaughter; forcible rape; mayhem; shooting, stabbing or cutting with intent to kill, wound or maim; assault with intent to kill or commit rape or robbery; assault while armed; poisoning; assault with a dangerous weapon; aggravated assault; robbery; kidnapping; burglary in a dwelling when occupied by another person; and assault on a correctional officer.

In spite of this limited initial applicability, the bill provides for the creation of an overall framework designed for adaption to sentencing for all offenses. Indeed, the bill has been specifically designed to provide for a set of statutory guidelines and criteria of general applicability. Consequently, rather than leaving an application of the guidelines delineated in State v. Chaney, supra, and its progeny to individual cases, the specific factors to be examined are codified.

The bill also sets out sentencing alternatives available to a court and specifies that a sentence of confinement shall be imposed when certain circumstances are present. In this respect, a fundamental concept embodied in the bill is a rejection of rehabilitation as the principal purpose of imprisonment and a reinstatement of the basic precept that the primary purpose of imprisonment for crime is punishment. Reliance on the principle of rehabilitation as a justification for the imprisonment of an offender has in large measure contributed to disparate sentencing practices. Extensive correctional research has failed to demonstrate that rehabilitative programs in general are effective in reducing recidivism. Consequently, the primary purpose of imprisonment should be honestly identified for what it should be, punishment of an offender for the commission of a criminal act against society.

I must emphasize that this bill is the product of combined efforts over many months of the Criminal Division of the Department of Law and the Alaska Judicial Council, which first proposed the concept of presumptive sentencing as an alternative to a straight mandatory minimum approach. The penalties set out in the bill for Class A felonies are "presumptive" penalties in that they establish the "average" sentence to be imposed in a "typical" case. Presumptive sentencing provides for sentences set by statute, such as those proposed in this bill, within a range that is neither fully mandatory nor fully discretionary, but rather, which establishes a "bottom line" below which a judge cannot reduce a sentence except in extraordinary circumstances pursuant to a procedure that is specifically delineated in the bill.

The penalties proposed in the bill are included as a beginning point for legislative discussion of the subject. While they are not "fixed in stone", neither are they merely arbitrary terms of years, but rather, have been derived from an exhaustive statistical analysis conducted by the Judicial Council of Alaska felony sentences actually imposed during a two year period between August 1, 1974, and August 1, 1976. Thus, to a large extent the terms set out in the bill adopt as a point of departure the aggregate experience of Alaska's superior court bench as expressed in actual sentencing decisions.

Under the presumptive sentencing scheme established in the bill, individual presumptive terms are provided for the specified felonies, on the basis of a first, second and third or subsequent offense. In the case of an offender with no prior felony conviction, a sentencing judge could suspend the presumptive term and place the defendant on probation if in committing the offense, he did not cause physical injury to any person and did not employ a firearm in furtherance of the offense. In the case of an individual with two prior Class A felony convictions, the presumptive term set out in the bill would become a mandatory minimum sentence below which a court could not sentence. On the other hand, a sentencing judge would be free to impose any sentence from the presumptive term up to the statutory maximum.

Recognizing that justice entails more than a mechanical scheme, the bill provides the sentencing judge with the ability to enter findings in a particular case, again by a standard of clear and convincing evidence, that a manifest injustice would result either to the public or the defendant from imposition of a presumptive sentence. In such a case, sentencing would then become the responsibility of a three-judge sentencing panel, which is specifically provided for under the bill. The three-judge panel would be free to sentence a defendant in the interest of justice to any term applicable irrespective of the presumptive sentencing provisions of the bill.

The bill also addresses the system of awarding good time to prisoners in correctional institutions. The present scheme is an amalgam of statutory and meritorious good time which, at best, is confusing to prison administrators and prisoners alike. The proposed approach allows a prisoner to earn one day

reduction in his period of confinement for every two days of good conduct served. Further, only a maximum of 30 days of accrued good time plus a period of future good time could be forfeited for any single infraction of prison rules.

Additionally, the bill provides that a prisoner sentenced under the presumptive sentencing provisions established in the bill is not eligible for discretionary release on parole. However, in order to adjust for the reality that recidivist rates are generally higher among individuals released from prison without supervision, the bill additionally provides that when a prisoner is released early as a result of accumulated good time, he is placed on parole subject to such conditions as may be imposed by the parole board or his parole officer for a period identical to his accumulated good time. The purpose and effect of this provision is to maintain active supervision over an offender for the entire length of his presumptive sentence.

Lastly, it should be emphasized that while the bill is, of necessity, drafted in a manner to fit the present offense structure found in the Alaska Statutes, it was also intentionally designed to readily mesh with the criminal code revision effort now in progress through the Alaska Criminal Code Revision Subcommission.

Sincerely,

Jay S. Hammond
Governor

COMPARISON OF LENGTHS OF SENTENCES IMPOSED OR TIME SERVED BY OFFENSES

(All Time Expressed in Years)

OFFENSE	Number of cases in Alaska, August 1, 1974 to August 1, 1976.[A]	Range of sentence as prescribed in AS Title 11.	Mean sentence imposed in Alaska[B] for all offenders 1974-1976.	2/3 of mean sentence imposed in Alaska 1974-1976.[C]	Twentieth Century Fund Recommended presumptive sentences.[D]	California presumptive sentence range.[E]	Average sentences imposed in U.S. District Courts, 1972.[F]	Mean time served before parole in all 50 states 1965-1970.[G]	Average time served by first releases from federal institutions, 1972.[H]
Second degree murder	8	15 to life	25.75	17.25	5	5-6-7		6.6	4.9
Manslaughter	18	1 to 20	5.6	3.74	4	2-3-4	5.06	2.4	
Kidnapping	3	any term of years	65.44[3]	43.84		3-4-5	18.2		2.4
Rape	23	1 to 20[1]	7.95	5.3	6	3-4-5	7.9	5.7	3.5
Robbery	60	1 to 15	6.1	4.1		2-3-4	10.3	1.34	4.0
Assault w/A dangerous weapon	79	6 months to 10 yrs; or $100 to $1000 or both	1.67	1.1	6	2-3-4	3.5	1.9	5.5
Burglary in a dwelling	16	1 to 10, 15 or 20 years[2]	1.5	1	2		3.6	1.8	4.5

A. Alaska Judicial Council Sentencing Study, 1977.

B. Alaska Judicial Council Sentencing Study, 1977.

C. The Alaska Court System is presently studying the length of time an offender serves before being released from imprisonment. Preliminary findings show that on an average, offenders actually serve 2/3 of the sentence imposed.

D. Twentieth Century Fund Task Force on Criminal Sentencing: Fair and Certain Punishment. (McGraw-Hill, N.Y. 1976) Appendix B.

E. California Senate Bill 42 (1976) Effective July 1, 1977, the statute prescribes a presumptive sentence as well as minimum and maximum beyond which the judge cannot impose time.

F. From Sourcibook of Criminal Justice Statistics, 1973, LEAA. Table 5.38.

G. Gottfredson, Don M.; M. G. Neithercutt; and Joan Nuffield: "Four Thousand Lifetimes: A Study of Time Served and Parole Releases". National Council on Crime and Delinquency, June 1973, page 28.

H. U.S. Department of Justice, Bureau of Prisons. "Statistical Report, Fiscal Years 1971 and 1972". pp.152, 153.

1. When the victim of a rape is the offender's daughter, son, sister or brother, or is under the age of 16, the sentence prescribed by Alaska law is any term of years (AS 11.15.130(a)).

2. If the burglary was committed during the daytime, the maximum is 10 years, if it was at night, the maximum is 15 years, and if the dwelling was occupied, the maximum is 20 years (AS 11.20.080).

3. One defendant received 30 years, two defendants received life terms.

STATE OF ALASKA

JAY S. HAMMOND, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

POUCH K — STATE CAPITOL
JUNEAU 99811

March 3, 1977

The Honorable Terry Gardiner
House of Representatives
Pouch V
Juneau, Alaska 99811

Dear Terry:

I am attaching a copy of the presumptive sentencing bill which was introduced today in both houses. I am sorry this bill has been so late, but we have worked very hard to try and reach a compromise position with the Judicial Council so that the administration and the Judicial Council would be able to present one bill to the legislature rather than starting the whole thing off with contrasting versions. In my humble view, this proposed legislation, which represents literally thousands of hours of work both in last year's legislature and in the interim, is an excellent approach to the sentencing problem. The bill has been worked over in great depth and I think we can defend every provision of it. I am giving you an advance copy of it because I know of your interest in the bill.

If you would like to talk about the bill informally before it reaches the hearing stage, I'd be happy to do so.

Yours very truly,

Avrum M. Gross
Attorney General

AMG:as

file with those
Sentencing Studies
or
Bill introduced
today

(907) 272-5522

UNIVERSITY OF ALASKA
CRIMINAL JUSTICE CENTER
3211 PROVIDENCE AVENUE
ANCHORAGE, ALASKA 99504

February 18, 1977

Dear Representative:

As you are undoubtedly aware, one of the more significant issues facing this session of the legislature relates to sentencing reform proposals. One of those proposals, known as presumptive sentencing, has already been introduced in the House.

Enclosed you will find a copy of a report dealing with presumptive sentencing which was prepared last year for the Criminal Law Revision Subcommission. The report digests Fair and Certain Punishment, a study conducted by the Twentieth Century Fund which developed the concept of presumptive sentencing and is considered the definitive word on the subject. Particular attention should be paid to pages 3-5 of the enclosed report which provide a summary of legislative responsibilities related to presumptive sentencing which were recommended by the Twentieth Century Fund.

The enclosed report also suggested a number of areas for further research which would be required prior to active legislative consideration of presumptive sentencing (pp. 6-8). Research conducted by the Judicial Council during the past six months should provide some answers to the issues raised in the report.

Also enclosed is a report which summarizes sentencing standards established by the Alaska Supreme Court as a result of sentence appeals heard by it under AS 12.55.120.

A third enclosure contains excerpts from an unpublished memorandum written by Professor Jerry Israel of the University of Michigan Law School entitled: "An Introduction to Basic Sentencing Issues".

I hope that you will find the enclosed reports both informative and helpful to you at the time that this issue comes before the legislature. If the Center can be of further assistance to you on this issue, please feel free to contact Peter S. Ring.

Sincerely,

John E. Havelock
Director

sl

Enclosures

SENTENCING ISSUES:

A SUMMARY

PREPARED BY THE

CRIMINAL JUSTICE CENTER

UNIVERSITY OF ALASKA, ANCHORAGE

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Director of Research

REPORT ON PRESUMPTIVE SENTENCING

Several members of the Criminal Code Revision Commission, at its January meeting in Juneau, asked for more information on the concept of presumptive sentencing. Staff has reviewed Fair and Certain Punishment*, the study which, in 1976, introduced the concept of presumptive sentencing to a wider audience.

In very brief terms, Fair and Certain Punishment is a significant contribution to the literature on sentencing. It is worthy of the most serious consideration by all Commission members, legislators, criminal justice practitioners and concerned members of the public. It presents an excellent picture of current sentencing practices across the country and of the serious problems associated with those practices.

The Task Force deals quite fairly with these problems and presents a brief but extremely thorough discussion of a number of proposed alternatives to current sentencing practices - including mandatory minimums - all of which it found to be less than satisfactory.

Because of the special concern of the Commission on the matter of mandatory minimums, the comments of the Task Force on that subject are quoted here in full:

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*Report of the Twentieth Century Fund, Task Force on Criminal Sentencing. McGraw Hill, (1976). Because of an embargo on substantial quotation from the report prior to its April 13, 1976 release date, staff was unable to provide this report in a more timely fashion.

"Flat-time sentencing goes too far in eliminating all flexibility. By requiring every single defendant convicted under the same statute to serve the identical sentence, it threatens to create a system so automatic that it may operate in practice like a poorly programmed robot. This is especially true if statutory definitions of crime remain as broad and inclusive as they are today.

These same objections apply substantially to mandatory minimum sentences for most crimes. We agree that there are certain extremely serious crimes for which imprisonment should be required without regard to the circumstances. (Our own recommendations make provision for such imprisonment.) But we reject the concept of the mandatory minimum as a general approach to sentencing. Moreover, we have concluded that a mandatory minimum sentencing structure, even if it were desirable, only addresses a small part of the critical problem of disparity and extremes in sentencing. It deals only with minimum sentences - not with the major injustices at the high end of the range.

It is our considered view that some degree of flexibility must be maintained both at the sentencing and the parole stage in order for the system to be just and effective. We have also concluded that discretion cannot be significantly reduced or controlled without thoroughgoing legislative (or legislatively authorized) redefinition and subcategorization of current crimes."*

The Task Force went on to recommend its own solution to the problem - presumptive sentencing. This system would require substantial code revision (at least for sentencing purposes) which would allow criminal conduct to be divided into a large number of categories depending upon the circumstances of the crime. This significantly greater particularization of criminal conduct would make it unnecessary to give a judge as much latitude in

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* Id., pp. 17, 18. (Emphasis in the original.)

sentencing since the legislature would have anticipated many of the variations which go into leniency or severity in sentencing through its codification efforts.

The present discretion of judges and parole boards would be guided by a presumptive sentence for each established criminal circumstance, the type of crime having been refined by the introduction of a large number of degrees within each crime. The court would justify departure from that presumptive sentence through a calculus of certain designated mitigating or aggravating circumstances. A similar calculus would be used for second or subsequent offenders.

To implement the system the Task Force recommended:

> "For each subcategory of crime, we propose that the legislature, or a body it designates, adopt a presumptive sentence that should generally be imposed on typical first offenders who have committed the crime in the typical fashion."*
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> * * *
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> "The Task Force recommends that the legislature, or a body it designates, also define specific aggravating or mitigating factors again based on frequently recurring characteristics of the crime and the criminal."**
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> "The Task Force believes that sentencing hearings should be mandatory to establish any aggravating or mitigating circumstances and to have the sentence pronounced."***
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>
> "We recommend that the legislature establish a commission composed of representatives of the judiciary

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*Id., p. 20.
**Id., p. 20.
***Id., p. 21.

and other interested groups to undertake the drafting, establishment, and periodic review of a presumptive sentencing system."*

* * *

"We recommend that there should be periodic review of crime categories; of minimum, maximum, and presumptive sentences; and of mitigating and aggravating factors."**

* * *

"We recommend that more imaginative approaches be taken to sentencing by imposing punishment that mitigates the crime breeding effects of today's prisons."***

* * *

"We recommend the elimination of most current barriers to employment of ex-convicts."****

* * *

"We urge that, in general, presumptive sentences be accompanied by a considerable reduction in the lengths of sentences authorized by legislatures, imposed by courts, and served by prisoners. It is also our recommendation that a larger number of criminal defendants - principally those convicted of serious crimes - should serve some time in prison."*****

Each of these recommendations was accompanied by detailed commentary which outlined the Task Force's rationales and what they believed would be accomplished in a positive fashion by implementation. Their commentary touched on substantially all of the issues which the Criminal Code Revision Commission has considered in its discussions relating to substantive code revision of terms of sentence and factors related to sentencing.

The Task Force then presented an <u>illustrative</u> presumptive

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*Id., pp. 25, 26.
**Id., p. 28.
***Id., p. 28.
****Id., p. 29.
*****Id., p. 32

sentencing sentencing statute for armed robbery, and a further list of illustrative crimes and presumptive sentences. They took great pain to point out that these were illustrations of the system and not recommendations supported by the entire Task Force.

The report concluded with an excellent background paper by Professor Alan M. Dershowitz of the Harvard Law School. This paper deals with a variety of issues related to sentencing and treats all of them in a comprehensive yet easily read and understood fashion.

As is made clear by the recommendations of the Task Force, legislative enactment of a presumptive sentencing system for Alaska would require a great deal more research and analytical work beyong that provided by the Task Force's recommendations. It is of considerable significance to the Alaska Commission that such a system does not require a legislative basis. It could be implemented through the judicial power without specific legislative sanction, a course deserving careful consideration by its avoidance of adding further complexity to the work of code revision.

The Study justified non-legislative implementation as follows:

> "Except for the proposed curtailment of the power of parole boards and prison administrators, federal, state, and local court systems need not wait for legislative action to establish a system of presumptive sentences. Courts are administrative agencies in fact if not design; as Professor

> Kenneth Culp Davis notes, 'Earlier and more diligent use of agencies' rule-making power is a far more promising means of confining excessive discretionary power than urging legislative bodies to enact more meaningful standards.' Since 'power to make rules always accompanies discretionary power and need not be separately converred,' presumptive sentences for each crime, as well as the weights to be attached to prior convictions and to mitigating and aggravating circumstances, can be promulgated by courts in the form of administrative rules and guidelines. (See Kenneth Culp Davis, Discretionary Justice [Baton Rouge, La.: Louisiana State University Press, 1969], ch. 3, esp. pp. 56, 68.)"*

Thus, at least two avenues are open to arriving at implementation of a presumptive sentencing system. Of the two, the latter - court promulgated administrative rules and guidelines - presents a number of advantages over legislative enactment.

It provides the ability to experiment on the utility of presumptive sentencing in connection with a limited number of crimes without encountering the difficulties inherent in drafting, introducing and gaining passage of new legislation. Moreover, if the system develops unforeseen problems it can be revised or abandoned altogether in a much easier fashion than is required for statutory enactments.

Taking the Task Force's recommendations as a guide for legislative action, the following work would be required before a presumptive sentencing system could be enacted.

1) Substantive crimes would have to be broken down

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*Id., p. 20. (The language is contained in a comment to the text by Mr. Charles Silberman, a New York author and member of the Task Force.)

into subcategories which reflected degrees of severity. In part, we are engaged in this process already in our Code revision work. It should be noted, however, that the Commission has been resistant to a large number of subcategorizations and that, though a high degree of subdivisions may be useful to sentencing, it may well pose problems for the prosecution.

2) Terms of sentence for each subcategory of crime would have to be established for the presumptive sentence and a formula developed for dealing with repeaters and aggravating and mitigating circumstances.

These terms and their accompanying formulae could be developed through the process of group discussion and legislative compromise. Or, they could be arrived at by the process of research. Given the significance of the end product to the administration of justice, the latter seems to be the preferred course of action.

An a priori sentencing model could be constructed by random sampling of all cases involving the crime in question over a period of time to determine what Alaska's judges have given the average first time offender convicted for that crime. A similar process would be used for second, third, etc. offenders. The results of this research would provide "real" sentencing parameters within which questions related to presumptive sentences could be addressed. This research would

tend to indicate why the Task Force calls for a continuing process of review. Changes in community attitude and social conditions have a good deal to do with actual sentencing practices.

3) The same research is required on issues of mitigation and aggravation. Exhaustive "laundry" lists could be developed based on the experience of practitioner recollections, or case files could be surveyed to develop real lists of typical aggravating and mitigating circumstances which recur with some frequency in Alaska's environment.

The research involved in items (2) and (3), above, would require considerable time and effort, but it may be essential in a system where fairness is to be first subject to mechanical screening.

SENTENCING STANDARDS IN ALASKA

(NOTE: The material which follows has been excerpted from an article written by Supreme Court Justice Robert C. Erwin [entitled: "Five Years of Sentence Review in Alaska"], which appeared in 5 U.C.L.A.-Alaska L. Rev. 1 (1975).)

The Supreme Court has defined four overreaching goals of sentence review:

> "(i) to correct the sentence which is excessive in length, having regard to the nature of the offense, the character of the offender, and the protection of the public interest;
>
> (ii) to facilitate the rehabilitation of the offender by affording him an opportunity to assert grievances he may have regarding his sentence;
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> (iii) to promote respect for law by correcting abuses of the sentencing power and by increasing the fairness of the sentencing process; and
>
> (iv) to promote the development and application of criteria for sentencing which are both rational and just.

In addition, the court specified objectives which inhere in the Alaska Constitution's mandate that "[p]enal administration shall be based on the principle of reformation and upon the need for protecting the public":

> Within the ambit of this constitutional phraseology are found the objectives of rehabilitation of the offender into a non-criminal member of society, isolation of the offender from society to prevent criminal conduct during the period of confinement, deterrence of the offender himself after his release from confinement or other penological treatment, as well as deterrence to other members of the community who might possess tendencies toward criminal conduct similar to that of the offender, and community condemnation of the individual offender, or in other words, reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves."[1]

After reviewing a number of sentence appeal cases involving homicides and other crimes against people, Justice Erwin notes:

> "These cases suggest that in the court's view the violent criminal conduct which causes injury to an innocent victim

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[1] Erwin, "Five Years of Sentence Review," 5 U.C.L.A.-Alaska L. Rev. 1,2(1975); citing State v. Chaney, 477 P2d 441 (Alaska 1970). (Footnotes omitted.)

should be dealt with firmly, and that the protection of society and the affirmation of societal norms should be primary criteria for sentencing in this area. Such a view was confirmed in the case of Ames v. State in which the Alaska Supreme Court specifically stated:

> This court has previously expressed the view that violent crimes involving physical injury to innocent people are to be regarded as our most serious offenses and are not to be treated lightly. . . ."[2]

Justice Erwin then addressed sentencing of drug offenders. He noted that in Waters v. State[3] the Supreme Court, for purposes of analysis, divided drug offenses into four degrees of culpability.

> "1. Smuggling or sale of large quantities of narcotics of possession of large quantities for sale.
>
> 2. Smuggling or sale of small quantities of narcotics or possession of small quantities for sale.
>
> 3. Possession of narcotics without intent to sell.
>
> 4. Marijuana offenses.

The court reminded the trial courts that these categories are important factors in the determination of the sentence:

> We think these categories are relevant in sentencing of drug offenders. From the record it seems that appellant is neither a titan of the narcotics business nor a mere user; he seems to be an occasional retailer. In sentencing it should be remembered that the maximum sentence for a particular offense expresses a legislative judgment about how the worst offender within a class designated by the legislature should be treated. Here there is an absence of foundation for characterization of the appellant as the worst type of drug offender."[4]

Continuing his review of sentencing drug offenders, Justice Erwin observed that:

> "The Waters case may be read as standing for three basic propositions. First, in a drug case, it is appropriate for the court on review to undertake a somewhat thorough canvass of the background, age, and particular circumstances of the defendant;

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[2] Erwin, supra. at 7, (footnotes omitted).

[3] 483 P2d 199 (Alaska 1971).

[4] Erwin, supra. at 89, (footnote omitted).

these considerations loom larger than in the areas of violent crime discussed above. Secondly, incarceration for a substantial period for a single violation will generally be inappropriate, unless the offender falls squarely within the worst category, e.g., a large-scale wholesaler. Finally, a course of drug related criminal conduct, as evidenced by other convictions, may aggravate the seriousness of the drug charge itself."[5]

Crimes involving property were also considered by Justice Erwin. With respect to this group he made the following observations:

"A substantial number of sentence appeal cases have arisen in the area of crimes involving property. These are roughly divisible for purposes of analysis into crimes of stealth, such as burglary, larceny or forgery, and crimes in which weapons are employed, such as robbery and perhaps arson.

A review of these cases indicates that age, background, and previous criminal history play a more significant part in determining the proper sentence than in those cases in which physical injury to the victim is involved. In this area the court has referred to the standards of the American Bar Association, in stating the sentences in excess of five years should be restri - ted to those cases clearly appropriate by virtue of background."[6]

* * *

"Robbery involves somewhat different considerations, given its higher potential for injury. The court has affirmed substantial sentences where violence has actually occurred or where life has been endangered, or where prior convictions indicate that "less stern measures have proven unsuccessful." Nonetheless, the opinions evidence a willingness to take a hard look at the age, background and psychiatric profile of the individual offender, and it cannot be said that the court considers the possibility of sentence relief to be automatically foreclosed in the robbery area. However, it would appear appropriate to take into consideration the potential injury to the victim in arriving at a proper sentence. Certainly, the use of weapons aggravates the nature of the crime."[7]

Before concluding his review of sentence appeals Justice Erwin dealt with one other class of offenders worthy of some attention: repeat offenders. As to their sentencing he observed:

"One further special sentencing problem, which has been mentioned in other sections but which may deserve scrutiny in

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[5] Id, pp. 9, 10.

[6] Id, p. 12 (footnote omitted).

[7] Id, p. 13 (footnote omitted).

isolation, is that of the repeated offender. In a number of per curiam opinions the court summarily approved long-term sentences for recidivists, evidencing a recognition that the incidence of repeated offenses greatly enhances the likelihood of continued antisocial behavior and the concomitant need to protect society therefrom."[8]

Justice Erwin's concluding remarks merit serious consideration and are presented hereafter in toto:

"Given the small number of sentences reversed as excessive over the past five years, can it be said that sentence appeals in Alaska have been a waste of time for the court or an exercise in futility for defendants? The answer must surely be no. A brief review of the expectations enunciated in Chaney provides a standard by which to judge success or failure.

"At the heart of sentence appeal is a developed commitment to justice for the offender, and thus the correction of an excessive sentence in a particular case. A re-reading of those cases in which relief has been granted leaves one with a sense that the Alaska Supreme Court was on solid ground, and confirms that a dispassionate appellate perspective is required. Perhaps some cases have been presented without sufficiently thoughtful examination of the defendant's background, his value to our society or the presence of mitigating circumstances (or at least without sufficient articulation of those factors); the supreme court, like all courts, must take care that classifications devised to stimulate thought do not curtail it. On the other hand, it must be remembered that, as a practical matter, the trial court is the principal repository of justice in a criminal case. The "clearly mistaken" standard assures that if the supreme court errs, it will err in favor of the trial court's discretion. Given the inherent limitations of appellate review, no other course is feasible.

"The other side of the coin of justice to the offender is justice to the community. Three times the court has disapproved lenient sentences, expressing a sense of outrage toward the gratuitous violence shown by the record. Many times it has affirmed lengthy sentences which reflect the trial judge's willingness to be severe if necessary. Early criticisms that judicial initiative would be stifled and that judges leery of reversal would seek the apparent safety of middle range sentences, have not come true. Thus it does not appear that the community has been ill-served by sentence appeal due to half-hearted vindications of societal norms.

"Finally, has sentence appeal promoted development of rational, just and humane sentencing criteria? The supreme court seems to have made progress in this area. Arguably some standards such as the rule against consideration of police "contacts" or unverified allegations, or the need for psychiatric data, could have been promulgated absent the sentence

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[8] Id, p. 18.

appeal legislation. Other doctrines - the notion that only hardcore defendants should be visited with maximum sentences, the adoption of the ABA's five year sentence guideline, the expression of the need for firmness to counter violence - clearly derive from the sentence review authority vested in the court by the legislature, and might not otherwise have been promulgated.

"Whether the rules developed in the cases are wise is a matter for individual judgment. In any event, the job of devising rational standards is far from complete, and will never be finished as long as community standards and perceptions continue to evolve. But the need for a central arbiter of those values in criminal cases, within the sentencing parameters set by the legislature, has been convincingly demonstrated. The cases show that manifest unfairness has led to reversal in a few cases; the appearance of unfairness has been alleviated in others; and, hopefully, unfairness has been prevented in numerous cases due to the guidance afforded by the Alaska Supreme Court's sentence appeal decisions."[9]

A cursory review of cases involving sentence appeals heard by the Supreme Court since Justice Erwin's article appeared revealed no significant departures from the standards enunciated in the article.

A comparison of the sentencing standards and guidelines established by the Alaska Supreme Court in the course of its sentence reviews with factors considered to be either aggravating or mitigating in nature under a presumptive sentencing scheme suggests a considerable amount of similarity. Thus, the legislature may wish to consider sentencing criteria set forth in Alaska case law should it decide to pursue a presumptive sentencing bill.

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[9] Id, pp. 20, 21.

NOTE: This is a heavily edited version of a memorandum written by Professor Jerold Israel of the University of Michigan Law School. Professor Israel has given permission to reproduce the memorandum. The editing was done by the Staff of the Criminal Justice Center and was designed to reduce the number of references to the various studies which were included in the original. In addition, appendicies contained in the original have been ommitted.

AN INTRODUCTION TO BASIC SENTENCING ISSUES

This memorandum discusses a series of proposals, advanced by generally acknowledged "experts," concerning the reform of the laws governing sentencing. Among the proposals considered are those advanced by the following groups, whose titles are too long to bear repeating in full throughout the text: American Bar Association (A.B.A. Standards), the National Counsel on Crime and Delinquency (Model Sentencing Act), the American Law Institute (Model Penal Code), the 1967 President's Commission on Law Enforcement and Administration of Justice (President's Commission), the 1973 National Advisory Commission on Criminal Justice Standards and Goals (N.A.C.), the National Commission on Reform of Federal Criminal Laws, Working Paper Report by Peter Low (Low Study), and the Twentieth Century Fund: Task Force Report on Criminal Sentencing (20th Century). The memorandum is devoted to proposals relating to the use and allocation of sentencing authority rather than to procedure utilized in exercising that authority.

LIMITED GRADES OF CRIMES

First, it is recommended that the range of available sentences be reduced to several set categories, typically classified by letter (e.g., class A felony, class B felony, class C felony, etc.). The advantages of this approach, adopted in all of the recent codes modeled after the Model Penal Code, are noted in the Low study:

> "There is a consensus among recent Code Reform efforts that the best way to avoid inconsistencies of penalty structure . . . is to systematize the sentencing provisions in a separate part of the Code by the use of sentencing categories which are intended to represent the entire spectrum of punishment that is to be available for crime. Such an approach has the effect of creating an internally consistent, carefully thought-out penalty structure which not only will assist the rationalization of penalties provided for presently existing offenses, but which also will help to assure that new offenses can be integrated into the existing structure in a manner consistent with what is already on the books. . . .

EMPHASIS UPON ALTERNATIVES TO IMPRISONMENT

Another generally accepted recommendation is that the emphasis in sentencing should be upon alternatives to imprisonment. That is, fines and community based treatments, like probation, where reasonably applicable, should be preferred to imprisonment. In support of restricting the

use of imprisonments, Professor Norval Morris, in The Future of Imprisonment, stresses that "parsimony in the use of imprisonment" follows from the basic moral and utilitarian functions of imprisonment:

> "The least restrictive--least punitive--sanction necessary to achieve defined social purposes should be chosen. . . . [Accordingly,] a presumption in favor of punishment less severe than imprisonment pervades all recent scholarship and most legislative reforms. This principle is utilitarian and humanitarian; its justification is somewhat obvious since any punitive suffering beyond societal need is, in this context, what defines cruelty. . . . The draftsmen of the American Law Institute's Model Penal Code sought to capture this principle of parsimony in imprisonment in the phraseology of that code's main article on sentencing. Section 7.01 is entitled 'Criteria for Withholding Sentence of Imprisonment . . .' and the section directs the court to order other punishments unless 'imprisonment is necessary for protection of the public.'"

MANDATORY IMPRISONMENT

Some experts argue that guidelines, such as those suggested by the Model Penal Code or Professor Morris, are inadequate because they still permit too much judicial leeway. What is needed, they argue, is greater certainty of imprisonment for serious crimes. The best approach here, they argue, is requiring imprisonment for certain crimes. In some instances,

the proposals do not require that the imprisonment be for any specified term beyond the minimum sentence that is administratively feasible in a particular jurisdiction (ordinarily one year). In other proposals, it is suggested that there should be a mandatory minimum of a specified period (e.g., 2, 3, or 4 years). This approach was recently supported by President Ford in his crime message:

"Imprisonment too seldom follows conviction for a felony. In the 1960's crime rates went higher, but the number of criminals in prison, state and federal, actually went down. * * * There should be no doubt in the minds of those who commit violent crimes -- especially crimes involving harm to others -- that they will be sent to prison if convicted under legal processes that are fair, prompt and certain."

Consider also the following comments of Professor James Q. Wilson in Thinking About Crime:

"[O]ne way of defining a good sentence is to say it is that disposition that minimizes the chance of a given offender's repeating his crime. Under that definition, we would not only expect but want disparities in sentences -- one armed robber getting five years in prison and another getting probation -- provided only that we had good reason to believe that each sentence was appropriate to each criminal's prospects for rehabilitation. On the other hand, if we believe that a good sentence is one which deters others from committing a crime, then we might wish to impose the same penalty on persons with very different prospects for rehabilitation, and to make that penalty sufficiently severe to discourage potential criminals, especially those who believe they might be regarded as good bets for rehabilitative -- which is to say, lenient -- treatment."

Compare, however, the following comments in mandatory minimums in the Low study:

"Two related arguments are typi ly advanced in support of legislatively mandated sentences. The first is that a mandatory sentence is necessary in some instances to assure that the courts will not deal too leniently with a particular offender. The second is that the certainty of substantial punishment for the violation of a particular statute will act as a significant deterrent to the commission of that offense.

"Neither argument, however, is persuasive. In the first place, there is clear evidence as a practical matter that the system does not function as the arguments would envisage. As is explored in part I of this memorandum, there is no certainty of punishment for Federal narcotics offenders [notice the standing mandatory sentences], nor are the courts prevented from dealing leniently with an offender if that is their desire.

"There are affirmative disadvantages to such sentences as well. In some instances, a mandatory sentence results, as a practical matter, in a vesting of sentencing authority in the invisible and uncontrollable discretion of the prosecutor, perhaps the least desirable place for such authority to repose. There are always alternative offenses which could be charged. . . .

Opponents of mandatory sentencing provisions have raised, in addition to the arguments noted in the Low study, the question as to whether the "taxpayers [r]eally are willing to bear the momentary costs of a mandatory sentencing program"? It is noted that the prisons currently are almost at capacity, and considerable costs would be entailed in building new prisons. It has been suggested that the public must be

willing to commit "substantial additional resources for prisons, courts and prosecutors -- in many states perhaps even doubling or tripling the capacity of the criminal-justice system -- [or such] sentencing reforms (mandatory minimums) will be a disaster, if not a joke. (Wall Street Journal, 624, 1976).

DETERMINING THE LENGTH OF SENTENCE: INDETERMINATE SENTENCE

The nature of indeterminate sentencing

Prison sentences for felony offenses typically are of the "indeterminate" variety. That is, there is a significant gap between the maximum sentence that may be served and the minimum that must be served. Thus, a person will be sentenced to imprisonment for a term of from one-to-five or three-to-ten years. Even life sentences often are indeterminate because state law will provide that a "lifer" may be paroled after serving a specified sentence (e.g., 10 years). (This does not apply to "mandatory life sentences," usually reserved for homicide).

The maximum sentence that may be imposed always is established by statute. In some jurisdictions, the judge may set a outer-limit for the indeterminate sentence that is less than that allowed by statute. In others, the maximum set by statute applies as the outer-limit in all cases. Those favoring automatic application for the statutory maximum in all cases argue that there is no way a judge can be certain in advance that the progress of the prisoner will justify his release at an earlier point than the maximum authorized by law. Those favoring granting the judge discretion to reduce the maximum argue that the judge may find that the crime committed, under the facts of the case, does not justify the full range of the sentence considered by the legislature, which must set the maximum with the most serious variety of the particular crime in mind.

Ordinarily, minimum sentences are not prescribed by law but left to the judge's discretion -- except that the minimum cannot be so close to the maximum as to eliminate the concept of indeterminancy. Thus, typically the minimum is limited by law to no more than 1/3 or 1/2 of the maximum. Some judges frown upon imposing minimums

OBJECTIONS TO INDETERMINATE SENTENCING

Disparity

A major objection to current indeterminate sentencing is that it grants the court far too much discretion, even if one accepts the value of a certain degree of indeterminancy. Consider, for example, a situation where the statute sets a maximum of 10 years and the court has the authority to reduce the maximum by half in the individual case and to set a minimum up to 1/2 of the maximum given in the case. One defendant convicted of the offense may be sentenced to 5-10 years, while the other may receive 1-5 years. Moreover, even where the maximum imposed must be that set by statute, and the discretionary minimum is limited to 1/3 of the maximum, there is a substantial difference, it is argued, between a sentence of 1 to 10 years and 3-1/3 to 10 years. While parole releases ordinarily coming in the range of two years where the board is not restricted by a lengthier minimum, the 2nd defendant may serve almost twice as long as the first.

LENGTH OF SENTENCE

Some persons, though accepting the concept of indeterminate sentences generally argued that the quest for indeterminancy does not justify the high maximum sentences authorized under typical American statutes. They argue that maximum terms should be limited to a shorter period, perhaps five years, with longer terms provided only for especially dangerous offenders through extended term sentencing provisions. The rationale supporting this proposal is noted in the N.A.C. report, which recommends that "state penal code revisions should include a provision that the maximum sentence for any offender not specifically found to represent a substantial danger to others should not exceed five years for felonies other than murder." The study report notes:

"It is well-documented and almost universally recognized that the sentences imposed in the United States are the highest in the western world. This results from a number of factors including the high maximum sentences authorized by statutory provisions. To be assured that the very dangerous offender is incapacitated, legislatures in effect have increased the possible maximum sentence for all offenders. This dragnet approach often results in imposition of a high maximum sentence on persons for whom it is patently excessive. The wide flexibility exacerbates the disparities in sentencing that seriously handicap correctional programs.

"The President's Commission . . . reported in 1967 that more than one-half of all persons confined in state prisons in 1960 had been sentenced to maximum terms of at least ten years. But of those released in that year the average length of time actually served in confinement was less than two years, and only 8.7% had actually served five years or more.[11] Lowering the authorized maximum term will not unduly restrict the court's discretion as it affects the length of time actually served in prisons. It will, however, reduce the excessively long sentences served by some offenders for whom such sentences are inappropriate. It also will diminish disparate treatment of similarly situated offenders."

[Professor Israel concluded his discussion of basic sentencing issues with a discussion of presumptive sentencing. Because a separate memorandum from the Center has addressed that issue, it has been omitted herein.]

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11 A subsequent study, showing sentence and actual time served by first releases from state correctional institutions in 1970, was consistent. Thus, in most of the jurisdictions examined, more than 50% of the persons sentenced received terms in excess of 5 years, with over 90% actually serving less than 5 years. In Tennessee, for example, 62% were sentenced to terms of 5 years or less, 20% to terms of 10 years or less and 18% to terms in excess of 10 years. Actual time spent was less than 5 years for 90%, less than 10 years for an additional 8-1/2%, and more than ten years for only 1-1/2%. Only one of the jurisdictions cited in the study had more than 5% serving in excess of 10 years.

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February 18, 1977

Dear Representative:

As you are undoubtedly aware, one of the more significant issues facing this session of the legislature relates to sentencing reform proposals. One of those proposals, known as presumptive sentencing, has already been introduced in the House.

Enclosed you will find a copy of a report dealing with presumptive sentencing which was prepared last year for the Criminal Law Revision Subcommission. The report digests Fair and Certain Punishment, a study conducted by the Twentieth Century Fund which developed the concept of presumptive sentencing and is considered the definitive word on the subject. Particular attention should be paid to pages 3-5 of the enclosed report which provide a summary of legislative responsibilities related to presumptive sentencing which were recommended by the Twentieth Century Fund.

The enclosed report also suggested a number of areas for further research which would be required prior to active legislative consideration of presumptive sentencing (pp. 6-8). Research conducted by the Judicial Council during the past six months should provide some answers to the issues raised in the report.

Also enclosed is a report which summarizes sentencing standards established by the Alaska Supreme Court as a result of sentence appeals heard by it under AS 12.55.120.

A third enclosure contains excerpts from an unpublished memorandum written by Professor Jerry Israel of the University of Michigan Law School entitled: "An Introduction to Basic Sentencing Issues".

I hope that you will find the enclosed reports both informative and helpful to you at the time that this issue comes before the legislature. If the Center can be of further assistance to you on this issue, please feel free to contact Peter S. Ring.

Sincerely,

John E. Havelock
Director

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Enclosures

3/3/77

~~CSSB 687~~

~~SB~~

HB 297

Bud Carpenter.

Testimony
against HB297

do not do in a piece meal concept

compatibility w/ Criminal Code

homicide definition.
in Criminal Code.
2nd degree murder HB297 ~~homicide~~

mayhem presently. HB297
4 levels of assault in Criminal Code.

forcible rape. HB297
4 levels of sexual assault Crim Code

=

Abolition of plea bargaining.
adopted under HB 297
effect is not fully known at this
time

3/30/77

Professor Clark referred to
study on plea bargaining still
in progress

thirdly — likely increase litigation
speculation

areas of bill in

constitutionality —
would be raised in courts

Class A
Class B
raised by aggravated violence
2 questions
12.55.035(d) — Escape clause

assault — not defined in bill

Clark →
study [redacted]

Question input to Presumptive Sentencing
from narrow representation Judicial Committee
& AG —
preferable to use Criminal Code — broader base

3/30/77

~~Expand~~

HB 297 =

will it dovetail w/ Criminal Code.?

dispute:

=

3 judge sentence appeal board

=

Commissioner Burton

in favor of HB 297

all law enforcement people
he knows support bill & concept

=

Fiscal Note:

67

222
.85
1110
1776
1887.0

Fiscal Note:

project 4% increase in days served for ~~ADP~~ ADW.

TELEGRAM

ALASKA COMMUNICATIONS, INC.
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1977 MAR 22 PM 2 13

15003 KETCHIKAN ALASKA 154 03-22 144P PST

PMS HONORABLE TERRY GARDINER

JUN

DEAR TERRY; AS SECRETARY OF THE KETCHIKAN BAR ASSOCIATION, I'VE BEEN AUTHORIZED TO GIVE YOU OUR GROUPS FEELINGS WITH REGARD TO THE PRESUMPTIVE SENTENCING BILL. WE FEEL THAT THE BILL IS PREMATURE IN THAT NO ONE HAS REALLY HAD THE OPPORTUNITY TO PROPERLY ANALYZE ITS VARIOUS RAMIFICATIONS AND THE LENGTH OF SENTENCES INVOLVED. IN OTHER WORDS, IT SHOULD NOT BE BROUGHT OUT THIS SESSION - IT SHOULD WAIT UNTIL NEXT YEAR. THIS OPINION HAS NOTHING TO DO WITH THE MERITS OF THE PROPOSAL BUT MERELY ITS TIMELINESS. SECONDLY, IF IN FACT SOME BILL MUST COME OUT, WE WOULD SUGGEST THAT A MINIMUM PERIOD OF ONE YEAR BE ALLOWED BEFORE ITS EFFECTIVE DATE. THIS WOULD GIVE THE COURTS AND BAR TIME TO PREPARE AND PUT FORTH ANY AMENDMENTS THAT MIGHT BE NECESSARY. IF THE KETCHIKAN BAR CAN FURNISH YOU ANY INFORMATION OR BE OF ANY HELP WITH REGARD TO THIS, PLEASE LET US KNOW.

CLIFFORD H SMITH, SECRETARY, KETCHIKAN BAR ASSOCIATION

CLASS A

	Second Degree Murder	Manslaughter	Rape	Robbery	Kidnapping	Shooting with intent to kill, wound or maim	Assualt with intent to kill, rape, or rob	Assault with a Dangerous weapon	Burglary in a Dwelling (occupied)	Total
Number of convictions 1974-1976	8	18	23	60	3	6	10	78	16	(222)(.85)= 188
% of total Class A Felony Convictions	3.6%	8.1%	10.4%	27%	1.4%	2.7%	4.5%	35.1%	7.2%	100%
Mean Sentence imposed overall1 (months)	A	66.8	95.4	57.6	A	53.1	48.3	15.4	18	43.3
Mean Active sentences imposed2 (months)	A	75.1	95.4	68.1	A	74.4	53.7	29.5	26.2	57
Number and percentage of cases receiving probation	0	2(11%)	0	9(15%)	0	2(29%)	1(10%)	26(33%)	5(31%)	45(20%)
ACTIVE TIME										
1-6 months	0	1(6%)	1(4%)	4(7%)	0	-	4(40%)	24(31%)	1(6%)	35(20%)B
7-12 months	0	3(17%)	4(17%)	4(7%)	0	0	1(10%)	6(8%)	3(19%)	21(12%)B
13-24 months	0	1(6%)	1(4%)	7(12%)	0	0	0	7(9%)	4(25%)	20(11.3%)B
25-60 months	0	3(17%)	3(13%)	18(30%)	0	2(29%)	2(20%)	12(15%)	3(19%)	43(24.3%)B
Over 100 months	8(100%)	8(44%)	14(61%)	18(30%)	3(100%)	3(43%)	2(20%)	3(4%)	0	59(33%)B
Highest Sentence (Months)	Life	180	360	180	Life	120	180	120	60	

1. Including probation averaged in as 0 Time
2. Not including sentences of o time

A.mean not computed because some sentences were life imprisonment
B.of setences imposing active time.

PROPOSED AMENDMENTS TO SB 206 AND HB 297

p. 1, line 23: after "sentence" delete all material and insert the following "which the offender deserves, considering the following:"

p. 1, line 24: delete all material

p. 1, line 27: delete "nature" and insert "circumstances"

p. 1, line 29: between "the" and "isolation" insert "need for"

p. 2, line 9 and 10: delete all material

p. 2, line 11: delete "(c)" and insert "(b)"

p. 2, line 11: delete "further"

p. 2, line 17: between "(a)" and "In" insert: "Except as provided in sec. 35 of this chapter,"

p. 3, line 9: delete all material and insert "(1) the offender deserves to be imprisoned considering the"

line 11: after "and" insert "imprisonment (of ts) equitable considering sentences

p. 3, line 12: after "offenders" insert ","

p. 3, line 12: delete "due"

p. 3, line 13: after ";" insert "or"

p. 3, line 14: delete "the term of"

p. 3, line 15: delete ";" and insert "."

p. 3, lines 16-18: delete all material

p. 4, line 5: delete all material and insert "aggravated violence against a person."

p. 5, line 20: delete "will" and insert "may"

p. 6, line 18: delete "any other felony," and insert "more than one felony"

p. 7, line 3: delete "must" and insert "shall"

p. 7, line 18: delete "must" and insert "shall"

p. 7, line 21: delete "must" and insert "shall"

p. 7, line 27: delete "must" and insert "shall"

p. 8, line 10: delete "must and insert "shall"

p. 8, line 11: delete "due"

p. 8, line 14: delete "must" and insert "shall"

p. 9, line 2: delete "or"

p. 9, between lines 5 and 6: insert the following:

"(8) the defendant was on release for another felony charge under AS 12.30.020 or 040; or

(9) the defendant was on probation, parole or community supervision for a prior felony conviction."

p. 9, line 6: delete "must" and insert "shall"

p. 9, line 23: delete "or"

p. 9, lines 24-25: delete all material and insert the following:

"(7) the defendant does not have a criminal history of prior convictions other than for minor traffic offenses; or civil citation...

(8) imposition of the presumptive term would cause great hardship to persons dependant on the defendant for support, which may result in the responsibility for the support passing to the state."

p. 10, line 3: delete "must" and insert "shall"

p. 10, line 6: delete "must" and insert "shall"

p. 10, line 7: delete "must" and insert "shall"

p. 10, line 14: delete "will" and insert "may"

p. 11, line 15: delete "members" and insert "of the judges"

p. 11, line 16: delete "." and insert ";"

p. 11, line 17: delete "superior court"

p. 12, line 16: delete "parole" and insert "community supervision"

p. 12, line 17: after "deduction" insert ", but in no event for more than 18 months,"

p. 12, line 17: delete "rules and"

p. 12, line 18: delete "his parole officer" and insert "the probation/parole officer."

p. 12, line 22: after "," insert "or imprisoned for a violation of probation, parole or community supervision,"

p. 12, line 27: delete "any one subsequent" and insert "an"

p. 12, line 28: after "time" insert "not to exceed 30 days"

p. 13, lines 16-19: delete all material and insert the following:

* Sec. 7. EXISTING REHABILITATIVE PROGRAMS. The Alaska Division of Corrections shall examine existing and alternative rehabilitation programs to determine how the constitutional principle of reformation may best be carried out within the context of the presumptive sentencing provisions of this Act, and annually report their findings and recommendations under this section to the legislature."

p. 14, lines 2-4: delete all material and insert the following:

"(b) The Alaska Judicial Council shall collect and analyze data relating to existing sentencing practices in the state, the impact of legislative enactments affecting sentencing, and trends in sentencing practices in other jurisdictions. The council shall periodically distribute the data and analyses to the legislature, the court system, and other affected or interested agencies.