

SB

1411



Original sponsor: Ziegler

Offered: 3/7/79  
Referred: Rules

CS

1 IN THE SENATE

BY THE JUDICIARY COMMITTEE

2 CS FOR SENATE BILL NO. 141

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 ELEVENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to sentencing of criminal defendants;  
7 and providing for an effective date."

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

9 \* Section 1. AS 12.55 is amended by adding a new section to read:

10 Sec. 12.55.086. IMPRISONMENT AS A CONDITION OF SUSPENDED IMPOSI-  
11 TION OF SENTENCE. (a) When the imposition of sentence is suspended  
12 under AS 12.55.085, the court may require, as a special condition of  
13 probation, that the defendant serve a definite term of continuous or  
14 periodic imprisonment, not to exceed the maximum term of imprisonment  
15 that could have been imposed. While the defendant is imprisoned, he  
16 shall be under the supervision of the Department of Health and Social  
17 Services rather than the probation officer of the court.

18 (b) A defendant imprisoned under this section is entitled to a  
19 deduction from his term of imprisonment for good conduct under AS 33.-  
20 20.010. Unless otherwise specified in the order of suspension of impo-  
21 sition of sentence, a defendant imprisoned under this section is eli-  
22 gible for parole if his term of imprisonment exceeds one year and is  
23 eligible for any work furlough, rehabilitation furlough, or similar  
24 program available to other state prisoners.

25 (c) A defendant imprisoned under this section may not have his  
26 probation revoked because of abandonment to improper associates while he  
27 is imprisoned. If probation is revoked and the defendant is sentenced  
28 to imprisonment, he shall receive credit for time served under this  
29 section. Deductions for good conduct under AS 33.20.010 do not consti-

1 tute "time served".

2 \* Sec. 2. AS 12.55.085(c) is amended to read:

3 (c) Upon the revocation and termination of the probation, the  
4 court may pronounce sentence at any time after the suspension of the  
5 sentence within the longest period for which the defendant might have  
6 been sentenced, subject to the limitation specified in AS 12.55.086(c).

7 \* Sec. 3. AS 33.05.070(b) is amended to read:

8 (b) As speedily as possible after arrest the probationer shall be  
9 taken before the court for the district having jurisdiction over him.  
10 Thereupon the court may revoke the probation and require him to serve  
11 the sentence imposed, or any lesser sentence, and, if imposition of  
12 sentence was suspended, may impose any sentence which might originally  
13 have been imposed, subject to the limitation specified in AS 12.55.-  
14 086(c).

15 \* Sec. 4. AS 33.05.080(1) is amended to read:

16 (1) "probation", except as authorized under AS 12.55.086, is  
17 a procedure under which a defendant, found guilty of a crime upon ver-  
18 dict or plea, is released by the superior court subject to conditions  
19 imposed by the court and subject to the supervision of the probation  
20 service as [HEREINAFTER] provided in this chapter;

21 \* Sec. 5. This Act takes effect immediately in accordance with AS 01.10.-  
22 070(c).



Superior Court

State of Alaska

FIRST JUDICIAL DISTRICT  
415 MAIN STREET, ROOM 402  
KETCHIKAN, ALASKA 99901

Chambers of  
THOMAS E. SCHULZ, Judge

February 21, 1979

SB141

Hon. Robert H. Ziegler, Sr.  
Alaska State Senate  
Pouch V  
Juneau, Alaska 99811

Re: An Act Relating to Probation

Dear Bob:

I have reviewed the proposed legislation that would allow imprisonment as a condition of a suspended imposition of sentence and thus, get us out of the disaster fomented by the Boyne decision. I think that the proposed legislation covers all the bases. I particularly like the provisions for deductions for good conduct but I'm not so sure that I agree with the provisions allowing parole. If parole is to be a factor, I think the minimum term of imprisonment should be one year rather than 180 days. In my experience, when a judge suspends imposition of sentence but feels that the defendant should serve some time in prison, he usually has a definite period of time in mind and putting parole eligibility into the equation just makes it more difficult to arrive at a sentence that gets the desired results. I also feel that imprisonment as a condition of a suspended imposition of sentence should never involve more than one year's incarceration anyway. If the guy needs to go to jail longer than a year, he probably should not have gotten an SIS anyway. Of course, the same argument can be made at the six month level but frequently that young slow learner comes along that you want to give a good sharp jolt to but still leave him an opportunity to clear his record of the conviction and so I would like to see the latitude of using up to a year's imprisonment as a condition of an SIS and without having to worry about parole. The good time deduction is fine. If the guy can get along in the institution and obey all the rules and get his good time deduction, he should be able to earn it.

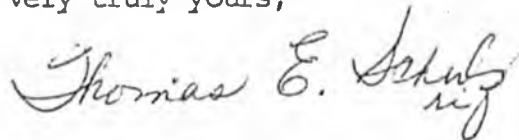
Under Sec. 5, the Act is take effect on January 1, 1980. The new Criminal Code goes into effect on January 1, 1980, as I understand it at this time, and we would not have the Boyne problem under the new Criminal Code because the statute specifically authorizes the judge to impose a period of imprisonment as a condition of probation. I would much prefer to see this Act rammed through

Hon. Robert H. Ziegler, Sr.  
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as quickly as possible to take effect immediately after its signature by the Governor and thus, cover the period of time between now and the time the new Code comes into effect.

As you know Jeff Currall has left the District Attorney's Office but I have talked to both he and Mike Thompson on this subject before and I am sure they agree with the need for the Bill. I know that Harold Brown does also but I'm not sure that anyone else would agree with my comments about parole. Since I am going to Anchorage to play Supreme Court Justice for awhile, I am going to send them a copy of this letter and ask that they get their comments to you directly as soon as possible. I would really like to see this legislation in effect just as soon as it can get passed.

Very truly yours,

A handwritten signature in cursive script that reads "Thomas E. Schulz". The signature is written in dark ink and is positioned above the typed name.

Thomas E. Schulz  
Superior Court Judge

TES:ri

cc: Hon. Jay Rabinowitz, Chief Justice  
Hon. Robert Boochever  
Hon. Roger G. Connor  
Hon. Edmund W. Burke  
Hon. Warren Matthews

probationer whenever found without a warrant. At any time within the probation period, or within the maximum probation period permitted by AS 12.55.080 and 12.55.090, the court for the district in which the probationer is being supervised or, if he is no longer under supervision, the court for the district in which he was last under supervision may issue a warrant for his arrest for violation of probation occurring during the probation period. Such warrant may be executed in any district by the probation officer or any peace officer in the district in which the warrant was issued or of any district in which the probationer is found. If the probationer shall be arrested in any district other than that in which he was last supervised, he shall be returned to the district in which the warrant was issued, unless jurisdiction over him is transferred as above provided to the district in which he is found, and in that case he shall be detained pending further proceedings in that district.

(b) As speedily as possible after arrest the probationer shall be taken before the court for the district having jurisdiction over him. Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed. (§ 5 ch 105 SLA 1960)

**Sec. 33.05.080. Definitions.** When used in this chapter, unless the context otherwise requires,

(1) "probation" is a procedure under which a defendant, found guilty of a crime upon verdict or plea, is released by the superior court subject to conditions imposed by the court and subject to the supervision of the probation service as hereinafter provided;

(2) "commissioner" means the commissioner of the Department of Health and Social Services or his designee. (§ 1 ch 105 SLA 1960; am § 6 ch 104 SLA 1971)

**Effect of amendment.** — The 1971 amendment substituted "Department of Health and Social Services" for "Department of Health and Welfare" in paragraph (2). **Quoted in Newsom v. State, Sup. Ct Op. No. 1136 (File No. 2189), 533 P.2d 904 (1975).**

**Sec. 33.05.090. Short title.** This act may be cited as the Probation Administration Act. (§ 7 ch 105 SLA 1960)

### Chapter 10. Interstate Compact on Probation and Parole.

Section 10. Authorizing governor to execute interstate compact	Section 20. Definition
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**Sec. 33.10.010. Authorizing governor to execute interstate compact.** The governor of Alaska is hereby authorized and directed to

the exercise of conscientious judgment, and not arbitrary action; that the discretion of the court has not been abused; and that the facts revealed at the hearing satisfy the court that the modification or revocation of the sentence, or a part thereof, will serve the ends of justice. *Snyder v. State*, Sup. Ct. Op. No. 785 (File No. 1381), 496 P.2d 62 (1972).

Applied in *Hoffman v. State*, Sup. Ct. Op. No. 297 (File No. 562), 404 P.2d 444 (1965).

Am. Jur., ALR and C.J.S. references. — 15 Am. Jur., Criminal Law, §§ 498, 499; 39 Am. Jur., Pardon, Reprieve and Amnesty, §§ 81 to 95.

Validity of probation on condition of leaving state or locality, 70 ALR 100.

Power to impose sentence with direction that, after defendant shall have served part of the time, he be placed on probation for the remainder of term, 147 ALR 656.

Right to notice and hearing before revocation of probation or suspension of sentence, parole, or conditional pardon, 29 ALR2d 1074.

24 C.J.S. Criminal Law §§ 577, 1618; 67 C.J.S. Pardons § 1 et seq.

**Sec. 12.55.085. Suspending imposition of sentence.** (a) If it appears that there are circumstances in mitigation of the punishment, or that the ends of justice will be served, the court may, in its discretion, suspend the imposition of sentence and may direct that the suspension continue for a period of time, not exceeding the maximum term of sentence which may be imposed, and upon the terms and conditions which the court determines, and shall place the person on probation, under the charge and supervision of the probation officer of the court during the suspension.

(b) At any time during the probationary term of the person released on probation, a probation officer may, without warrant or other process, rearrest the person so placed in his care and bring him before the court, or the court may, in its discretion, issue a warrant for the rearrest of the person and may revoke and terminate the probation, if the interests of justice require, and if the court, in its judgment, has reason to believe that the person placed upon probation is violating the conditions of his probation, or engaging in criminal practices, or has become abandoned to improper associates, or a vicious life.

(c) Upon the revocation and termination of the probation, the court may pronounce sentence at any time after the suspension of the sentence within the longest period for which the defendant might have been sentenced.

(d) The court may at any time during the period of probation revoke or modify its order of suspension of imposition of sentence. It may at any time, when the ends of justice will be served, and when the good conduct and reform of the person held on probation warrants it, terminate the period of probation and discharge the person held. If the court has not revoked the order of probation and pronounced sentence, the defendant shall, at the end of the term of probation, be discharged by the court.

(e) Upon the discharge by the court without imposition of sentence, the court may set aside the conviction and issue to the person a certificate to that effect. (§ 1 ch 50 SLA 1965)

Cross reference.—See note to AS 12.55.080. Sup. Ct. Op. No. 785 (File No. 1381), 496 P.2d 82 (1972).

Subsection (b) provides for the revocation of probation for the violation of conditions imposed or engaging in criminal practices. Snyder v. State, Quoted in Fresneda v. State, Sup. Ct. Op. No. 573 (File No. 1045), 458 P.2d 134 (1969).

Sec. 12.55.090. Granting of probation. (a) Probation may be granted whether the crime is punishable by fine or imprisonment or both. If a crime is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

(b) The court may revoke or modify any condition of probation, or may change the period of probation.

(c) The period of probation, together with any extension, shall not exceed five years.

(d) Repealed by § 11 ch 68 SLA 1965.

(e) Repealed by § 11 ch 68 SLA 1965. (§ 8.09 ch 34 SLA 1962; am § 25 ch 43 SLA 1964; am § 11 ch 68 SLA 1965)

Cross reference.—See Cr. R. 35(c). Effect of amendments.—The 1964 amendment added former subsection (d), which prohibited granting of probation in certain instances, and former subsection (e), which specified conditions under which parole board should acquire exclusive jurisdiction over prisoner. and the probationer may not complain if he has been given ample opportunity to appear before the court imposing the sentence, and he has been permitted to combat the accusation or charges against him and there has been no abuse of discretion on the part of the court. United States v. Feller, 17 Alaska 417, 156 F. Supp. 107 (D. Alas. 1957).

The 1965 amendment repealed subsections (d) and (e). Cited in Hood v. Smedley, Sup. Ct. Op. No. 800 (File No. 1406), 498 P.2d 120 (1972).

The trial judge who imposed the sentence has certainly broad discretionary powers to revoke probation,

Sec. 12.55.100. Conditions of probation. (a) While on probation and among the conditions of probation, the defendant may be required

- (1) to pay a fine in one or several sums;
(2) to make restitution or reparation to aggrieved parties for actual damages or loss caused by the crime for which conviction was had; and
(3) to provide for the support of any persons for whose support he is legally responsible.

(b) The defendant's liability for a fine or other punishment imposed as to which probation is granted shall be fully discharged

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Quot Op. No. 120 (1971)

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There is no authority which would sanction the expansion of the superior court's jurisdiction to pass sentence into a realm of review and modification which is statutorily vested in either the supreme court or the executive branch of government. Therefore, the superior court lacks jurisdiction to review its own sentence, after it has entered a judgment on the matter, more than 60 days after it has imposed sentence. *Davenport v. State*, Sup. Ct. Op. No. 1218 (File No. 2202), 543 P.2d 1204 (1975).

Sentencing court may impose a fine as a condition of probation upon a defendant's conviction of a crime which is not directly punishable by a fine. *Brown v. State*, Sup. Ct. Op. No. 1367 (File No. 2890), 559 P.2d 107 (1977).

Given the specific authorization emanating from AS 12.55.100(a)(1) which permits the trial court to impose a fine as a condition of probation, together with the need for flexibility on the part of the sentencing court in fashioning appropriate conditions of probation, where probation is

warranted, a rational harmonization and construction of AS 12.55.090(a) and 12.55.100(a)(1) leads to the conclusion that a sentencing court is empowered to make payment of a fine a condition of probation even in the circumstance where the crime is only punishable by imprisonment, or by imprisonment or fine. *Brown v. State*, Sup. Ct. Op. No. 1367 (File No. 2890), 559 P.2d 107 (1977).

Applied in *Jones v. State*, Sup. Ct. Op. No. 1258 (File No. 2689), 548 P.2d 958 (1976); *Andrews v. State*, Sup. Ct. Op. No. 1287 (File No. 2519), 552 P.2d 150 (1976); *Thomas v. State*, Sup. Ct. Op. No. 1445 (File No. 2723), 566 P.2d 630 (1977).

Quoted in *Hofhines v. State*, Sup. Ct. Op. No. 904 (File No. 1845), 511 P.2d 1292 (1973).

Cited in *Wacek v. State*, Sup. Ct. Op. No. 1108 (File No. 2166), 530 P.2d 751 (1975); *Taylor v. State*, Sup. Ct. Op. No. 1436 (File No. 2924), 564 P.2d 1219 (1977); *Szeratics v. State*, Sup. Ct. Op. No. 1525 (File No. 3390), 572 P.2d 63 (1977).

### Sec. 12.55.085. Suspending imposition of sentence.

Subsection (a) and AS 12.55.080 apply to Chapters 10 and 12 of Title 17. — The provisions of AS 12.55.080 and subsection (a) of this section apply to violations of Chapters 10 and 12 of Title 17. *Speas v. State*, Sup. Ct. Op. No. 889 (File No. 1555), 511 P.2d 130 (1973); *Call v. State*, Sup. Ct. Op. No. 890 (File No. 1844), 511 P.2d 135 (1973).

The two-year minimum sentence requirement of AS 17.10.200(d) has thus been implicitly repealed as contrary to more recent expressions of legislative intent. *Speas v. State*, Sup. Ct. Op. No. 889 (File No. 1555), 511 P.2d 130 (1973); *Call v. State*, Sup. Ct. Op. No. 890 (File No. 1844), 511 P.2d 135 (1973).

AS 12.55.080 and this section postdate both the mandatory minimum sentence provision of AS 17.10.200 and the "except where specific provision is otherwise made" language of AS 12.55.010. *Speas v. State*, Sup. Ct. Op. No. 889 (File No. 1555), 511 P.2d 130 (1973).

The mandatory requirements of AS 17.10.200 have been modified by AS 12.55.080 and AS 12.55.085(a) providing for suspended imposition of sentence and parole. *White v. State*, Sup. Ct. Op. No. 1055 (File No. 1907), 523 P.2d 428 (1974).

Different limitations of probation period. — Under AS 12.55.080, a court may

suspend the execution of all or a portion of a sentence and place the defendant on probation "for a period and upon the terms and conditions as the court considers best." That period of probation, however, is specifically limited by AS 12.55.090(c) to a maximum of 5 years. This differs from probation granted after the court suspends the imposition of any sentence under subsection (a). *Tiedeman v. State*, Sup. Ct. Op. No. 1592 (File No. 3394), 576 P.2d 114 (1978).

Where probation is granted after the court suspends the imposition of any sentence, the legislature has specifically limited the period of probation to a term not to exceed the maximum sentence which could be imposed for the particular offense. *Tiedeman v. State*, Sup. Ct. Op. No. 1592 (File No. 3394), 576 P.2d 114 (1978).

Where the court actually imposed sentence and suspended the execution of a portion thereof, the only statutory limitation on the term of probation is that contained in AS 12.55.090(c). *Tiedeman v. State*, Sup. Ct. Op. No. 1592 (File No. 3394), 576 P.2d 114 (1978).

Discretion of sentencing court. — Whether or not a sentencing court should impose a suspended imposition of sentence in a given case is, by subsection (a) left to the discretion of the sentencing court.

*Nattrass v. State*, Sup. Ct. Op. No. 1314 (File No. 2869), 554 P.2d 399 (1976).

Subsection (a) of this section reposes discretion in the trial court to suspend imposition of the sentence and place the defendant on probation. *Mullins v. State*, Sup. Ct. Op. No. 1549 (File No. 3284), 573 P.2d 860 (1978).

**Superior court did not abuse discretion in failing to impose suspended imposition of sentence.** — See *Nattrass v. State*, Sup. Ct. Op. No. 1314 (File No. 2869), 554 P.2d 399 (1976).

Where at the time of sentencing for the crime of embezzlement by an employee of property worth more than \$100, defendant was 22 years old, had been working several years and had spent two semesters in college, and other than minor traffic violations he had no previous criminal record, the trial court was not clearly mistaken in failing to order a suspended imposition of sentence, instead of actually imposing a sentence of three years and four months, with the entire period suspended upon the condition that he enter a twelve month period of public service. *Mullins v.*

*State*, Sup. Ct. Op. No. 1549 (File No. 3284), 573 P.2d 860 (1978).

**Probation can be revoked on the basis of a conviction which is on appeal and therefore not yet final.** *Alexander v. State*, Sup. Ct. Op. No. 1622 (File No. 3505), 578 P.2d 591 (1978).

A conviction, with the attendant constitutional safeguards, constitutes sufficient "good cause" to find that conditions of probation have been violated and that probation should be revoked. *Alexander v. State*, Sup. Ct. Op. No. 1622 (File No. 3505), 578 P.2d 591 (1978).

**Alaska's trial judges totally barred from engaging in either charge or sentencing bargaining.** — See *State v. Buckalew*, Sup. Ct. Op. No. 1391 (File No. 3143), 561 P.2d 289 (1977).

**Applied in** *Andrews v. State*, Sup. Ct. Op. No. 1287 (File No. 2519), 552 P.2d 150 (1976); *Franzen v. State*, Sup. Ct. Op. No. 1546 (File No. 3160), 573 P.2d 55 (1978).

**Cited in** *Barrett v. State*, Sup. Ct. Op. No. 1225 (File No. 2299), 546 P.2d 161 (1976); *Thomas v. State*, Sup. Ct. Op. No. 1445 (File No. 2723), 566 P.2d 630 (1977).

**Sec. 12.55.088. Modification of sentence [Effective January 1, 1980].** (a) The court may modify or reduce a sentence at any time during a term of imprisonment if it finds that conditions or circumstances have changed since the original sentencing hearing such that the purpose of the original sentence is not being fulfilled.

(b) The sentencing court may not be required to entertain a second or successive motion for similar relief brought under (a) of this section on behalf of the same prisoner.

(c) No sentence may be reduced or modified so as to result in a term of imprisonment which is less than the minimum or presumptive sentence required by law for the original sentence. (§ 12 ch 166 SLA 1978)

**Effective date.** — Section 25, ch. 166, S.L.A. 1978, provides: "This Act takes effect January 1, 1980."

**Editor's note.** — Section 23, ch. 166, S.L.A. 1978, effective January 1, 1980, provides in subsection (b): "Except as provided in (c) of this section, sec. 12 of this Act governs the punishment for any offense committed on or after the effective date of this Act." Subsection (c) relates to the applicability of AS 12.55.125 through 12.55.185.

Section 23 of ch. 166, in subsection (f), provides: "Sections 1—12 of this Act do not apply to govern the construction of and punishment for any offense committed

before the effective date of this Act or the construction or application of any defense to a prosecution for the offense. An offense shall be construed and punished according to the law existing at the time of the commission of the offense in the same manner as if this Act had not become law."

Section 24, ch. 166, S.L.A. 1978, effective January 1, 1980, provides: "AS 12.55.088, enacted in sec. 12 of this Act, changes Rule 35 of the Alaska Rules of Criminal Procedure by defining additional circumstances without regard to time limit wherein a defendant's sentence may be modified or reduced."

POSITION PAPER / Department of Health and Social Services

POSITION PAPER

Senate Bill 141

"An Act relating to sentencing of Criminal Defendants; and Providing for an Effective Date."

The Dept. of Health & Social Services is in support of Senate Bill 141.

This legislation would provide a means by which a defendant who has received a suspended imposition of sentence may be required to serve a portion of that suspended sentence in incarceration.

This concept allows the court to prescribe a short period of incarceration as a special condition of probation. Thus, the defendant, especially in cases of youthful and/or first offender, will experience incarceration and also receive probation supervision upon release to the community. This "jail therapy" is one attempt to deter offenders from committing additional crimes when used as a part of a probation plan.

At this time, the Department is unable to determine the fiscal impact that would result from this method of sentencing. The Department will be able to make that determination after having gained experience. It should be noted that terms of incarceration served on a continuous basis would probably not have a major impact. However, a sentence to be served on weekends, would be difficult and restrictive from an operational aspect. All correctional centers are presently operating near, at or over capacity. Normally, there is an increase in the population of these facilities over the weekend period. To include offenders sentenced to serve their period of incarceration on weekends would increase the "weekend peaking effect" and possibly cause overcrowding.

Recommended by: Charles F. Campbell 3/28/79  
Charles F. Campbell, Director Date  
Division of Corrections

Approved by: Helen D. Beirne 3/28/79  
Helen D. Beirne, Commissioner Date  
Department of Health & Social Services



Superior Court

State of Alaska

FIRST JUDICIAL DISTRICT  
415 MAIN STREET, ROOM 402  
KETCHIKAN, ALASKA 99901

SB141

Chambers of  
THOMAS E. SCHULZ, Judge

February 21, 1979

Hon. Robert H. Ziegler, Sr.  
Alaska State Senate  
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Re: An Act Relating to Probation

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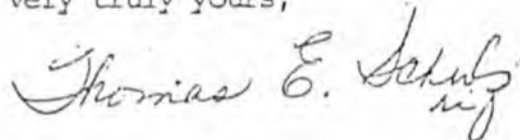
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Very truly yours,

A handwritten signature in cursive script that reads "Thomas E. Schulz". The signature is written in dark ink and is positioned above the typed name and title.

Thomas E. Schulz  
Superior Court Judge

TES:ri

cc: Hon. Jay Rabinowitz, Chief Justice  
Hon. Robert Boochever  
Hon. Roger G. Connor  
Hon. Edmund W. Burke  
Hon. Warren Matthews