STATE OF ALASKA
THE LEGISLATURE

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May, 1988

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Mary Van Nimwegen

House Judiciary:

1987 ~ May 15

Ben Esch
ATTORNEY AT LAW, P.C.

3003 Minnesota Drive
Suite 301
Anchorage, Alaska 99503

(907) 272-4475

MAR 2 5 1987

March 23, 1987

Senator Jay Kerttula, Chairman
Senate Judiciary Committee
P. O. Box V
Juneau, AK 99811

Dear Senator Kerttula:

I would like to bring to your attention a particular problem I am presented with regarding a client. This individual is presently incarcerated awaiting sentencing for an offense committed last year here in Anchorage. He is subject to a presumptive sentence for his offense. Pending sentencing, my client provided substantial help to authorities both in discovering and turning over contraband (a handcuff key) which he was secreted inside the jail in which he was residing and further cooperated with authorities in providing trial testimony against an inmate who had made admissions to my client while he was in the institution. At the time of sentencing, it was dicovered that my client had no statutory mitigating factors in his case and both the prosecutor and I began to examine AS 12.55.155. In the course of our review, it appeared to both of us that perhaps in enacting the statutory mitigators, there had been legislative oversight as to one of the mitigating factors. Under that statute, a mitigating factor exists if: "The defendant assisted authorities to detect or apprehend other persons who committed the offense with the defendant." See AS 12.55.155(d)(12). My client provided an equivalent service to the State, but due to the fact the individuals against whom he provided substantial assistance to the State in their prosecution and conviction were not co-defendants in his case: he was denied the application of this mitigating factor.

As I pondered this, I failed to discern any policy difference between a defendant who assists authorities to detect and/or apprehend co-defendants as opposed to someone

who provides information as to third-parties. One result of this situation is that prosecutors are forced to enter "deals" with defendants who wish to provide information in other cases to get this help. Prosecutors are sometimes reluctant to do so given the fact that the existence of this "deal" will be brought out on cross-examination, if and when the informant testifies, thereby possibly weakening the strength of his testimony and resulting in tainting perfectly legitimate evidence by virture of the fact that it is obtained through a direct quid pro quo transaction involving an individual who is facing charges himself. The current situation involving the star witness in the McKay case is a perfect example of this situation.

I would like to suggest to you for possible consideration of legislation to be introduced by your Committee, an amendment to AS 12.55.155(d) which reads as follows:

> (12) The defendant assisted authorities to detect [or], apprehend, or prosecute other persons who committed [the] an offense [with the defendant].

Such an amendment would allow substantial cooperation with authorities to act as a mitigating factor at the time of sentencing for any individual. This could result in the trial judge being given the latitude to take into account any cooperation with authorities provided by an offender and provide a method of rewarding (or at least providing the opportunity for reward,) individuals who cooperate without creating the potential for any "stigma" to be suggested during cross-examination that this help is provided only in contemplation of a preferential treatment of or deal concerning their own charges. A provision similar to this is included in the new Anti-drug Abuse Act of 1986 on the federal level. There are certain minimum sentences which are required to be given (like presumptive sentences) and these can only be reduced upon a demonstration of "substantial assistance" in the investigation or prosecution of another person who has committed an offense (See § 1007.).

From the point of view of the prosecutor, I believe the statute solves one problem while providing an inducement to individuals to provide information without the necessity of entering into a specific deal. This will encourage individuals to provide whatever information they have or offer whatever assistance they can give. As such, I see this as an amendment which could benefit many people in general, and my client in particular, if such an amendment is made prior to his mid-June sentencing date. Thank you in advance for your consideration in this matter. I would enjoy hearing your thoughts.

Yours truly,

Ben Esch

BE/cag

Alaska State Legislature
Senate

Official Business

P.O. BOX V
State Capitol
Juneau, Alaska 99811

MAY 14,1987

MEMO

RE: SB-237 (AN ACT PROVIDING THAT ASSISTANCE TO AUTHORITIES TO DETECT, APPREHEND, OR PROSECUTE OTHER PERSONS IS CONDUCT CONSTITUTING A MITIGATING FACTOR IN CRIMINAL SENTENCING)

FROM: SENATOR JAY KERTTULA

TO: REPRESENTATIVE JOHN SUND, CHAIR, HOUSE JUDICIARY, & MEMBERS OF HOUSE JUDICIARY COMMITTEE

THIS BILL WAS INTRODUCED TO RESOLVE AN INEQUITY IN THE LAW. THE DEPARTMENT OF PUBLIC SAFETY SUPPORTS THE BILL.

CURRENTLY THERE EXISTS A POTENTIAL MITIGATOR IN THE PRESUMPTIVE SENTENCING CODE FOR DEFENDANTS WHO ASSIST AUTHORITIES WITH DETECTING OR APPREHENDING THEIR CO-DEFENDANTS. THIS BILL SLIGHTLY BROADENS THE POTENTIAL MITIGATOR TO INCLUDE DEFENDANTS WHO ASSIST AUTHORITIES WITH DETECTING, APPREHENDING OR PROSECUTING A PERSON WHO COMMITTED AN OFFENSE. THE DIFFERENCE IS SLIGHT, IT SIMPLY EXTENDS THE POTENTIAL MITIGATOR A LITTLE, TO ALLOW DEFENDANTS WHO HELP AUTHORITIES WITH INFORMATION CONCERNING ANY OTHER PERSON (NOT JUST THEIR CO-DEFENDANTS) TO BE ELIGIBLE FOR CONSIDERATION FOR THE MITIGATION OF THEIR SENTENCE, AND TO INCLUDE THE POINT THAT A DEFENDANT CAN BE ELIGIBLE FOR THE POTENTIAL MITIGATOR IF HE HELPED PROSECUTE ANOTHER PERSON AS WELL AS JUST DETECTING OR APPREHENDING ANOTHER PERSON.

ONLY IF A DEFENDANT ACTUALLY ASSISTS AUTHORITIES WILL HE BE ELIGIBLE FOR CONSIDERATION UNDER THE SUGGESTED MITIGATOR-THIS WON'T APPLY IF THE INFORMATION DOES NOT AID AUTHORITIES.

UNDER OUR STIFF PRESUMPTIVE SENTENCING CODE PRACTICALLY THE ONLY LEE-WAY A JUDGE HAS LEFT IS THROUGH THE LIST OF MITIGATORS AND AGGRAVATORS INCLUDED IN THE CODE. WHEN A DEFENDANT IS SENTENCED PRESUMPTIVELY THE DEFENDANT FITS INTO A SENTENCING "SLOT" (FOR LESSER FELONIES THIS ONLY APPLIES ON A SECOND OFFENSE-FOR MORE SERIOUS FELONIES SUCH AS RAPE OR MURDER DEFENDANTS ARE SENTENCED PRESUMPTIVELY FOR A FIRST OFFENSE). THE ONLY WAY THE SENTENCE CAN BE MODIFIED IS BY EITHER A MITIGATING OR AGGRAVATING FACTOR BEING FOUND BY CLEAR AND CONVINCING EVIDENCE AND BY THE JUDGE APPLYING

IT (AFTER FINDING IT THE JUDGE IS NOT BOUND TO APPLY IT). (THERE IS ALSO A PROVISION FOR A JUDGE TO GO CUTSIDE THE SENTENCING "SLOT" IF MANIFEST INJUSTICE WOULD ARISE FROM THE SENTENCE, BUT THIS IS EXTREMELY RARE.)

IF A DEFENDANT'S PRESUMPTIVE TERM IS 4 YEARS OR LESS, AND A MITIGATOR IS FOUND, A JUDGE HAS THE POWER TO MITIGATE THE SENTENCE DOWN 100%. IF A SENTENCE IS MORE THAN 4 YEARS A JUDGE CAN ONLY MITIGATE IT DOWN 50%.

BETWEEN 1980-1984, UNDER OUR CURRENT PRESUMPTIVE SENTENCING CODE, CRIMINAL SENTENCES ROSE 100%. WE HAVE A VERY STIFF CODE, WITH VERY LITTLE JUDICIAL DISCRETION REMAINING. THE LIST OF MITIGATORS AND AGGRAVATORS SHOULD BE SCRUTINIZED FOR THINGS THAT SHOULD BE ADDED OR DELETED. THIS BILL WILL AMEND A CURRENT MITIGATOR JUST SLIGHTLY SO THAT THE CODE IS A LITTLE MORE EQUITABLE.

THANK YOU FOR YOUR CONSIDERATION OF SB-237. I THINK THAT IT IS GOOD PUBLIC POLICY IN THAT IT AIDS THE POLICE AND THE DISTRICT ATTORNEYS BY ENCOURAGING DEFENDANTS TO COOPERATE WITH THEM BY PROVIDING INFORMATION THAT WILL ASSIST THEM IN RESOLVING CRIMES.

BILL NO: SB 237 DATE: 4/21/87

TITLE: "An Act providing that assistance to authorities to detect, apprehend, or prosecute other persons is conduct constituting a mitigating factor in criminal sentencing."

CONTACT: James D. Vaden
Deputy Commissioner

APR 23 1987

DEPARTMENT OF PUBLIC SAFETY

Provides an incentive for persons accused of a crime to provide information to authorities to detect, apprehend, or prosecute other offenders involved in the commission of criminal offenses.

This proposed legislation would assist authorities by encouraging persons involved in or having knowledge of criminal activity to come forward with their information and assist the criminal justice agencies in identifying and prosecuting other offenders. This type of assistance to the criminal justice agencies would be considered by the sentencing court as a mitigator to presumptive sentencing as set out in 12.55.125.

The Department of Public Safety supports this legislation.

Arthur English
Commissioner

STATE OF ALASKA 1987 LEGISLATIVE SESSION

FISCAL NOTE

REQUEST
Revision Date:
Title: "An Act providing that assistance to authorities to detect..."
Sponsor: Senator Kerttula
Requestor: Senate HESS

Bill Version: SB 237
Publish Date:
Agency Affected: Public Safety
BRU: Alaska State Troopers

Components: Detachments & CIB

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING:: (Thousands of Dollars)

GENERAL FUNDS		0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME		0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact is anticipated.

Prepared by: Francis C. Allan G.S.A. Phone: 269-5691
Division: Alaska State Troopers Date: 4/15/87

JMF 4/16/87

Approved by Commissioner: Date: 4/15/87
Agency: Public Safety

Distribution (by preparer):
- Legislative Finance
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- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

3691), 578 P.2d 971 (1978); Putnam v. State, Sup. Ct. Op. No. 2251 (File No. 3475), 629 P.2d 35 (1980); State v. Brinkley, Ct. App. Op. No. 361 (File No. A-164), P.2d (1984); Cleary v. State, Sup. Ct. Op. No. 1257 (File No. 2623), 548 P.2d 952 (1976); Salazar v. State, Sup. Ct. Op. No. 1404 (File No. 2567), 562 P.2d 694 (1977); Cleary v. State, Sup. Ct. Op. No. 1431 (File No. 3059), 564 P.2d 374 (1977); Amidon v. State, Sup. Ct. Op. No. 1434 (File Nos. 2511, 2512), 565 P.2d 1248 (1977); Black v. State, Sup. Ct. Op. No. 1506 (File No. 3327), 569 P.2d 804 (1977); Sumabat v. State, Sup. Ct. Op. No. 1648 (File No. 3739), 580 P.2d 323 (1978); Hansen v. State, Sup. Ct. Op. No. 1689 (File No. 3412), 582 P.2d 1041 (1978); Kanipe v. State, Sup. Ct. Op. No. 2242 (File No. 4993), 620 P.2d 678 (1980); Hintz v. State, Sup. Ct. Op. No. 2334 (File No. 3541), 627 P.2d 207 (1981).

Inclusion of improper reference to unverified police contacts did not require remand for resentencing before a different judge. — See Parks v. State, Sup. Ct. Op. No. 1529 (File No. 3209), 571 P.2d 1003 (1977).

Reference to unverified police contacts in a presentence report does not require a remand for resentencing where the record indicates that the sentencing judge was not unduly or improperly influenced by reference to the unverified police contacts. Pascoe v. State, Sup. Ct. Op. No. 2249 (File No. 4290), 628 P.2d 547 (1980).

Case remanded for resentencing. — See Neal v. State, Sup. Ct. Op. No. 2341 (File No. 4787), 628 P.2d 19 (1981).

Case remanded for sentence review. — Although a sentence of 15 years' imprisonment with eligibility for parole at the discretion of the parole board upon conviction of manslaughter was not excessive, since the trial court had sentenced defendant as if his conviction had been obtained within one year of the crime and therefore substantially ignored his subsequent history of steady employment, his meritorious service in the army, and his lack of involvement in any criminal activity other than a few traffic offenses in the 12 years since the commission of the crime, the case was remanded for the purpose of permitting the trial court to review the sentence it imposed, in light of all available information concerning defendant without excluding the time period commencing one year from the time of the killing until the present. Padie v. State, Sup. Ct. Op. No. 1843 (File No. 3564), 594 P.2d 50 (1979).

Sec. 12.55.125. Sentences of imprisonment for felonies. (a) A defendant convicted of murder in the first degree shall be sentenced to a definite term of imprisonment of at least 20 years but not more than 99 years.

(b) A defendant convicted of murder in the second degree, kidnapping, or misconduct involving a controlled substance in the first degree shall be sentenced to a definite term of imprisonment of at least five years but not more than 99 years.

(c) A defendant convicted of a class A felony may be sentenced to a definite term of imprisonment of not more than 20 years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 — 12.55.175:

(1) if the offense is a first felony conviction and does not involve circumstances described in (2) of this subsection, five years;

(2) if the offense is a first felony conviction, other than for manslaughter, and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, or knowingly directed the conduct constituting the offense at a uniformed or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, seven years;

(3) if the offense is a second felony conviction, 10 years;

(4) if the offense is a third felony conviction, 15 years.

(d) A defendant convicted of a class B felony may be sentenced to a definite term of imprisonment of not more than 10 years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 — 12.55.175:

(1) if the offense is a second felony conviction, four years;

(2) if the offense is a third felony conviction, six years;

(3) if the offense is a first felony conviction, and the defendant knowingly directed the conduct constituting the offense at a uniformed or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, two years.

(e) A defendant convicted of a class C felony may be sentenced to a definite term of imprisonment of not more than five years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 — 12.55.175:

(1) if the offense is a second felony conviction, two years;

(2) if the offense is a third felony conviction, three years;

(3) if the offense is a first felony conviction, and the defendant knowingly directed the conduct constituting the offense at a uniformed or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, one year.

(f) If a defendant is sentenced under (a) or (b) of this section,

(1) imprisonment for the prescribed minimum term may not be suspended under AS 12.55.080;

(2) imposition of sentence may not be suspended under AS 12.55.085;

(3) imprisonment for the prescribed minimum term may not be otherwise reduced.

(g) If a defendant is sentenced under (c), (d)(1), (d)(2), (e)(1), (e)(2), or (i) of this section, except to the extent permitted under AS 12.55.155 — 12.55.175,

(1) imprisonment may not be suspended under AS 12.55.080;

(2) imposition of sentence may not be suspended under AS 12.55.085;

(3) terms of imprisonment may not be otherwise reduced.

(h) Nothing in this section or AS 12.55.135 limits the discretion of the sentencing judge except as specifically provided.

(i) A defendant convicted of sexual assault in the first degree or sexual abuse of a minor in the first degree may be sentenced to a definite term of imprisonment of not more than 30 years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 — 12.55.175:

(1) if the offense is a first felony conviction and does not involve circumstances described in (2) of this subsection, eight years;

(2) if the offense is a first felony conviction, and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 10 years;

(3) if the offense is a second felony conviction, 15 years;

(4) if the offense is a third felony conviction, 25 years. (§ 12 ch 166 SLA 1978; am § 18 ch 45 SLA 1982; am §§ 28-30 ch 143 SLA 1982; am § 8 ch 78 SLA 1983; am §§ 1-3 ch 92 SLA 1983)

Cross references. — For classification of felonies and misdemeanors, see AS 11.81.250; for authorized fines, see AS 12.55.035; for reduction of sentence for good behavior, see AS 33.20.010.

Effect of amendments. — The first 1982 amendment in subsection (b), deleted "or" preceding "kidnapping" and inserted "or misconduct involving a controlled substance in the first degree."

The second 1982 amendment in subsection (c), redesignated former paragraphs (1)-(3) as present paragraphs (2)-(4), added present paragraph (1), and substituted "possessed a firearm, used a dangerous instrument" for "possessed or used a firearm" and "seven years" for "six years" in present paragraph (2). The amendment also substituted "under (c), (d)(1), (d)(2), (e)(1), (e)(2), or (i) of this section" for "under (c)(1), (c)(2), (c)(3), (d)(1), (d)(2), (e)(1), or (e)(2) of this section" in the introductory language of subsection (g), corrected the section number set out in paragraphs (1) and (2) of subsection (g), and added subsection (i).

The first 1983 amendment inserted "or sexual abuse of a minor in the first degree" in the introductory language of subsection (i).

The second 1983 amendment in (c)(2) added "or knowingly directed . . . at the time of the offense," added paragraph (3) of subsection (d), added paragraph (3) of subsection (e), and made other minor punctuation changes.

Editor's notes. — For declaration of legislative purpose, see § 1, ch. 45, SLA 1982 in the 1982 Temporary and Special Acts and Resolves.

NOTES TO DECISIONS

I. General Consideration.
II. Presumptive Sentencing.

I. GENERAL CONSIDERATION.

Limited use of both suspended jail time and probation is permitted under AS 12.55.155. Lacquement v. State, Ct. App. Op. No. 85 (File No. 5741), 644 P.2d 856 (1982). See also Friedberg v. State, Ct. App. Op. No. 258 (File No. 7015), 663 P.2d 558 (1983).

Probationary sentences. — Although a probationary sentence may properly be used when a first offender is convicted of a class C felony involving sexual abuse of a child, such a sentence will be appropriate only if mitigating circumstances exist and the offender is a promising candidate for rehabilitation through probationary supervision. State v. Coats, Ct. App. Op. No. 291 (File No. 7102), 669 P.2d 1329 (1983).

Under former law where statutory mitigating factors warrant a sentence of 90 days to three years, extraordinary circumstances might justify a sentence of straight probation. State v. Brinkley, Ct. App. Op. No. 361 (File No. A-164), P.2d (1984).

Placement of offenders. — It is within the sentencing judge's authority to make a recommendation to the commissioner regarding the appropriate placement of the offender. Under AS 33.30.100, the commissioner has the power to effectuate such a recommendation by placing the offender in the appropriate facility, and although the commissioner is not bound by the sentencing court's recommendation, a demonstrated failure to provide an appropriate rehabilitation program or to further the purposes of the sentence may justify judicial intervention. Nell v. State, Ct. App. Op. No. 77 (File No. 5565), 642 P.2d 1361 (1982).

Sec. 12.55.135. Sentences of imprisonment for misdemeanors.

NOTES TO DECISIONS

Sentence upheld. — Composite sentence of 24 months with six months suspended for refusal to submit to a chemical breath test and for driving with a suspended operator's license was affirmed where the defendant had five prior driving while intoxicated convictions and at least four prior driving with suspended license convictions and was on probation for a prior driving while intoxicated and driving with suspended license conviction. Witt v. State, Ct. App. Op. No. 433 (File No. A-482), 692 P.2d 976 (1984).

Sec. 12.55.145. Prior convictions.

NOTES TO DECISIONS

Section applied in defining what a "felony charge or conviction" is for purposes of AS 12.55.155(c)(20). — See Kuvaas v. State, Ct. App. Op. No. 450 (File No. A-547), 696 P.2d 684 (1985).

Prior conviction out of state.

Subsection (a)(2) of this section has consistently been interpreted to apply to the statute establishing the elements of the offense for which the defendant was previously convicted, which was an Oregon statute that is a class C felony in Oregon as it is in Alaska. Thus, it was not error to consider the previous conviction a felony even though the defendant was sentenced under an Oregon statute providing for the reduction of certain felonies to misdemeanors. Wells v. State, Ct. App. Op. No. 401 (File Nos. 7479, 7663), 687 P.2d 346 (1984) (decided prior to the 1982 amendment).

A 1983 Oklahoma conviction for felony escape while on work release from a Department of Corrections treatment facility was a prior conviction for purposes of presumptive sentencing, for the Oklahoma escape statute had elements "substantially similar" to AS 11.56.310, a class B felony. Martin v. State, Ct. App. Op. No. 508 (File No. A-722), 704 P.2d 1341 (1985).

Sufficient evidence of prior conviction. — An authenticated copy of a foreign docket abstract constituted sufficient evidence of a prior conviction. Gant v. State, Ct. App. Op. No. 576 (File No. A-1059), 712 P.2d 906 (1986).

Sec. 12.55.155. Factors in aggravation and mitigation. (a) If a defendant is convicted of an offense and is subject to sentencing under AS 12.55.125(c), (d)(1), (d)(2), (e)(1), (e)(2), or (i) and

(1) the presumptive term is four years or less, the court may decrease the presumptive term by an amount as great as the presumptive term for factors in mitigation or may increase the presumptive term up to the maximum term of imprisonment for factors in aggravation;

(2) the presumptive term of imprisonment is more than four years, the court may decrease the presumptive term by an amount as great as 50 percent of the presumptive term for factors in mitigation or may increase the presumptive term up to the maximum term of imprisonment for factors in aggravation.

(b) Sentence increments and decrements under this section shall be based on the totality of the aggravating and mitigating factors set out in (c) and (d) of this section.

(c) The following factors shall be considered by the sentencing court and may aggravate the presumptive terms set out in AS 12.55.125:

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

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

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

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

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

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

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

(8) the defendant's prior criminal history includes conduct involving aggravated or repeated instances of assaultive behavior;

(9) the defendant knew that the offense involved more than one victim;

(10) the conduct constituting the offense was among the most serious conduct included in the definition of the offense;

(11) the defendant committed the offense pursuant to an agreement that the defendant either pay or be paid for the commission of the offense, and the pecuniary incentive was beyond that inherent in the offense itself;

(12) the defendant was on release under AS 12.30.020 or 12.30.040 for another felony charge or conviction or for a misdemeanor charge or conviction having assault as a necessary element;

(13) the defendant knowingly directed the conduct constituting the offense at an active officer of the court or at an active or former judcial officer, prosecuting attorney, law enforcement officer, correctional employee, fire fighter, emergency medical technician, paramedic, ambulance attendant, or other emergency responder during or because of the exercise of official duties;

(14) the defendant was a member of an organized group of five or more persons, and the offense was committed to further the criminal objectives of the group;

(15) the defendant has three or more prior felony convictions;

(16) the defendant's criminal conduct was designed to obtain substantial pecuniary gain and the risk of prosecution and punishment for the conduct is slight.

(17) the offense was one of a continuing series of criminal offenses committed in furtherance of illegal business activities from which the defendant derives a major portion of the defendant's income;

(18) the offense was a crime specified in AS 11.41 and was committed against a spouse, a former spouse, or a member of the social unit comprised of those living together in the same dwelling as the defendant;

(19) the defendant's prior criminal history includes an adjudication as a delinquent for conduct that would have been a felony if committed by an adult;

(20) the defendant was on furlough under AS 33.30 or on parole or probation for another felony charge or conviction that would be considered a prior felony conviction under AS 12.55.145(a)(2);

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

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

(23) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the delivery of a controlled substance under circumstances manifesting an intent to distribute the substance as part of a commercial enterprise;

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

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

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

(d) The following factors shall be considered by the sentencing court and may mitigate the presumptive terms set out in AS 12.55.125:

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

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

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

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

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

(6) in a conviction for assault under AS 11.41.200 — 11.41.230, the defendant acted with serious provocation from the victim;

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

(8) *[Repealed, § 42 ch 143 SLA 1982.]*

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

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

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

(12) the defendant assisted authorities to detect or apprehend other persons who committed the offense with the defendant;

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

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

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

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

(e) If a factor in aggravation is a necessary element of the present offense, or requires the imposition of a presumptive term under AS 12.55.125(c)(2), (d)(3) or (e)(3), that factor may not be used to aggravate the presumptive term. If a factor in mitigation is raised at trial as a defense reducing the offense charged to a lesser included offense, that factor may not be used to mitigate the presumptive term.

(f) If the state seeks to establish a factor in aggravation at sentencing or if the defendant seeks to establish a factor in mitigation at sentencing, written notice must be served on the opposing party and filed with the court not later than 10 days before the date set for imposition of sentence. Factors in aggravation and factors in mitigation must be established by clear and convincing evidence before the court sitting without a jury. All findings must be set out with specificity.

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

(h) In this section, "serious provocation" has the meaning given in AS 11.41.115(f). (§ 12 ch 166 SLA 1978; am §§ 39-41 ch 102 SLA 1980; am §§ 19, 20 ch 45 SLA 1982; am §§ 36, 38, 39, 42 ch 143 SLA 1982; am §§ 6, 7 ch 92 SLA 1983; am § 19 ch 37 SLA 1986)

Effect of amendments. — The 1986 amendment, effective May 26, 1986, added "that would be considered a prior felony conviction under AS 12.55.-145(a)(2)" at the end of paragraph (20) of subsection (c).

NOTES TO DECISIONS

I. GENERAL CONSIDERATION.

Sentences for sexual assaults. — Review of cases which address sexual assaults involving both adult and child victims supports a sentencing range for aggravated offenses of 10 to 15 years, and use of Atkinson and Depp as benchmarks for determining the kind of conduct warranting a sentence within that range. These benchmarks are applicable to all aggravated cases because of: (1) multiple victims; (2) multiple assaults on a single victim; or, (3) serious injuries to one or more victims. State v. Andrews, Ct. App. Op. No. 510 (File Nos. A-468, A-492, A-552), 707 P.2d 900 (1985).

Sentence upheld. — Where defendant received a ten-year presumptive sentence for attempted first-degree murder as a second felony offender and appealed on the ground that the trial court gave insufficient consideration to former paragraph (d)(8) of this section, the mitigating factor that his prior felony of burglary was a less serious crime than the present offense, the court of appeals held that the trial judge's decision to give the mitigator little weight because he stressed general deterrence and affirmation of community norms was appropriate and the sentence was not clearly mistaken. Staael v. State, Ct. App. Op. No. 454 (File No. A-78), 697 P.2d 1050 (1985).

Sentence of eight-year presumptive term for first-degree sexual abuse of a minor and concurrent sentences of three years for two counts of second-degree sexual abuse of a minor to run concurrently with the eight-year term were upheld. The defendant's continued efforts to justify his conduct as "sex education" and his only limited acceptance and understanding of the grave risks of psychological damage to children that his conduct presented led the court of appeals to conclude the trial judge was not clearly erroneous in concluding that the mitigating factor of conduct among the least serious in the definition of the offense was not established by clear and convincing evidence. S.B. v. State, Ct. App. Op. No. 516 (File No. A-811), 706 P.2d 695 (1985).

Sentence not upheld. — Where a defendant was sentenced to consecutive sentences of 10 years for burglary in the first degree, 20 years for robbery in the first degree and 10 years for assault in the second degree made consecutive to a previously imposed eight-year sentence for shooting with intent to wound, the case was remanded for resentencing of the defendant as a second-felony offender with a total sentence, including the unserved portion of the previous sentence, not to exceed 40 years. Larson v. State, Ct. App. Op. No. 403 (File No. 6179), 688 P.2d 592 (1984).

Applied in Depp v. State, Ct. App. Op. No. 390 (File No. 7002), 686 P.2d 712 (1984); Wells v. State, Ct. App. Op. No. 401 (File Nos. 7479, 7663), 687 P.2d 917 (1984); Travelstead v. State, Sup. Ct. Op. No. 407 (File No. A-114), 689 P.2d 494 (1984); Gregory v. State, Sup. Ct. Op. No. 411 (File No. A-430), 689 P.2d 508 (1984); Wortham v. State, Sup. Ct. Op. No. 414 (File No. 7353), 689 P.2d 1133 (1984); Carlson v. State, Ct. App. Op. No. 448 (File No. A-346), 696 P.2d 178 (1985); Benboe v. State, Ct. App. Op. No. 466 (File No. A-225), 698 P.2d 1230 (1985); Hart v. State, Ct. App. Op. No. 482 (File No. A-295), 702 P.2d 651 (1985); Thomas v. State, Ct. App. Op. No. 549 (File No. A-721), 710 P.2d 1017 (1985); Resek v. State, Ct. App. Op. No. 597 (File No. A-787), 715 P.2d 1188 (1986); Dymenstein v. State, Ct. App. Op. No. 624 (File No. A-1210), P.2d (1986).

Quoted in Lausterer v. State, Ct. App. Op. No. 438 (File No. A-104), 693 P.2d 887 (1985); Marin v. State, Ct. App. Op. No. 475 (File No. A-556), 699 P.2d 886 (1985); Hancock v. State, Ct. App. Op. No. 518 (File No. 7818), 706 P.2d 1164 (1985).

sentencing purposes can be condoned only in those cases where the state, after exercising due diligence, is unable to meet the statutory requirements for proof of a prior conviction. Kelly v. State, Ct. App. Op. No. 251 (File No. 6311), 663 P.2d 967 (1983).

Sec. 12.55.165. Extraordinary circumstances. If the defendant is subject to sentencing under AS 12.55.125(c), (d)(1), (d)(2), (e)(1), (e)(2), or (i) and the court finds by clear and convincing evidence that manifest injustice would result from failure to consider relevant aggravating or mitigating factors not specifically included in AS 12.55.155 or from imposition of the presumptive term, whether or not adjusted for aggravating or mitigating factors, the court shall enter findings and conclusions and cause a record of the proceedings to be transmitted to a three-judge panel for sentencing under AS 12.55.175. (§ 12 ch 166 SLA 1978; am § 37 ch 143 SLA 1982)

Effect of amendments. — The 1982 amendment substituted "AS 12.55.125(c), (d)(1), (d)(2), (e)(1), (e)(2), or (i)" for "AS 12.55.125(c)(1), (c)(2), (c)(3), (d)(1), (d)(2), (3)(1), or (e)(2) of this chapter" near the beginning of this section.

Editor's notes. — Section 23, ch. 166, SLA 1978, in subsection (c), provides: "AS 12.55.125 — 12.55.185, enacted in sec. 12 of this Act, apply only upon conviction of the crime of murder in the first or second degree, kidnapping, or any crime classified as a class A, B, or C felony or a class A or B misdemeanor. For purposes of AS 12.55.125, 12.55.145, and 12.55.155, the court shall consider prior convictions whether committed before, on, or after the effective date of this Act."

NOTES TO DECISIONS

Constitutionality of presumptive sentencing provisions. — See notes under same heading, AS 12.55.125, Nell v. State, Ct. App. Op. No. 77 (File No. 5565), 642 P.2d 1361 (1982).

Authority to sentence defendant. — See notes to AS 12.55.175 under catchline "Sentencing authority," Heathcock v. State, Ct. App. Op. No. 293 (File No. 6803), 670 P.2d 1155 (1983). See also Winfree v. State, Ct. App. Op. No. 378 (File No. A-156), P.2d (1984).

Manifest injustice. — Manifest injustice is basically a subjective standard because of the purpose that the standard serves in recognizing cases that will inevitably arise in which the subjective judgment of the sentencing court should take precedence over the objective limits imposed by statute. Lloyd v. State, Ct. App. Op. No. 307 (File No. 7393), 672 P.2d 152 (1983).

The judge did not commit error by refusing to find manifest injustice based on imposition of the adjusted presumptive term in light of the totality of the circumstances. Lloyd v. State, Ct. App. Op. No. 307 (File No. 7393), 672 P.2d 152 (1983).

Judge did not err in failing to refer defendant's case to the three-judge panel to allow further reduction of defendant's sentence based on his lack of prior criminal convictions. Lloyd v. State, Ct. App. Op. No. 307 (File No. 7393), 672 P.2d 152 (1983).

Judge did not apply an incorrect standard in determining the question of manifest injustice when he defined the term as "something that's shocking to the conscience," and remand for application of the obvious unfairness standard proposed by defendant was unwarranted. Lloyd v. State, Ct. App. Op. No. 307 (File No. 7393), P.2d (1983).

Applied in McManners v. State, Ct. App. Op. No. 123 (File No. 6065), 650 P.2d 414 (1982); Sears v. State, Ct. App. Op. No. 151 (File No. 6692), 653 P.2d 349 (1982); Peetook v. State, Ct. App. Op. No. 178 (File No. [illegible]30), 655 P.2d 1308 (1982); Seymore v. State, Ct. App. Op. No. 196 (File No. 6935), 655 P.2d 786 (1982); Shaw v. State, Ct. App. Op. No. 313 (File No. 7561), 673 P.2d 781 (1983); Walsh v. State, Ct. App. Op. No. 338 (File No. 7887), 677 P.2d 912 (1984).

Stated in Erhart v. State, Ct. App. Op. No. 185 (File No. 6244), 656 P.2d 1199 (1982); State v. Rastopsoff, Ct. App. Op. No. 228 (File No. 6295), 659 P.2d 630 (1983); Maldonado v. State, Ct. App. Op. No. 349 (File No. 7897), 676 P.2d 1093 (1984).

Cited in Juneby v. State, Ct. App. Op. No. 72 (File No. 5606), 641 P.2d 823 (1982); Lacquement v. State, Ct. App. Op. No. 85 (File No. 5741), 644 P.2d 856 (1982); Wolf v. State, Ct. App. Op. No. 99 (File No. 5882), 647 P.2d 609 (1982); Griffith v. State, Ct. App. Op. No. 154 (File No. 6233), 653 P.2d 1057 (1982); Neakok v. State, Ct. App. Op. No. 163 (File No. 6418), 653 P.2d 658 (1982); Wright v. State, Ct. App. Op. No. 204 (File No. 6569), 656 P.2d 1226 (1983); Koteles v. State, Ct. App. Op. No. 232 (File No. 6782), 660 P.2d 1199 (1983); Langton v. State, Ct. App. Op. No. 236 (File Nos. 7188, 6247, 7114), 662 P.2d 954 (1983); Woods v. State, Sup. Ct. Op. No. 2698 (File No. 6180), 667 P.2d 184 (1983); Maal v. State, Ct. App. Op. No. 295 (File No. 7076), 670 P.2d 708 (1983); State v. LaPorte, Ct. App. Op. No. 306 (File Nos. 7220, 7285), 672 P.2d 466 (1983); Flink v. State, Ct. App. Op. No. 370 (File Nos. 6962, 7060, P.2d (1984).

Sec. 12.55.175. Three-judge sentencing panel. (a) There is created within the superior court a panel of five superior court judges to be appointed by the chief justice in accordance with rules and for terms as may be prescribed by the supreme court. Three judges of the panel shall be designated by the chief justice as members. The remaining two judges shall be designated by the chief justice as first and second alternates to sit as members in the event of disqualification or disability in accordance with rules as may be prescribed by the supreme court.

(b) Upon receipt of a record of proceedings under AS 12.55.165, the three-judge panel shall consider all pertinent files, records, and transcripts, including the findings and conclusions of the judge who originally heard the matter. The panel may hear oral testimony to supplement the record before it. If the panel finds that manifest injustice would result from failure to consider relevant aggravating or mitigating factors not specifically included in AS 12.55.155 or from imposition of the presumptive term, whether or not adjusted for aggravating or mitigating factors, it shall sentence the defendant in accordance with this section. If the panel does not find that manifest injustice would result, it shall remand the case to the sentencing court, with a written statement of its findings and conclusions, for sentencing under AS 12.55.125.

(c) The three-judge panel may in the interest of justice sentence the defendant to any definite term of imprisonment up to the maximum term provided for the offense or to any sentence authorized under AS 12.55.015.

(d) Sentencing of a defendant or remanding of a case under this section shall be by a majority of the three-judge panel. (§ 12 ch 166 SLA 1978)

Editor's notes. — Section 23, ch. 166, SLA 1978, in subsection (c), provides: "AS 12.55.125 — 12.55.185, enacted in sec. 12 of this Act, apply only upon conviction of the crime of murder in the first or second degree, kidnapping, or any crime classified as a class A, B, or C felony or a class A or B misdemeanor. For purposes of AS 12.55.125, 12.55.145, and 12.55.155, the court shall consider prior convictions whether committed before, on, or after the effective date of this Act."

alaska judicial council

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ACTING DIRECTOR
Teresa W. Carns

March 19, 1987

ALASKA FELONY SENTENCES: 1984

The Alaska Judicial Council found that presumptive sentencing caused only part of the increases in court felony trials and prison populations during the early 1980s. A one-hundred percent increase in the number of convicted offenders, and legislative reclassification of drug and sexual offenses contributed equally to high court caseloads and jail overcrowding. The Judicial Council's study was based on data about all 1984 felony case filings that resulted in a conviction and sentence. The data were provided by state agency computerized information systems, especially the Department of Law's PROMIS system. Department of Public Safety and Department of Corrections also contributed data for the report.

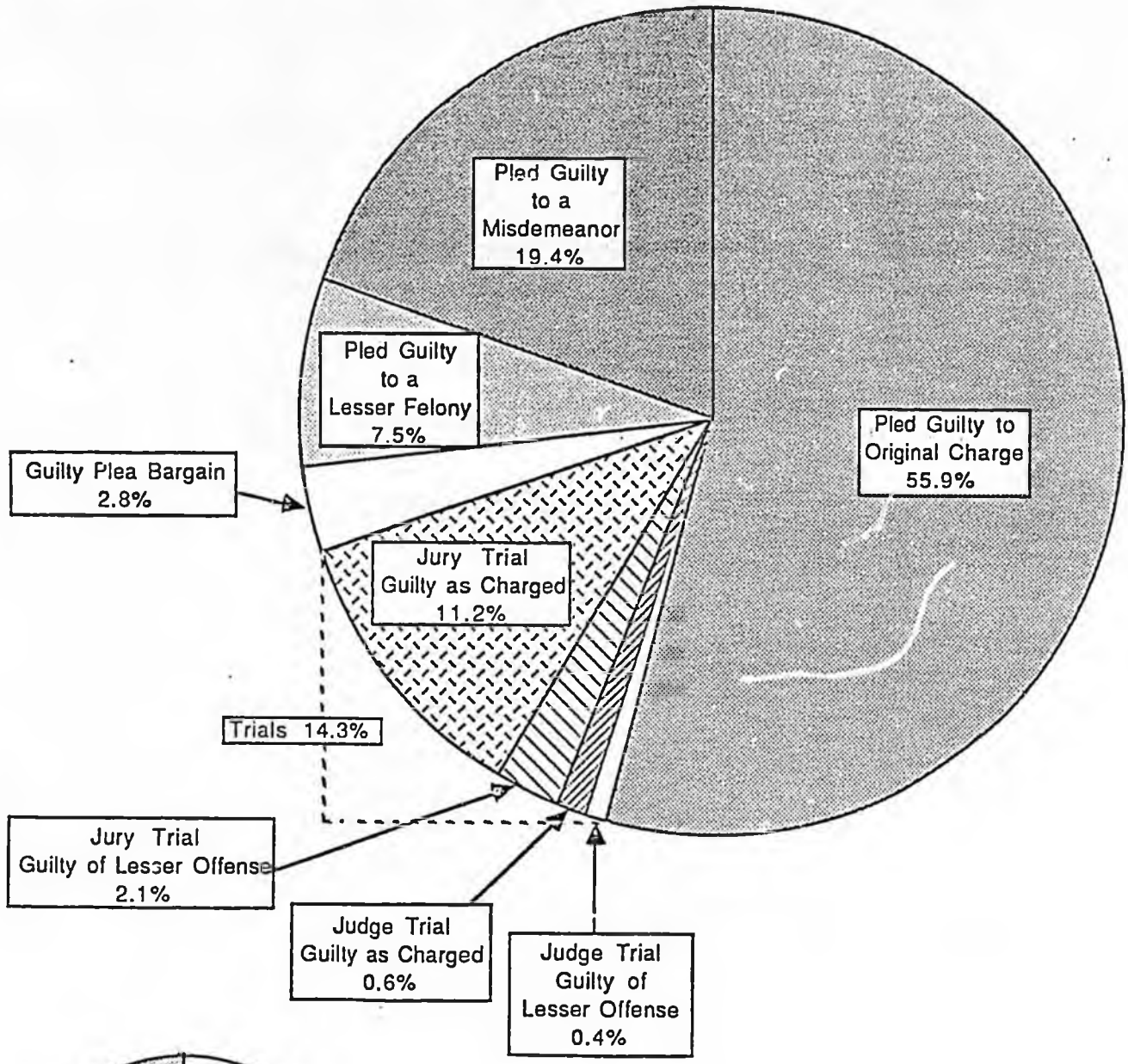
The study found that 14.3% of the offenders had been convicted after a trial. Nearly 20% of the 1984 offenders had a misdemeanor as their final, most serious charge of conviction. Only 2.8% of the convicted offenders pled guilty in a recorded plea bargain as an exception allowed under the Attorney General's prohibition of plea bargaining.

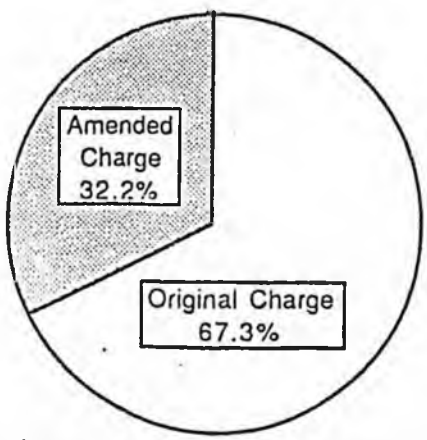
Sentence lengths for offenders were strongly related to the seriousness of the offense. The most serious offenses (Unclassified) received sentences ranging from 87.9 months for sexual abuse of a minor I to 401.3 months for murder I. Class A offenses typically received sentences of about 5 years, Class B offenses were sentenced to about 2 years and Class C offenses to about 1 year. The study found that the presumptive sentencing scheme had, with few exceptions, resulted in consistent sentence lengths for most offenders.

The report found a 100% increase in the amount of prison time imposed between 1980 and 1984. The study estimates that the increased numbers of convictions between 1980 and 1984 accounted for about 40% of the increased prison time in 1984. Legislative changes, including presumptive sentences for first-time felony offenders convicted of Class A offenses and reclassification of sexual and drug offenses, accounted for another 40% of increased prison time. The balance of the increase was due to the fact that a higher percentage of 1984 offenders were convicted of serious crimes than were 1980 offenders.

Additional copies of the report are available upon request from the Alaska Judicial Council. Contact: Teresa W. Carns, Acting Director, Alaska Judicial Council, 1031 W. 4th Avenue, Suite 301, Anchorage, Alaska 99501, telephone 279-2526.

FIGURE 3
(Alaska Felony Sentences: 1984)
Types of Convictions



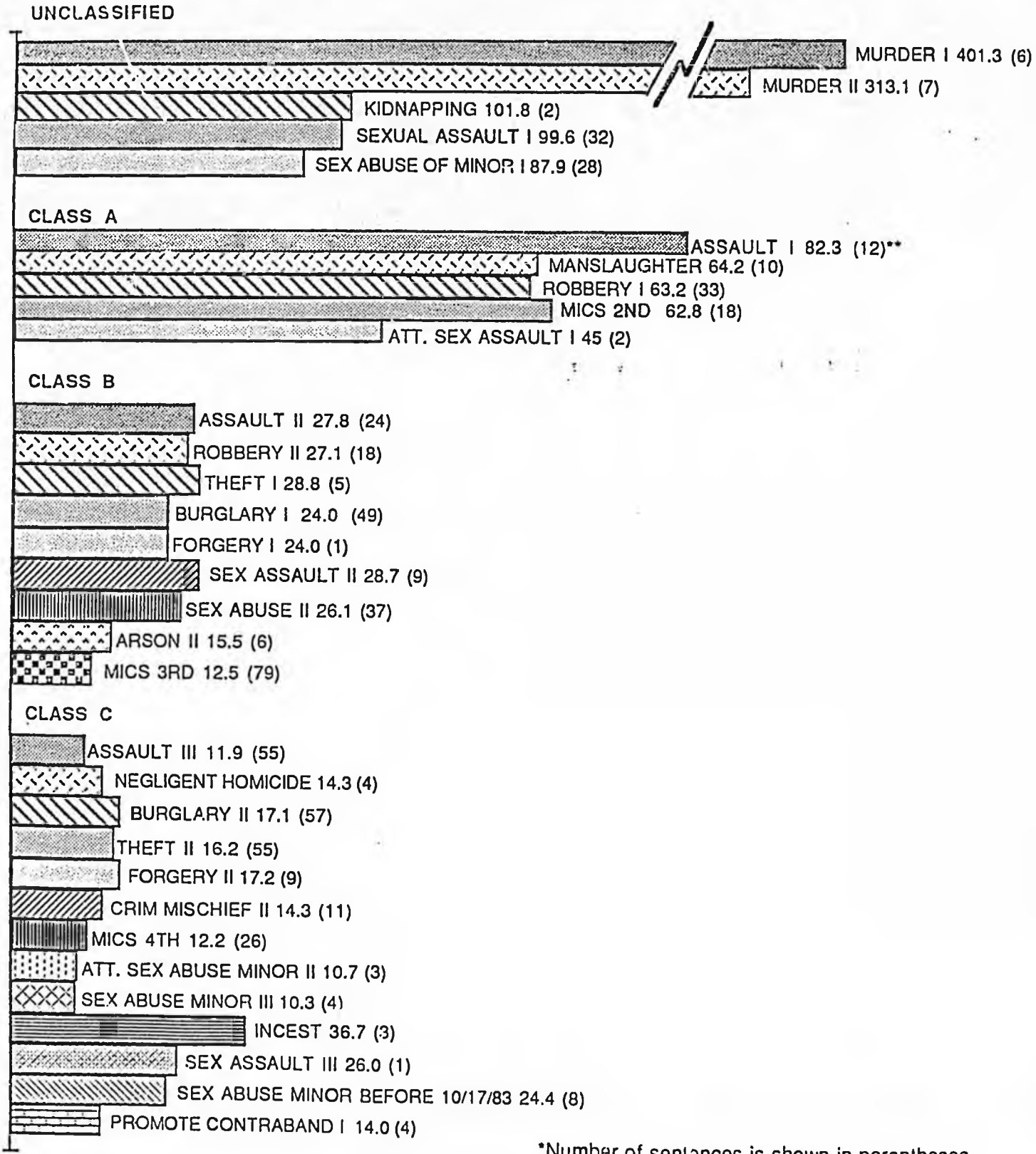


Original vs. Amended Charge

FIGURE 7

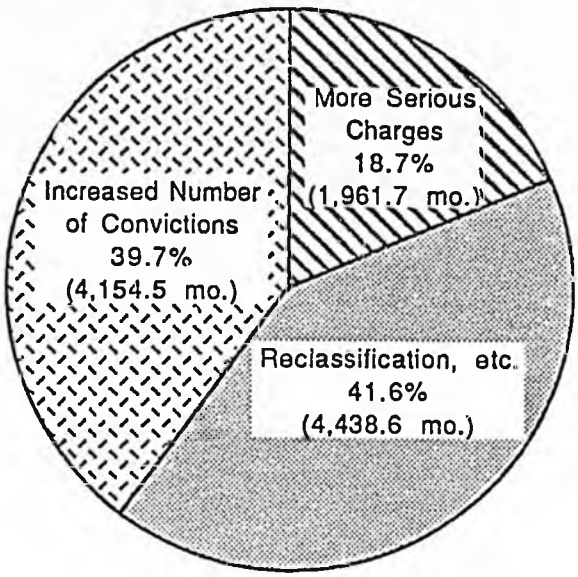
Alaska Felony Sentences: 1984

Comparison of Mean Sentence Length For Selected Offenses by Class of Offense*



*Number of sentences is shown in parentheses.
All sentence lengths are in months.
**Includes one sentence of 20 years (240 months)

FIGURE 6
(ALASKA FELONY SENTENCES: 1984)
Increase in Total Prison Time: Percent of Increase Due to Specific Factors



HOUSE COMMITTEE REPORT

(7)

Date referred: 5/14/87

FURTHER REFERRALS:

DATE: 5/15/87

The Judiciary Committee has considered SB 237

"An Act providing that assistance to authorities to detect, apprehend, or prosecute other persons is conduct constituting a mitigating factor in criminal sentencing."

RECOMMENDS:

[ ] replace with _____ [ ] the same title

[ ] attached amendment(s) [ ] a new title

[✓] do pass

[ ] do not pass

[ ] no recommendation

[ ] individual recommendations

[ ] additional referral to the _____ Committee

ADOPTS: [ ] _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact

[ ] zero fiscal note

[ ] zero with analysis

[ ] same as previous fiscal note published _____

[X] same as previous zero fiscal note published _____

SIGNED DO PASS:

SIGNING OTHER RECOMMENDATIONS:

Chairman's signature