

SB

231

**STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE**

REQUEST: _____
 Revision Date: _____
 Title: "An Act related to sexual
 abuse or a minor"
 Sponsor: Halford, Jones, Duncan
 Requestor: _____

Bill Version: CSB 231 HESS
 Publish Date: 4-8-87

Agency Affected: Dept. of Corrections
 BRU: _____
 Components: _____

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	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

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

ANALYSIS :

This legislation should have minimal impact on the Department of Corrections.

Prepared by: Susan E. Knighton, Research Analyst IV
 Division: Statewide Programs

Phone: 465-3376
 Date: 4-21-87

Approved by Commissioner: Susan Humphrey-Barnett
 Agency: Department of Corrections

Date: 4-21-87

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

CORRECTIONS

**STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE**

Bill Version: CS SB 231 HESS
Publish Date: _____

REQUEST: _____

Revision Date: _____

Title: An Act relating to sexual
abuse of a minor

Sponsor: Halford, Jones, etc.

Requestor: Senate HESS

Agency Affected: Public Safety
BRU: Council on Domestic
Violence & Sexual Assault

Components: _____

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	0

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS

Prepared by: Barbara Miklos, Executive Director
Division: Council on Domestic Violence & Sexual Assault

Phone: 465-4356
Date: 4-10-87

Approved by Commissioner: [Signature]
Agency: Public Safety

Date: 4/13/87

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

Public Safety

*JMR
4/17/87*

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version CS SB 231/MESS
Publish Date: 4/2/87

REQUEST: _____

Revision Date: 4/10/87
Title: "An Act relating to sexual abuse of a minor..."
Sponsor: Halford, Jones, et.al.
Requestor: Senate Judiciary

Agency Affected: Administration
BRU: Office of Public Advocacy

Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

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

FUNDING: (Thousands of Dollars)

GENERAL FUND		0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL		0	0	0	0	0

POSITIONS:

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

ANALYSIS:

Prepared by: Brant McGee, Public Advocate
Division: Office of Public Advocacy

Phone: 274-1684
Date: 4/10/87

Approved by Commissioner: Garrey Peska
Agency: Department of Administration

Date: 4/13/87

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

Public Advocacy

**STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE**

Bill Version: CS SE 231 HESS
Publish Date: _____

REQUEST:
Revision Date: April 10, 1987
Title: "An Act relating to sexual
abuse of a minor"
Sponsor: Sen. Halford
Requestor: Senate Judiciary

Agency Affected: Department of Administration
BRU: Public Defender Agency
Components: Third Judicial District

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 FUND		-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL		-0-	-0-	-0-	-0-	-0-

POSITIONS:

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

ANALYSIS

Prepared by: Dana Fabe, Public Defender
Division: Public Defender Agency

Phone: 279-7541
Date: April 10, 1987

Approved by Commissioner: Garrey Peska
Agency: Department of Administration

Date: 4/13/87

Distribution (by preparer):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

Public Defender

POSITION PAPER

SB 231

The Alaska Public Defender Agency and the Office of Public Advocacy are totally reactive agencies which provide representation to indigent persons when appointed by the court. These agencies do not make policy nor do they initiate litigation. Only proposed legislation with fiscal or program ramifications for these agencies can be said to have a direct agency impact. Thus, the Public Defender Agency and Office of Public Advocacy submit position papers for legislation which will affect these agencies fiscally or programatically or will require these agencies to litigate constitutional issues raised by the legislation.

Fiscal impact: X None See attached fiscal note

Program impact: None See analysis below X

Constitutional impact: None See analysis below X

This bill is apparently designed to expand the offense of sexual abuse of a minor in the first degree to include persons who have authority over a child in the household but are not legally related to that child. Unfortunately, this bill is drafted so broadly that it could apply to a number of situations which may not merit the eight-year presumptive term for a first offender of this offense.

Specifically, the bill would allow conviction of an eighteen year old exchange student who has a romantic relationship with the seventeen year old daughter of the family with whom he is living. If sexual penetration including digital penetration were to occur, that eighteen year old would be subject to prosecution and conviction with an eight-year presumptive term. Similarly, if two adults with teenage children were to begin to live together, and the teenagers, age eighteen and seventeen were to have a romantic relationship which involved any sexual penetration, the eighteen year old could be convicted of this offense.

Since the apparent goal of this legislation is to make culpable persons in a quasi-stepparent relationship with a child victim, regardless of whether that adult is married to the victim's parent or guardian, the statute should be framed more specifically to target that population.

Based on the information above, the Alaska Public Defender Agency and the Office of Public Advocacy oppose this bill.

Dana Fabe
Dana Fabe, Director
Public Defender Agency

Brant McGee
Brant McGee, Director
Office of Public Advocacy

Garrey Peska
Commissioner Garrey Peska
Department of Administration

2/10/87
Date

4/10/87
Date

4/13/87
Date

BILL NO: SB 231

DATE: April 10, 1987

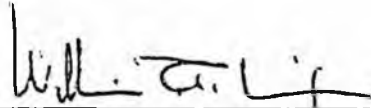
TITLE: An Act relating to sexual
abuse of a minor

CONTACT: Barbara Miklos
Executive Director
Council on Domestic
Violence & Sexual
Assault

DEPARTMENT OF
PUBLIC SAFETY

The Council on Domestic Violence and Sexual Assault supports the concept of SB 231 which adds a provision to the sexual abuse of a minor statutes to include an offense against a victim who is residing as a member of a social unit in the same household with the offender. Such a relationship is not covered in statutes describing first and second degree sexual abuse of a minor, yet a notable number of minors are sexually assaulted by live-in partners of the parent who are recognized by the child as a parental or authoritative figure. In many instances, encouragement is given to accept live-in partners as surrogate parents and to comply with any parental authority which may be extended. In essence this "sets up" a child to yield to an adult who is not the legally-recognized custodian, but who is in a position to exert a great degree of control and influence. Therefore, the child is vulnerable to this authority and should be specifically protected in statute.

The language in Section 11.41.434(a)(2)(C) is too broad because it could include consensual sexual penetration of a 15-year-old by a 19-year-old. Also the Council feels that the word illegitimate in Section (B) should be replaced with a term with less stigma on the child. It could read "a child born out of wedlock".



William R. Nix
Acting Commissioner


Sexual Abuse of a Minor:

- 1st degree: Offender's age: 16+
Victim's age: under 13
Act: sexual penetration
Relationship: N/A
Statute: 11.41.434
Unclassified offense: 8 years presumptive sentence
- 1st degree: Offender's age: 18+
Victim's age: under 18
Act: sexual penetration
Relationship: offender is legal parent or cares for the
child by authority of law.
Statute: 11.41.434
Unclassified offense: 8 years presumptive sentence
- 2nd degree: Offender's age: 16+
Victim's age: 13-15 and three yrs younger than offender
Act: sexual penetration
Relationship: N/A
Statute: 11.41.436
Class B felony. Not presumptive until second conviction.
Second conviction: 4 years presumptive
- 2nd degree: Offender's age: 16+
Victim's age: under 13
Act: sexual contact
Relationship: N/A
Statute: 11.41.436
Class B felony. Not presumptive until second conviction.
Second conviction: 4 years presumptive
- 2nd degree: Offender: 18+
Victim's age: under 18
Act: sexual contact
Relationship: legal parent or cares for the child by
authority of law
Statute: 11.41.436
Class B felony. Not presumptive until second conviction.
Second conviction: 4 years presumptive

SB 231 -- Sexual Abuse of a Minor

This bill was introduced at the request of STAR (Standing Together Against Rape) of Anchorage.

Purpose:

~~Its purpose is to correct a loophole in the sentencing of parents and parent figures who sexually abuse a child.~~ Currently, a father or stepfather who sexually abuses his daughter under 18 is guilty of an unclassified felony offense. But the abusing live-in boyfriend of the child's mother is guilty of only a Class B felony. 

Frequently a child is encouraged to accept a live-in partner as a substitute parent. The child is vulnerable to the influence and control of the parent figure.

The presence or absence of a marriage certificate should not change the length of sentence for sexual assault of a minor.

Suggested added language:

At the suggestion of Public Defender Dana Fabe, I would request an addition to the bill. The bill's language states that "at the time of the offense (the minor child) is residing as a member of a social unit in the same household with the offender." Dana Fabe suggests adding "...and the offender has authority over the minor child." The Department of Law, which helped with technical aspects of the wording of the bill, concurs with that language.

Fiscal notes:

The bill has zero fiscal notes.

Support for the bill:

The bill with the suggested added language is supported by:

STAR

The Child Advocacy Network (81 agencies and 110 individuals statewide)

The Municipality of Anchorage Dept of Health and Human Services

The Anchorage Police Dept and APD Employees Assn legislative committee

The Alaska Association of Chiefs of Police

The Alaska Women's Lobby

The Department of Health and Social Services

The Department of Public Safety

The Alaska Network on Domestic Violence and Sexual Assault has not officially met to discuss this bill but strongly supports it in concept.

The law:

The law concerning sexual abuse of a minor differs from that concerning sexual assault. Under AS 11.41.410, it is sexual assault in the first degree to sexually penetrate another person of any age without the victim's consent.

But consent does not apply if the victim is a minor child (under the age of 18). In the case of minor children, the law looks at the age of the victim and the relationship between victim and offender.

The relationship between victim and offender: If the offender is the victim's legal parent or guardian, sexual penetration of a child under 18 (the offender's son or daughter, including an illegitimate or adopted child, or a step child) is an unclassified felony. AS 11.41.434(a) and (b).

If the offender is not the victim's legal parent (or guardian), sexual penetration of a child between the ages of 13 and 15 is a Class B felony and sexual penetration of a child 16 and 17 is not a crime at all. AS 11.41.436(a)(1).

Penalties:

Under current law, first degree sexual abuse of a minor by a legal parent is an unclassified felony. It is a presumptive sentence, with no probation. The sentence for the first conviction is 8 years. For the second conviction it is 15 years. Imprisonment cannot exceed 30 years. AS 12.55.125(i).

Under current law, sexual penetration of a child ages 13-15 by someone who is not legally the child's parent is a Class B felony. It is a presumptive sentence upon the second conviction. The presumptive sentence for a second conviction is 4 years. For a third conviction it is 6 years. Imprisonment may not exceed 10 years. AS 12.55.125(d).

SEXUAL ABUSE OF A MINOR

<u>Victim's age:</u>	under 13	under 18	13-15	16-17
<u>Act:</u>	sexual penetratn	sexual penetratn	sexual penetratn	sexual penetratn
<u>Relationship:</u>	_____	legal parent	_____	_____
<u>Offense:</u>	unclassified	unclassified	B felony	Not a crime
<u>Statute:</u>	11.41.434	11.41.434	11.41.436	

Incest as included within charge of rape, 76 ALR2d 484

Criminal responsibility of husband for rape, or assault to commit rape, on wife, 84 ALR2d 1017

Fraud or impersonation, rape by, 91 ALR2d 591.

Impotency as defense to charge of rape, attempt to rape, or assault with intent to commit rape, 23 ALR3d 1351.

Rape or similar offense based on intercourse with woman who is allegedly mentally deficient, 31 ALR3d 1227

Liability of parent for injury to unemancipated child caused by parent's negligence, 41 ALR3d 904.

Seizure or detention for purpose of com-

mitting rape, robbery, or similar offense as constituting separate crime of kidnapping, 43 ALR3d 699.

Consent as defense in prosecution for sodomy, 58 ALR3d 636.

Multiple instances of forcible intercourse involving same defendant and same victim as constituting multiple crimes of rape, 81 ALR3d 1228.

What constitutes offense of "sexual battery," 87 ALR3d 1250.

Constitutionality of rape laws limited to protection of females only, 99 ALR3d 129

Validity and construction of statute defining crime of rape to include activity traditionally punishable as sodomy or the like, 3 ALR4th 1009.

must prove that engaged in sex recklessly disregarding consent. Construed does not punish but neither vague nor State, Ct. App. Op. 664 P.2d 621 (1983)

Construing the concurrent offenses together in nature has not distinguish between and the penalty offenses provisions not subject defendant punishment or due process or the equal Reynolds v. State (File No. 6890), 641 P.2d 621 (1983)

Categories common — All of the case, the definition of sexual degree under subsection (a)(4) of this section offense for legal purposes Ct. App. Op. No. 641 P.2d 823 (1982), and affirmed on rehearing 259 (File No. 5606)

And none is others. — Nothing in the language of the statute or the legislative history of the statute the type of conduct covered by subsection (a) is meant to be inherent in any of the other offenses. The grouping of these offenses together under one heading, with identical class A felonies, in the legislature's code paragraphs were involving equally v. State, Ct. App. 5606), 641 P.2d 621 (1983) other grounds and App. Op. No. 259 (1983)

Subsection (a) common law definition v. State, Ct. App. 5606), 641 P.2d 621 (1983) other grounds and App. Op. No. 259 (1983)

Mental state required. Lack of consent is

Sec. 11.41.410. Sexual assault in the first degree. (a) A person commits the crime of sexual assault in the first degree if,

(1) being any age, the defendant engages in sexual penetration with another person without consent of that person;

(2) being any age, the defendant attempts to engage in sexual penetration with another person without consent of that person and causes serious physical injury to that person;

(3) [Repealed, § 10 ch 78 SLA 1983.]

(4) [Repealed, § 10 ch 78 SLA 1983.]

(b) Sexual assault in the first degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 3 ch 166 SLA 1978; am § 8 ch 102 SLA 1980; am § 6 ch 143 SLA 1982; am § 10 ch 78 SLA 1983)

Cross references. — For evidence of past sexual conduct in trials of sexual assault in any degree or attempt to commit sexual assault in any degree, see AS 12.45.045.

Effect of amendments. — The 1980 amendment inserted "or aids, induces, causes or encourages a person under 13 years of age to engage in sexual penetration with another person" near the end of paragraph (3) in subsection (a).

The 1982 amendment substituted "an

unclassified felony and is punishable as provided in AS 12.55" for "a class A felony" at the end of subsection (b).

The 1983 amendment repealed paragraphs (3) and (4) of subsection (a).

Legislative history reports. — For a report on Chapter 102, SLA 1980 (HCS CSSB 511), see 1980 Senate Journal Supplement, No. 44, May 29, 1980, or 1980 House Journal Supplement, No. 79, May 28, 1980.

NOTES TO DECISIONS

I. General Consideration.

II. Former Law.

A. Generally.

B. Age of Consent.

C. Procedure.

I. GENERAL CONSIDERATION.

History of first-degree sexual assault statute. — See Reynolds v. State, Ct. App.

Op. No. 262 (File No. 6890), 664 P.2d 621 (1983).

Constitutionality. — In order to prove a violation of AS 11.41.410(a)(1), the state

(B) is incapacitated.

(b) Sexual assault in the second degree is a class B felony. (§ 3 ch 166 SLA 1978; am § 1 ch 78 SLA 1983)

Effect of amendments. — The 1983 amendment rewrote subsection (a).

NOTES TO DECISIONS

For cases construing former crime of rape, see notes to AS 11.41.410.

Attempted sexual assault in the first degree and sexual assault in the second degree are closely related, since sexual penetration involves sexual contact and both offenses proceed on a theory of coerced assent. *Nicholson v. State*, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982).

Constitutionality of conviction where original charge was under AS 11.41.410. — Where defendant was charged with attempted sexual assault in the first degree, he was thereby assumed to have notice that he might be convicted of second-degree sexual assault because of the similarities in the elements of the two offenses, and his conviction for the latter offense did not violate due process. *Nicholson v. State*, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982).

Evidence. — Where victim woke up in the early morning hours to find defendant

in her bed and fondling her breast, and where she testified that she was temporarily in shock and afraid he would hurt her, a jury could find that victim's momentary acquiescence in defendant's fondling her breast constituted second-degree sexual assault. *Nicholson v. State*, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982).

Instructions. — The trial judge did not err in refusing to instruct on the lesser included offense of attempted sexual contact in the second degree. *Johnson v. State*, Ct. App. Op. No. 267 (File No. 6662), 665 P.2d 566 (1983).

Sentence upheld. — Sentence of eight years with three years suspended for sexual assault in the second degree was not clearly mistaken. *Howard v. State*, Ct. App. Op. No. 260 (File Nos. 6027, 6123), 664 P.2d 603 (1983).

Cited in *Stores v. State*, Sup. Ct. Op. No. 2252 (File No. 3595), 625 P.2d 820 (1980).

Sec. 11.41.430. [Repealed, § 10 ch 78 SLA 1983. For current law, see AS 11.41.420(a)(2).]

Sec. 11.41.434. Sexual abuse of a minor in the first degree. (a) An offender commits the crime of sexual abuse of a minor in the first degree if

(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is under 13 years of age or aids, induces, causes, or encourages a person who is under 13 years of age to engage in sexual penetration with another person; or

(2) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 18 years of age and who

(A) is entrusted to the offender's care by authority of law; or

(B) is the offender's son or daughter, including an illegitimate or adopted child, or a stepchild.

(b) Sexual abuse of a minor in the first degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 2 ch 78 SLA 1983)

Editor's note below we 11.15.134 and

For cases statute, see A State's aut conduct of ci niles may hav privacy, the st cise control ove dren beyond t: control adults. Op. No. 1407 (1977).

Where juvener privacy and autonomy, the well-being of it islation that co to adults. Ande No. 1407 (File (1977).

As to constit ute making i toward childrer State, Sup. Ct 2641), 562 P.2d

Physical co former statute Sup. Ct. Op. No P.2d 351 (1977) Op. No. 1637 (F (1978).

Former secti See Anderson v 1407 (File No. 2

Consent is n may forbid an ac child under the regardless of wh the act. Andersc 1407 (File No. 2

Mitigating F for first-degree s familiarity with daughter) was Hodges v. State. 7330). 660 P.2d

Sentence unc upheld. — See No. 1286 (File (1976); Buchane

Sec. 11.41. (a) An offend second degree

NOTES TO DECISIONS

Editor's notes. — The cases cited in the note below were decided under former AS 11.15.134 and former AS 11.41.410(a)(4).

For cases construing former rape statute, see AS 11.41.410, Notes to Decisions, analysis line II.

State's authority to control sexual conduct of children. — Although juveniles may have certain rights to sexual privacy, the state may nevertheless exercise control over the sexual conduct of children beyond the scope of its authority to control adults Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).

Where juveniles have certain rights to privacy and to express their own autonomy, the state's interest in the well-being of its children may justify legislation that could not properly be applied to adults. Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).

As to constitutionality of former statute making lewd and lascivious acts toward children a crime, see Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).

Physical conduct punished under former statute. — See Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977); Smiloff v. State, Sup. Ct. Op. No. 1637 (File No. 3006), 579 P.2d 28 (1978).

Former section prohibited fellatio. — See Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).

Consent is not at issue. — The state may forbid an adult to have fellatio with a child under the statutorily prescribed age regardless of whether the child consents to the act. Anderson v. State, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).

Mitigating Factors. — In prosecution for first-degree sexual assault, defendant's familiarity with his victim (his 12-year old daughter) was not a mitigating factor. Hodges v. State, Ct. App. No. 233 (File No. 7330), 660 P.2d 1203 (1983).

Sentence under former AS 11.15.134 upheld. — See Noble v. State, Sup. Ct. Op. No. 1286 (File No. 2468), 552 P.2d 142 (1976); Buchanan v. State, Sup. Ct. Op.

No. 1316 (File No. 2553), 554 P.2d 1153 (1976); Morgan v. State, Sup. Ct. Op. No. 1908 (File No. 4187), 598 P.2d 952 (1979); Baker v. State, Sup. Ct. Op. No. 1968 (File No. 4631), 602 P.2d 797 (1979); Alvarado v. State, Sup. Ct. Op. No. 2323 (File No. 5133), 626 P.2d 582 (1981).

Sentence for assault upheld. — In prosecution of defendant with no prior criminal record on two counts of first-degree sexual assault of his 12-year old daughter, sentence of two consecutive eight-year terms with five years suspended was not excessive. Hodges v. State, Ct. App. Op. No. 233 (File No. 7330), 660 P.2d 1203 (1983).

In light of the substantial duration of defendant's sexual abuse of his stepdaughter (three years), his failure to learn from the earlier discovery of his prior offenses, his disregard of a court order that he avoid contact with the victim, and his total failure to take any meaningful step toward rehabilitation, 10-year sentence with four years suspended was not excessive for conviction of first-degree sexual assault. Langton v. State, Ct. App. Op. No. 236 (File Nos. 7188, 6247, 7114), 662 P.2d 954 (1983).

Sentence under AS 11.15.134 held excessive. — See Qualie v. State, Ct. App. Op. No. 138 (File No. 3666), 652 P.2d 481 (1982).

Sentence for assault held excessive. — Sentence of 20 years imprisonment for first-degree sexual assault of two-year old child was excessive and case was remanded for resentencing not to exceed 120 years. Langton v. State, Ct. App. Op. No. 236 (File Nos. 7188, 6247, 7114), 662 P.2d 954 (1983).

Sentence for assault held too lenient. — Suspended five-year sentence for first-degree sexual assault of defendant's four-year old son was disapproved as too lenient, with a 90-day to three-year sentence suggested. Langton v. State, Ct. App. Op. No. 236 (File Nos. 7188, 6247, 7114), 662 P.2d 954 (1983).

Applied in Seymore v. State, Ct. App. Op. No. 196 (File No. 6995), 655 P.2d 786 (1982).

Sec. 11.41.436. Sexual abuse of a minor in the second degree. (a) An offender commits the crime of sexual abuse of a minor in the second degree if

felony. (§ 3 ch

ng her breast, and that she was nd afraid he would find that victim's nce in defendant's constituted sec- ult. Nicholson v. 193 (File No. 6192),

trial judge did not ruct on the lesser attempted sexual degree. Johnson v. 267 (File No. 6662),

- Sentence of eight rs suspended for second degree was oward v. State, Ct. Nos. 6027, 6123,

Sup. Ct. Op. No. 5 P.2d 820 (1980).

or current law,

st degree. (a) or in the first

ages in sexual aids, induces, age to engage

ages in sexual e and who f law; or illegitimate or

n unclassified 78 SLA 1983)

(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is 13, 14, or 15 years of age and at least three years younger than the offender, or aids, induces, causes or encourages a person who is 13, 14, or 15 years of age and at least three years younger than the offender to engage in sexual penetration with another person;

(2) being 16 years of age or older, the offender engages in sexual contact with a person who is under 13 years of age or aids, induces, causes, or encourages a person under 13 years of age to engage in sexual contact with another person;

(3) being 18 years of age or older, the offender engages in sexual contact with a person who is under 18 years of age and who

(A) is entrusted to the offender's care by authority of law; or

(B) is the offender's son or daughter, including an illegitimate or adopted child, or a stepchild; or

(4) being 16 years of age or older, the offender aids, induces, causes, or encourages a person who is under 16 years of age to engage in conduct described in AS 11.41.455(a)(2) — (6).

(b) Sexual abuse of a minor in the second degree is a class B felony. (§ 2 ch 78 SLA 1983)

NOTES TO DECISIONS

Prior law. — For cases decided under prior law, see notes to AS 11.41.434, Notes to Decisions.

Sec. 11.41.438. Sexual abuse of a minor in the third degree. (a) An offender commits the crime of sexual abuse of a minor in the third degree if, being 16 years of age or older, the offender engages in sexual contact with a person who is 13, 14, or 15 years of age and at least three years younger than the offender.

(b) Sexual abuse of a minor in the third degree is a class C felony. (§ 2 ch 78 SLA 1983)

NOTES TO DECISIONS

Prior law. — For cases decided under prior law, see notes to AS 11.41.434, Notes to Decisions.

Sec. 11.41.440. Sexual abuse of a minor in the fourth degree. (a) An offender commits the crime of sexual abuse of a minor in the fourth degree if, being under 16 years of age, the offender engages in sexual penetration or sexual contact with a person who is under 13 years of age and at least three years younger than the offender.

(b) Sexual abuse of a minor. (§ SLA 1983)

Effect of amendment re The 1983 act. Legislative

Prior law. — prior law, see notes to Decisions. Applied in Op. No. 201 (Feb. 1983).

Collateral r for carnal know of girl under a 79 ALR 1229. Assault with consenting fem ALR 599. Parent or pe

Sec. 11.41.410 — the alleged unless

- (1) the sp
(2) the d

(b) In a p provision o under a cer alleged offe age or olde of the alleg

Sec. 11.41.440 being 18 : penetration illegitimate

- (1) an ar
(2) a bro
(3) an ur
(b) Inces

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 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

(4) if the offense

(d) A defendant sentenced to a definite term of imprisonment provided in AS 12.

(1) if the offense

(2) if the offense

(3) if the offense knowingly directed or otherwise clearly officer, emergency attendant, or other performance of official

(e) A defendant sentenced to a definite term of imprisonment provided in AS 12.5

(1) if the offense

(2) if the offense

(3) if the offense knowingly directed or otherwise clearly officer, emergency attendant, or other performance of official

(f) If a defendant

(1) imprisonment pending under AS 12
(2) imposition of 12.55.085;

(3) imprisonment otherwise reduced.

(g) If a defendant:
(i) of this section, exc 12.55.175,

(1) imprisonment
(2) position of 12.55.085;

(3) terms of impris.

(h) Nothing in this the sentencing judge

(i) A defendant convicted of sexual abuse of a minor sentenced to a definite term of imprisonment provided in AS 12.55

(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).

Incarceration section (g). — subsection (g) of required to order convicted felon; place him on prob for his placement as a condition of App. Op. No. 77 (1361 (1982).

For cases co 12.55.050, imposi for persons convi felony, see Bowi v 769 (File No. 1422 State v. Carlson. (File Nos. 2905, 29 Davis v. State, Sup No. 2695), 566 P.2d State, Sup. Ct. O; 3424), 560 P.2d 7(State, Sup. Ct. O; 3348), 592 P.2d 2(State, Sup. Ct. O; 4416), 621 P.2d 4(454 U.S. 1090, 102(628 (1981); Sheakle No. 87 (File No. (1982).

Sentence upbel State, Ct. App. O; 627 P.2d 657 (1951 Hoover v. State, Ct. No. 6223, 641 (first-degree murder App. Op. No. 190 (Fi. 577 (1982) (se. Nukapigak v. State. (File No. 5820), 6 (first-degree murder App. Op. No. 205 (Fi: 850 (1983) (sec: Hodges v. State, Ct. No. 7330), 660 (first-degree sexual Stat. Ct. App. Op. 7188, 6247, 7114, 6 (first-degree sexual State, Ct. App. Op. No. 669 P.2d 961 (1983).

Sentence not upbe years' imprisonment; sexual assault of two excessive and case sentencing not to Langton v. State, Ct. (File Nos. 7185, 6247, (1983).

Suspended five-ye first-degree sexual ass four-year-old son was lenient, with a 90-day