HB

4

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. HB 4

Revision Date:
Title: Failure to report harm or assaults of the elderly or disabled
Sponsor: Rep. Mackie
Requestor: Rep. Mackie

Dept. Affected: Commerce & Economic Development
BRU: Occupational Licensing
Component: Operations
COMPONENT SERIAL NO. 1844

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES	57.9	57.9	57.9	57.9	57.9	57.9
TRAVEL	1.5	1.5	1.5	1.5	1.5	1.5
CONTRACTUAL	2.0	2.0	2.0	2.0	2.0	2.0
SUPPLIES	1.0	1.0	1.0	1.0	1.0	1.0
EQUIPMENT	10.0					
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	72.4	62.4	62.4	62.4	62.4	62.4
CAPITAL						
REVENUE FUND SOURCE:	.0	.0	.0	.0	.0	.0

FUNDING: (Thousands of Dollars)

	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts	72.4	62.4	62.4	62.4	62.4	62.4
1006 GF/MHTIA						
Other						
TOTAL	72.4	62.4	62.4	62.4	62.4	62.4

POSITIONS:

	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
FULL-TIME	1	1	1	1	1	1
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year (FY 93) impact: $ None

ANALYSIS: (Attach a separate page if necessary)
HB4 amends the centralized licensing statutes (AS 08.01) by adding a new section to provide that a licensee who is convicted of abusing an elderly or disabled person may subject their license to disciplinary proceedings or sanctions. The bill also mandates the court to notify licensing authorities upon a conviction of a licensee.

(Continued on attached)

Prepared by: Jennifer Strickler, Administrative Officer
Division: Occupational Licensing
Phone: 465-2144
Date: 2/26/93

Approved by Commissioner: Paul Fuhs
Date: [illegible]
Agency: Commerce & Economic Development

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Fiscal Note. CED - Occupational Licensing

CONTINUATION of FISCAL NOTE ANALYSIS
FOR BILL/RESOLUTION NO. HB 4

This fiscal note addresses the need for an Investigator III position, Range 18A, to properly monitor or initiate action against licensees who have been convicted of abusing the elderly or disabled persons.

Although a great amount of activity may not be generated as a result of this bill, the division already has a caseload of 60 to 70 impaired practitioners being monitored by one staff investigator. The new responsibilities under HB 4 added to the current caseload will increase an already high number of cases tracked by one position in comparison to a caseload of 6 to 25 cases monitored by similar positions in other States.

Individuals convicted of abusive-type cases as referred to in HB 4 may be difficult to monitor under an agreement situation as established for impaired practitioners. The division will need the additional position to properly pursue action against a licensee if convicted of abuse.

This fiscal note is based on the following:

Personal Services:	
1 - Investigator III position, Range 18A, PFT	57.9
Travel:	
Funding for at least two investigative trips	1.5
Contractual Services:	
Funding for postage, communications, copies of records, etc.	2.0
Supplies:	
Daily operating supplies (pens, paper, etc.)	1.0
Equipment: **(one-time costs)**	
Workstation/Furniture	10.0
Telephone	
Computer	

While no revenue will be generated as a result of HB 4, licensing fees across all occupations must be adjusted to cover the costs shown in this fiscal note.

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. HB 4

Revision Date: 1-25-93
Title: " ... adding an aggravating factor at sentencing
Sponsor: Rep. Mackie
Requestor: Rep. Mackie

Dept. Affected: Corrections
BRU: Statewide programs
Component: Statewide Programs
COMPONENT SERIAL NO. 1858

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY94	FY95	FY96	FY97	FY98	FY99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL	-0-	48.8	48.8	48.8	97.6	122.0
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	48.8	48.8	48.8	97.6	122.0
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

	FY94	FY95	FY96	FY97	FY98	FY99
1002 Federal Receipts						
1003 GF Match						
1004 GF	-0-	48.8	48.8	48.8	97.6	122.0
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	-0-	48.8	48.8	48.8	97.6	122.0

POSITIONS:

	FY94	FY95	FY96	FY97	FY98	FY99
FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: $ -0-

ANALYSIS: (Attach a separate page if necessary)

Please see attached fiscal analysis

Prepared by: Dana LaTour
Phone: 465-3376
Division: Office of the Commissioner
Date: 1-25-93
Approved by Commissioner: Lloyd G. Rupp
Date: 1-25-93
Agency: Office of the Commissioner

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Fiscal Note - Corrections

CONTINUATION OF FISCAL ANALYSIS

HB 4: "An Act adding as an aggravating factor at sentencing that a victim was elderly or disabled; and relating to failure to report harm or assaults of the elderly or disabled."

The bill would add an aggravator to be considered at sentencing if the victim of an offense was 65 years or older or had a physical or mental disability that substantially limited one or more life activities. This change will impact the Department by increasing total incarceration length in certain cases.

A person who, in the performance of their professional duties, has reasonable cause to believe that an elderly person has suffered harm, and who knowingly fails to comply with reporting requirements outlined in AS 47.24.010, would be guilty of a class B misdeamor. Such failure is a violation under current law. This change is not anticipated to impact the Department due to the assumption of infrequency of the offense and the assumption that imprisonment would be unlikely upon conviction.

Assuming that 5% of the total population (4.1% of population is over 65, and 1% is used to meet the criteria for "disabled" as used in this bill) meets the definition of the bill's aggravating factor, it is also assumed that 5% of the victims would meet that definition. Assuming only 5% of convictions would involve victims addressed by the bill's aggravator, the following numbers of convictions are assumed each year, based on the 1991 rates:

Class A felonies:	5% of 65 = 3
Class B felonies	5% of 72 = 4
Class C felonies:	5% of 150 = 8
Sexual Assault I:	5% of 38 = 2
Sexual Abuse of a Minor I :	1% of 26 = 0*

* Since this crime involves only minors, the 1% disabled estimate is used for this offense.

Assuming that the aggravator would result in an average increase of 20% of the non-aggravated terms of imprisonment, the Department has estimated the following:

FY94: No impact. Those sentenced in FY94 would receive sentences of over 12 months regardless of the aggravator.

FY95: If, in FY94, 8 Class C felonies were increased from 20 months of incarceration to 24 months of incarceration due to the aggravator, 8 felons would require four months (or 122 days) of additional incarceration in FY95. Assuming the additional time

could be served in a community residential center at an average statewide cost of $50/day, the additional cost would be:

8 felons x 122 additional days x $50 = $48,800

FY96: 8 Class C felons sentenced in FY 95 would result in another $48,800

FY97: 8 Class C felons sentenced in FY96 would result in another $48,800

FY98: 8 Class C felons sentenced in FY97 would result in another $48,800

4 Class B felons sentenced in FY94 would have had their sentences increased from 40 to 48 months. This would result in 8 additional months (or 244 days) of incarceration each, during FY98.

4 felons x 244 days x $50 = $48,800
+ 48,800
Total = 97,600

FY99: 8 Class C felons sentences in FY98 would result in another $48,800

4 Class B felons sentenced in FY95 would result in another $48,800

2 felons convicted of Sexual Assault I, in FY94, would have had their sentences increased from 64 months to 87 months. Instead of being released during the fourth month of FY99, they would remain incarcerated for the remainder of the year, resulting in an additional eight months (or 244 days) each. If these or other offenders could be transferred to CRC beds for the extra days, the impact would be:

2 felons x 244 days x $50 = $24,400
+ 48,800
+ 48,800

Total = $122,000

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. HB [illegible]

Revision Date:
Title: "An Act relating to Assault of Elderly/Disabl[illegible] and Failure to Report Harm"
Sponsor: Representative Mackie
Requestor: Representative Mackie

Dept. Affected: Health and Social Services
SRU: Family & Youth Services
Component: SERO, SCRO, NRO
COMPONENT SERIAL NO. 0258, 0254, 0255

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY94	FY95	FY96	FY97	FY98	FY99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE FUND SOURCE						

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: NONE

ANALYSIS: (Attach a separate page if necessary)
Alaska, like many states in the early 80's, passed but failed to fund a Protection of the Elderly statute. A decade after Alaska's law was passed, the Department still is not adequately funded for this mandate. There is concern over raising the penalty when mandated professionals fail to report abuse and neglect to elderly persons to the Department as the existing response system is inadequate. This bill, if passed, would not directly create any additional workload on the Department.

See attached for Fiscal Note Analysis

Prepared by: Deborah R. Wing, Director
Division: Department of Health & Social Services
Phone: 465-3191
Date: 01/29/93

Approved by Commissioner: Theodore A. Mala, MD, MPH
Agency: Department of Health & Social Services
Date: 1/29/93

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Fiscal Note – H+SS – Family + Youth Services

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. HB 4

Revision Date:
Title: "An Act adding as an aggravating factor at sentencing that a victim was elderly or disabled."
Sponsor: Representative Mackie
Requestor: House HESS

Department Affected: Administration
BRU: Public Defender Agency
Component: Public Defender Agency

COMPONENT SERIAL NO. 1631

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0

REVENUE FUND SOURCE:	0	0	0	0	0	0

FUNDING:

1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

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

Estimate of current year (FY93) impact:

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: John Salemi, Public Defender
Phone: 279-7541
Division: Public Defender Agency
Date: 1/21/93

Approved by Commissioner: Nancy Bear Usera
Agency: Administration
Date: 1/25/93

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Fiscal Note - Admin - Public Defender

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. HB 4

Revision Date:

Title: An Act adding as an aggravating factor at sentencing that a victim. . .'

Sponsor: Representative Mackie

Requestor: House Judiciary

Department Affected: Administration

BRU: Office of Public Advocacy

Component: Office of Public Advocacy

COMPONENT SERIAL NO. 43

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE:	0	0	0	0	0	0

FUNDING:

	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year (FY93) impact: None

ANALYSIS: (Attach a separate page if necessary.)

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

Phone: 274-1684
Date: 1/19/93

Approved by Commissioner: Nancy Bear Usera
Agency: Administration

Date: 1/20/93

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Ø - Fiscal Note - Admin - Office of Public Adv.

Alaska State Legislature
House of Representatives
COMMITTEE ON HEALTH, EDUCATION AND SOCIAL SERVICES

DATE: MARCH 8, 1993

PLACE: Capitol Room 106

SUBJECT OF MEETING:
*HB 3: REGULATION OF HOME CARE PROVIDERS
*HB 4: PROTECT ELDERLY AND DISABLED ADULTS
*HCR 7: ALCOHOL-RELATED BIRTH DEFECTS AWARENESS

NAME	REPRESENTING	BUSINESS/PERSONAL MAILING ADDRESS	ZIP	(H) PHONE	(W) PHONE	DO YOU WANT TO TESTIFY?		WHAT SUBJECT/ WHICH BILL?
Pat O'Brien	HSS				465-2145	Y	(N) circled	HB 3 & 4 Answer Questions.
Suzanne Perry	HSS/HOA				465-3071	(Y) circled	N	HCR 7
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	

Alaska State Legislature
House of Representatives
COMMITTEE ON HEALTH, EDUCATION AND SOCIAL SERVICES

DATE: MARCH 8, 1993

PLACE: Capitol Room 106

SUBJECT OF MEETING:
*HB 3: REGULATION OF HOME CARE PROVIDERS
*HB 4: PROTECT ELDERLY AND DISABLED ADULTS
*HCR 7: ALCOHOL-RELATED BIRTH DEFECTS AWARENESS

NAME	REPRESENTING	BUSINESS/PERSONAL MAILING ADDRESS	ZIP	(H) PHONE	(W) PHONE	DO YOU WANT TO TESTIFY?		WHAT SUBJECT/ WHICH BILL?
Rose Palmquist	OFAE.	Box 870294 - Wasilla AK 99687		376 2274		(Y)	N	HB. 3 -
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	
						Y	N	

HOUSE COMMITTEE REPORT

(7)

Date Referred: January 11, 1993

FURTHER REFERRALS: Judiciary, Finance

Date of Committee Action: 3-8-93

The HEALTH, EDUCATION AND SOCIAL SERVICES Committee considered: HB 4

HOUSE BILL NO. 4 — PROTECT ELDERLY AND DISABLED ADULTS

"An Act adding as an aggravating factor at sentencing that a victim was elderly or disabled; and relating to failure to report harm or assaults of the elderly or disabled."

RECOMMENDATIONS:

be replaced with ______________________ [ ] the same title [ ] a new title

- [ ] have attached amendments(s)
- [x] do pass
- [ ] do not pass
- [ ] no recommendations
- [ ] individual recommendations
- [ ] additional referral to the ______________ Committee

ADOPTS: ______________ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

2 [x] fiscal impact CED, Corrections

3 [x] zero fiscal note H+SS, Admin (2)

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) ______________

[ ] zero fiscal note(s) ______________

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
[signature]	✓	[signature]		✓	
Bettye Davis	✓	[signature]	X		
Irene Nicholia	✓	[signature]		✓	
Tom Brice	✓	Cal Bunde		✓	

[signature]

CHAIRMAN'S SIGNATURE

Alaska State Legislature

REPRESENTATIVE
JERRY MACKIE

ALASKA STATE CAPITOL
JUNEAU, ALASKA 99801-1182
(907) 465-4925

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CRAIG, ALASKA 99921
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House of Representatives

SPONSOR STATEMENT FOR HB 4

HB 4, An Act adding as an aggravating factor at sentencing that a victim was elderly or disabled; and relating to failure to report harm or assaults of the elderly or disabled, will place into state law deterrents to crimes against the elderly and disabled.

HB 4 will amend the code of criminal procedures, which allows presumptive sentences to be aggravated, by adding a new paragraph to include a victim of an offense who is 65 years of age or older or has a physical or mental disability which limits major life activities. The bill would amend the protection of the elderly and disabled adult protection laws to consistently provide a penalty of a class B misdemeanor for conviction of failure to report a crime under these statutes; it would also require the court to report convictions to the appropriate licensing/regulatory entity. Conviction of a professionally licensed person for a crime against an elderly or disabled person could lead to disciplinary actions or sanctions.

Elderly and handicapped persons are more vulnerable and disproportionately damaged by crimes against them because they are less able to escape offenders and tend to suffer greater relative deprivation. Additionally, the elderly and disabled take longer to recover from the impacts of financial, emotional and physical abuse.

The senior citizen population in Alaska is rapidly growing; between the 1980 and 1990 census, four areas of the state have seen over 130% growth in the senior population (Anchorage, Kenai, Mat-Su and Haines); the statewide average growth for this population group is 93.7%. The number of seniors living alone has grown by 108%.

28 states have adult protection laws, although many of them are underfunded as our services are here in Alaska. About 200 reports of elderly abuse are made in Alaska each year; HB 4, if enacted, will provide both an incentive to report abuse and a deterrent to crimes against the elderly.

I believe this legislation is timely and urge your support.

Sponsor Statement

Alaska State Legislature

REPRESENTATIVE
JERRY MACKIE

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JUNEAU, ALASKA 99801-1182
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House of Representatives

SECTIONAL ANALYSIS - HB 4

" AN ACT ADDING AS AN AGGRAVATING FACTOR AT SENTENCING THAT A VICTIM WAS ELDERLY OR DISABLED; AND RELATING TO FAILURE TO REPORT HARM OR ASSAULTS OF THE ELDERLY OR DISABLED"

Section 1 — Amends the centralized licensing statute by adding a new section which provides that conviction of a person licensed or regulated by a board or the department under the adult protection or protection of disabled persons statutes may be grounds for disciplinary actions or sanctions.

Section 2 — Adds a new paragraph to AS 12.55.155 to provide that a sentencing court may aggravate a presumptive sentence when the victim was an elderly or disabled person.

Section 3 — Amends As 47.24.010(c) to provide that a person required to report harm to an elderly person under the Protection of the Elderly statute who knowingly fails to report is guilty of a class B misdemeanor. The section also requires the court to report convictions under this section to the appropriate professional regulatory body.

Section 4 — Amends AS 47.24.110(b) to provide that a person required to report physical and sexual assault of a disabled person under the Protection of the Disabled statute who knowingly fails to report the assault is guilty of a class B misdemeanor. The section also requires the court to report convictions under this section to the appropriate professional regulatory body.

Sectional Analysis

...d or enlarged by allegations in the ...ment. Walsh v. State, 677 P.2d 912 ...ka Ct. App. 1984).

...mparison of former and current ...tes. — It was the elements of the ...se as established in the statute under ...h the defendant was convicted which ...to be compared with the current ...a statute in determining whether ...wo offenses had substantially identi... elements. Walsh v. State, 677 P.2d 912 ...ka Ct. App. 1984).

...ior conviction under former law. ...nder paragraph (a)(2) of this section, ...minal conviction entered under prior ...ka law or under the law of another ...liction may be deemed to be a prior ...y conviction for presumptive sentenc... purposes only if the offense for which ...rior conviction was entered had ele... ...ical to those of a ...ska law. Lee v. ...laska Ct. App. ...e, 683 P.2d 262

AS 12.55.155

...n using a viola... ...eny statute as a ...defendant's sen... ...irst degree since ...in effect since ...or offense would ...on v. State, 652 ...p. 1982).

...e receiving and ...which defendant ...did not require ...se differed sub... ...aw and did not ...any conviction. ...2d 262 (Alaska

...of state. — Fel... ...ri was a prior ...on (a)(2) where ...ant at age 17 was treated as an ...even though defendant would have ...treated as a juvenile under Alaska ...McManners v. State, 650 P.2d 414 ...ka Ct. App. 1982).

...ragraph (a)(2) of this section has con... ...ntly been interpreted to apply to the ...te establishing the elements of the ...e for which the defendant was previ... ...convicted, which was an Oregon ...te that is a class C felony in Oregon ...s in Alaska. Thus, it was not error to ...der the previous conviction a felony ...though the defendant was sentenced ...an Oregon statute providing for the ...tion of certain felonies to misde... ...ors. Wells v. State, 687 P.2d 346 (Alaska Ct. App. 1984) (decided prior to the 1982 amendment).

A 1983 Oklahoma conviction for a 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, 704 P.2d 1341 (Alaska Ct. App. 1985).

The legislature intended to treat convictions under prior codes and convictions under the codes of sister states identically, allowing their use as prior convictions only where their elements were substantially identical (now "similar") to the elements of crimes established in the current code. Wasson v. State, 652 P.2d 117 (Alaska Ct. App. 1982).

Conviction in New York for larceny was not a prior conviction for presumptive sentencing purposes where the New York statute involved theft of $50 — $500 and the current Alaska law required theft from $500 — $25,000. Walsh v. State, 677 P.2d 912 (Alaska Ct. App. 1984).

Presumptive sentence convictions must be consecutive. — Under the plain terms of AS 12.55.145(a)(3) and 12.55.185(6), (7), and (8), one conviction must precede the next before presumptive sentencing can apply. State v. Rastopsoff, 659 P.2d 630 (Alaska Ct. App. 1983).

Where defendant's three separate criminal episodes occurred in close proximity and his convictions were entered after all of the offenses had been committed, he cannot be deemed to be a second felony offender under AS 12.55.125 and AS 12.55.185. State v. Rastopsoff, 659 P.2d 630 (Alaska Ct. App. 1983).

The forgery of two checks on the same day involved two separate criminal episodes and convictions based on those episodes were not convictions arising out of a single, continuous criminal episode to be treated as a single conviction for purposes of considering prior convictions in imposing sentence. Linn v. State, 658 P.2d 150 (Alaska Ct. App. 1983).

Burglaries of three different residences owned by three separate victims are separate offenses. Lacquement v. State, 644 P.2d 856 (Alaska Ct. App. 1982).

Sufficient evidence of prior conviction. — An authenticated copy of a foreign docket abstract constituted sufficient evidence of a prior conviction. Gant v.

State, 712 P.2d 906 (Alaska Ct. App. 1986).

Failure to prove prior convictions. — When a party has had insufficient time to comply with the notice requirements relating to proof of prior convictions or aggravating and mitigating factors, the appropriate remedy should normally be a continuance of the sentencing proceedings; and failure to consider prior crimes for presumptive 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, 663 P.2d 967 (Alaska Ct. App. 1983).

When a mandatory minimum sentence is prescribed for a repeat offender, it would be inappropriate for the court to sentence the defendant as a first offender merely because the state has failed to obtain proof of the prior conviction in time for sentencing. The normal recourse under such circumstance is a continuance. Stewart v. State, 763 P.2d 515 (Alaska Ct. App. 1988).

New sentencing hearing not required on remand. — Although the judge improperly sentenced defendant to a presumptive four-year term and a remand for imposition of a nonpresumptive sentence was necessary, a new sentencing hearing would not be required upon remand since remand for such hearing would merely result in reimposition of a nonpresumptive four-year terms. Garroutte v. State, 683 P.2d 262 (Alaska Ct. App. 1984).

Applied in Bloomstrand v. State, 656 P.2d 584 (Alaska Ct. App. 1982); Fry v. State, 655 P.2d 789 (Alaska Ct. App. 1983); Huf v. State, 675 P.2d 268 (Alaska Ct. App. 1984); Maldonado v. State, 676 P.2d 1093 (Alaska Ct. App. 1984).

Quoted in Wright v. State, 656 P.2d 1226 (Alaska Ct. App. 1983); Morgan v. State, 661 P.2d 1102 (Alaska Ct. App. 1983); Sawyer v. State, 663 P.2d 230 (Alaska Ct. App. 1983); Ortberg v. State, 751 P.2d 1368 (Alaska Ct. App. 1988); McCombs v. State, 754 P.2d 1129 (Alaska Ct. App. 1988).

Cited in Koteles v. State, 660 P.2d 1199 (Alaska Ct. App. 1983); Hale v. State, 764 P.2d 313 (Alaska Ct. App. 1988); McCombs v. State, 754 P.2d 1129 (Alaska Ct. App. 1988).

Collateral references. — Chronological or procedural sequence of former convictions as affecting enhancement of penalty for subsequent offense under habitual criminal statute. 24 ALR4th 1247.

Sec. 12.55.147. Fingerprints at time of sentencing. When a defendant is convicted of a felony by a court of this state, the defendant's fingerprints shall be placed on the judgment of conviction in open court, on the record, at the time of sentencing. The defendant and the person administering the fingerprinting shall sign their names under the fingerprints. (§ 35 ch 143 SLA 1982)

Revisor's notes. — Enacted as AS 12.55.145(f). Renumbered in 1982.

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 judicial officer, prosecuting attorney, law enforcement officer, correctional employee, fire fighter, emergency medical technician, paramedic, am-

bulance 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

(A) 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; or

(B) specified in AS 11.41.410 — 11.41.460 and was committed against a minor, and the defendant has engaged in the same or similar conduct involving the same or another victim who was a minor;

(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, physical or mental disability, 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;

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

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

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

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

(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, apprehend, or prosecute other persons who committed an offense;

(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; am § 1 ch 37 SLA 1987; am § 4 ch 69 SLA 1987; am § 1 ch 83 SLA 1987; am § 7 ch 66 SLA 1988; am § 1 ch 10 SLA 1990)

Revisor's notes. — Paragraphs (23)-(26) of subsection (c) were enacted as (19)-(22). Renumbered in 1982.

Cross references. — For considerations in imposing sentence, see AS 12.55.005 and note to AS 12.55.120; for legislative purpose of ch. 45, SLA 1982, see § 1, ch. 45, SLA 1982, in the Temporary and Special Acts.

Effect of amendments. — The 1986 amendment added "that would be considered a prior felony conviction under AS 12.55.145(a)(2)" at the end of paragraph (c)(20).

The first 1987 amendment in paragraph (c)(22) inserted "physical or mental disability."

The second 1987 amendment substituted the present language of paragraph (d)(12) for "the defendant assisted authorities to detect or apprehend other persons who committed the offense with the defendant."

The 1988 amendment, in paragraph (c)(18), divided the formerly undivided language into an introductory paragraph and subparagraph (A), added "or" at the end of subparagraph (A), and added subparagraph (B).

The 1990 amendment added paragraphs (c)(27) and (c)(28).

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

For House letter of intent on ch. 66, SLA 1988 (CSHB 237 (Jud)), which amended this section, see 1988 House Journal 2330-2337.

NOTES TO DECISIONS

I. General Consideration.
II. Adjustment of Presumptive Sentences Generally.
III. Aggravating and Mitigating Factors.
A. Aggravating Factors Generally.
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D. Elements of Offense as Factors.
IV. Findings of Court.
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I. GENERAL CONSIDERATION.

Constitutionality of presumptive sentencing provisions. — See notes under same heading, AS 12.55.125. Nell v. State, 642 P.2d 1361 (Alaska Ct. App. 1982).

Legislative intent reflected. — The presumptive sentencing provisions contained in AS 12.55.125 and this section reflect the legislature's intent to assure predictability and uniformity in sentencing by the use of fixed and relatively inflexible sentences, statutorily prescribed, for persons convicted of second or subsequent felony offenses. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

Sentencing generally. — It is not fundamentally unfair for the trial court to sentence for a lesser offense based upon an assumption, supported by verified facts, that the defendant committed a higher offense. Schnecker v. State, 739 P.2d 1310 (Alaska Ct. App. 1987).

Comparison of purposes of AS 12.55.125 and this section. — The purpose of applying presumptive sentencing to a second or subsequent felony offender under AS 12.55.125 cannot properly be equated with the purpose served by the provisions of this section relating to enhancement of presumptive sentences upon proof of specified aggravating factors. Fry v. State, 655 P.2d 789 (Alaska Ct. App. 1983).

Limited use of both suspended jail time and probation is permitted under this section. Lacquement v. State, 644 P.2d 856 (Alaska Ct. App. 1982). See also Friedberg v. State, 663 P.2d 558 (Alaska Ct. App. 1983).

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, 707 P.2d 900 (Alaska Ct. App. 1985), aff'd, 723 P.2d 85 (Alaska 1986).

Sentence upheld. — See Montes v. State, 669 P.2d 961 (Alaska Ct. App. 1983).

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. Stanel v. State, 697 P.2d 1050 (Alaska Ct. App. 1985), aff'd, 718 P.2d 948 (Alaska 1986).

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, 706 P.2d 695 (Alaska Ct. App. 1985).

Where a trial judge found, based upon substantial evidence in the form of defendant's past proven criminal record, that defendant would remain a danger to the community for the remainder of his life, a sentence of 97 years with 32 years suspended was not clearly mistaken. Contreras v. State, 767 P.2d 1169 (Alaska Ct. App. 1989).

Imposition of an aggravated presumptive term of ten years for nonalcohol-related vehicular manslaughter and a consecutive suspended four-year sentence for assault in the second degree was not clearly mistaken, where defendant's callousness and irresponsibility were evidenced by his conduct in eluding police officers, racing down a highway, and running red lights before colliding with another vehicle. Barney v. State, 786 P.2d 925 (Alaska Ct. App. 1990).

Sentence of ten years with four years suspended, in the case of a first offender convicted of six counts of sexual abuse of a minor in the second degree, was affirmed, where defendant was the victim's music teacher and his abuse of the student-teacher relationship made it an exceptionally aggravated case. Osterback v. State, 789 P.2d 1037 (Alaska Ct. App. 1990).

Three-year sentence for failure to appear was not clearly mistaken, where defendant had been convicted of three or more prior felonies and the sentencing judge was entitled to take into account defendant's long history of alcohol abuse and record of offenses in concluding that his prospects for rehabilitation were guarded. Hayes v. State, 790 P.2d 713 (Alaska Ct. App. 1990).

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, 688 P.2d 592 (Alaska Ct. App. 1984).

A sentence of twenty-four years with four years suspended, upon conviction of three counts of sexual abuse of a minor in the first degree, was clearly mistaken, where the trial court did not address the ten- to fifteen-year benchmark established in prior decisions concerning aggravated cases of sexual assault, and nothing in the record established that a sentence in excess of fifteen years was necessary to protect the public. Mosier v. State, 747 P.2d 548 (Alaska Ct. App. 1987).

Imposition of consecutive terms totaling 23 years of unsuspended imprisonment was clearly mistaken, where, although defendant was convicted for multiple burglaries, the record failed to support the inference that he was incapable of being deterred or rehabilitated, or that the protection of the community required his isolation for a period of 23 years. Bumpus v. State, 776 P.2d 329 (Alaska Ct. App. 1989).

Applied in Kimbrell v. State, 647 P.2d 618 (Alaska Ct. App. 1982); Sears v. State, 653 P.2d 349 (Alaska Ct. App. 1982); Erhart v. State, 656 P.2d 1199 (Alaska Ct. App. 1982); Seymore v. State, 655 P.2d 786 (Alaska Ct. App. 1982); Goulden v. State, 656 P.2d 1218 (Alaska Ct. App. 1983); Hansen v. State, 657 P.2d 862 (Alaska Ct. App. 1983); Reynolds v. State, 664 P.2d 621 (Alaska Ct. App. 1983); Hasslen v. State, 667 P.2d 732 (Alaska Ct. App. 1983); State v. Coats, 669 P.2d 1329 (Alaska Ct. App. 1983); Shaw v. State, 673 P.2d 781 (Alaska Ct. App. 1983); Lee v. State, 673 P.2d 892 (Alaska Ct. App. 1983); Contreras v. State, 675 P.2d 654 (Alaska Ct. App. 1984); Walsh v. State, 677 P.2d 912 (Alaska Ct. App. 1984); Depp v. State, 686 P.2d 712 (Alaska Ct. App. 1984); Wells v. State, 687 P.2d 917 (Alaska Ct. App. 1984); Travelstead v. State, 689 P.2d 494 (Alaska 1984); Gregory v. State, 689 P.2d 508 (Alaska 1984); Wortham v. State, 689 P.2d 1133 (Alaska 1984); Carlson v. State, 696 P.2d 178 (Alaska Ct. App. 1985); Benboe v. State, 698 P.2d 1230 (Alaska Ct. App. 1985); Hart v. State, 702 P.2d 651 (Alaska Ct. App. 1985); Thomas v. State, 710 P.2d 1017 (Alaska Ct. App. 1985); Resek v. State, 715 P.2d 1188 (Alaska Ct. App. 1986); Dymenstein v. State, 720 P.2d 42 (Alaska Ct. App. 1986); Ecklund v. State, 730 P.2d 161 (Alaska Ct. App. 1986); Parks v. State, 731 P.2d 597 (Alaska Ct. App. 1987); Smith v. State, 745 P.2d 1375 (Alaska Ct. App. 1987); Covington v. State, 747 P.2d 550 (Alaska Ct. App. 1987); Upton v. State, 749 P.2d 386 (Alaska Ct. App. 1988); Ciervo v. State, 756 P.2d 907 (Alaska Ct. App. 1988); Robison v. State, 763 P.2d 1357 (Alaska Ct. App. 1988); Hale v. State, 764 P.2d 313 (Alaska Ct. App. 1988); Holtzheimer v. State, 766 P.2d

1177 (Alaska Ct. App. 1989); Massey v. State, 771 P.2d 1131 (Alaska Ct. App. 1989); Palmer v. State, 770 P.2d 296 (Alaska Ct. App. 1989); Barrett v. State, 772 P.2d 559 (Alaska Ct. App. 1989); Charles v. State, 780 P.2d 377 (Alaska Ct. App. 1989); Schuenemann v. State, 781 P.2d 1005 (Alaska Ct. App. 1989); Hayes v. State, 785 P.2d 33 (Alaska Ct. App. 1990); Harris v. State, 790 P.2d 1379 (Alaska Ct. App. 1990).

Quoted in Lausterer v. State, 693 P.2d 887 (Alaska Ct. App. 1985); Marin v. State, 699 P.2d 886 (Alaska Ct. App. 1985); Hancock v. State, 706 P.2d 1164 (Alaska Ct. App. 1985).

Stated in Tuckfield v. State, 621 P.2d 1350 (Alaska 1981); Born v. State, 633 P.2d 1021 (Alaska Ct. App. 1981); Linn v. State, 658 P.2d 150 (Alaska Ct. App. 1983); State v. Rostopsoff, 659 P.2d 630 (Alaska Ct. App. 1983); State v. Brinkley, 681 P.2d 351 (Alaska Ct. App. 1984); Bynum v. State, 708 P.2d 1293 (Alaska Ct. App. 1985); Thomas v. State, 710 P.2d 1017 (Alaska Ct. App. 1985); Tulowetzke v. State, Dep't of Pub. Safety, 743 P.2d 368 (Alaska 1987); Ortberg v. State, 751 P.2d 1368 (Alaska Ct. App. 1988); Stewart v. State, 766 P.2d 900 (Alaska Ct. App. 1988).

Cited in Whittlesey v. State, 626 P.2d 1066 (Alaska 1980); Law v. State, 624 P.2d 284 (Alaska 1981); Leuch v. State, 633 P.2d 1006 (Alaska 1981); Tritt v. State, 625 P.2d 882 (Alaska Ct. App. 1981); Nenkok v. State, 653 P.2d 658 (Alaska Ct. App. 1982); Karr v. State, 660 P.2d 450 (Alaska Ct. App. 1983); Howard v. State, 664 P.2d 603 (Alaska Ct. App. 1983); Martin v. State, 664 P.2d 612 (Alaska Ct. App. 1983); Heathcock v. State, 670 P.2d 1155 (Alaska Ct. App. 1983); Maal v. State, 670 P.2d 708 (Alaska Ct. App. 1983); Lloyd v. State, 672 P.2d 152 (Alaska Ct. App. 1983); Shaw v. State, 677 P.2d 259 (Alaska Ct. App. 1984); Cordes v. State, 676 P.2d 611 (Alaska Ct. App. 1984); Flink v. State, 683 P.2d 725 (Alaska Ct. App. 1984); Atkinson v. State, 699 P.2d 881 (Alaska Ct. App. 1985); Richey v. State, 717 P.2d 407 (Alaska Ct. App. 1986); Kuvaas v. State, 717 P.2d 855 (Alaska Ct. App. 1986); Whitlow v. State, 719 P.2d 267 (Alaska Ct. App. 1986); Gibson v. State, 719 P.2d 687 (Alaska Ct. App. 1986); Ewell v. State, 730 P.2d 164 (Alaska Ct. App. 1986); State v. Krieger, 731 P.2d 592 (Alaska Ct. App. 1987); Folsom v. State, 734 P.2d 1015 (Alaska Ct. App. 1987); Sweetin v. State, 744 P.2d 424 (Alaska Ct. App. 1987); Bond v. State, 747 P.2d 546 (Alaska Ct. App. 1987); Comegys v. State, 747 P.2d 554 (Alaska Ct. App. 1987); Kirby v. State, 748 P.2d 757 (Alaska Ct. App. 1987); Winther v. State, 749 P.2d 1356 (Alaska Ct. App. 1988); Monroe v. State, 752 P.2d 1017 (Alaska Ct. App. 1988); Howell v. State, 758 P.2d 103 (Alaska Ct. App. 1988); Gabrieloff v. State, 758 P.2d 128 (Alaska Ct. App. 1988); Jansen v. State, 764 P.2d 308 (Alaska Ct. App. 1988); Lawrence v. State, 764 P.2d 318 (Alaska Ct. App. 1988); Luepke v. State, 765 P.2d 988 (Alaska Ct. App. 1988); Fowler v. State, 766 P.2d 588 (Alaska Ct. App. 1988); Newell v. State, 771 P.2d 873 (Alaska Ct. App. 1989); Hamilton v. State, 771 P.2d 1358 (Alaska Ct. App. 1989); LeHart v. State, 781 P.2d 989 (Alaska Ct. App. 1989).

II. ADJUSTMENT OF PRESUMPTIVE SENTENCES GENERALLY.

Term subject to modification. — The presumptive one-year term imposed by AS 12.55.125(e)(3), and by extension (d)(3), are subject to modification because of aggravating or mitigating factors as well as possible referral to a three-judge panel like all other presumptive sentences. Edwin v. State, 762 P.2d 499 (Alaska Ct. App. 1988).

Two-step process. — The adjustment of a presumptive sentence for aggravating or mitigating factors essentially involves a two-step process: The first step, an evidentiary one, is comprised of establishing existence of specially alleged factors, and under subsection (f) of this section each alleged factor must be proved by clear and convincing evidence, and the proponent of the factor bears the burden of proof. The second step, however, involves a judgmental element rather than an evidentiary one and requires an evaluation by the court of factors that have been established, and a determination of the extent to which the factors will justify an upward or downward adjustment of the applicable presumptive term. Juneby v. State, 665 P.2d 30 (Alaska Ct. App. 1983).

Adjustment on basis of nonstatutory mitigating factor. — For purposes of future cases, when a case involving a presumptive term in excess of four years is referred to the three-judge panel on the sole basis of a nonstatutory mitigating factor, imposition by the panel of a sentence below 50% of the presumptive term will normally be deemed inappropriate and clearly mistaken unless the panel expressly concludes that such a sentence is required to avoid manifest injustice, although the panel has jurisdiction to impose a sentence of less than 50% of the presumptive sentence. State v. Price, 740 P.2d 476 (Alaska Ct. App. 1987) (not applying rule in present case).

Adjustment a judicial function. — The task of determining the amount by which a presumptive sentence should be increased upon proof of an aggravating factor is not an evidentiary one for which the state is responsible, but a judicial one for which the court is responsible. Juneby v. State, 665 P.2d 30 (Alaska Ct. App. 1983).

Sentencing powers of three-judge panel are not subject to restriction under subsection (a)(2). State v. Price, 730 P.2d 159 (Alaska Ct. App. 1986).

Deviation from presumptive sentence not automatic. — It is apparent from the language contained at the beginning of subsections (c) and (d) of this section that increases or decreases of presumptive terms should not be the automatic consequence when aggravating or mitigating factors are proved. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

Nature of crime charged. — In order to determine the realistic impact that proof of an aggravating or mitigating circumstance should have on adjustment of a presumptive sentence in any given case, it is essential to consider not only the specific conduct constituting the aggravating or mitigating factor, but also the nature of the crime charged. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

Application of Chaney criteria. — When the presumptive sentencing provisions of AS 12.55.125 and this section apply, the criteria of State v. Chaney, 477 P.2d 441 (Alaska 1970), are no longer of primary importance in determining the sentence. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

When applied to the adjustment of a presumptive sentence, the State v. Chaney, 477 P.2d 441 (Alaska 1970), analysis, as stated in AS 12.55.005, should not be broadened into a consideration of all circumstances of the offense, as if the sentence were being imposed anew, without regard for the presumptive term. Instead, consideration of the Chaney criteria should focus specifically on the aggravating and mitigating conduct in the particular case. The presumptive term should remain as the starting point of the analysis, and the Chaney criteria should be employed for the limited purpose of determining the extent to which the totality of the aggravating and mitigating factors will justify deviation from the presumptive term. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

When a defendant violates probation, the court must apply the Chaney criteria, emphasizing the original offense, the offender, and the defendant's intervening conduct. The fact that the probationer violated probation or broke an agreement, standing alone, cannot be given primary consideration. Betzner v. State, 768 P.2d 1150 (Alaska Ct. App. 1989).

Extent of physical injury. — In order to justify a substantial increase in the presumptive term the prosecution must bear the burden of making a clear and convincing showing that the injuries were unusual in nature or uncharacteristically severe. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

Progressively greater increases in the presumptive term will be justified as the injuries inflicted increase in severity; more substantial increases should be reserved for the most severe category of injuries which are those included within the definition of "serious physical injury" under the provisions of AS 11.81.900. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

Evidence introduced at trial may be considered. — A trial court, in conducting a hearing pursuant to Cr. R. 32 to determine whether mitigating and aggravating factors have been established, may consider evidence previously introduced at trial that resulted in conviction for which sentencing is being imposed. Wolf v. State, 647 P.2d 609 (Alaska Ct. App. 1982).

Belief that defendant committed

perjury at trial. — A sentencing judge may take into account his belief that the defendant committed perjury at his trial but the judge may do so only to the extent that the alleged perjury is used by him as indicia to determine the defendant's potential for rehabilitation, thus it is improper to enhance the sentence as punishment for the alleged perjury. Fyrdol v. State, 617 P.2d 513 (Alaska 1980); Coleman v. State, 621 P.2d 869 (Alaska 1980), cert. denied, 454 U.S. 1090, 102 S. Ct. 653, 70 L. Ed. 2d 628 (1981).

State without discretion to suppress factors. — Although the state has discretion whether or not to institute a prosecution, the state has no discretion to suppress evidence of past convictions or aggravating or mitigating factors. Hartley v. State, 653 P.2d 1052 (Alaska Ct. App. 1982).

Suspension of erroneously increased sentence immaterial. — Where the court did not find aggravating circumstances, increasing of the presumptive sentence was error even though the increased sentence was suspended. McManners v. State, 650 P.2d 414 (Alaska Ct. App. 1982).

Increased sentence upheld. — See Langton v. State, 662 P.2d 954 (Alaska Ct. App. 1983); Willard v. State, 662 P.2d 971 (Alaska Ct. App. 1983); Roberts v. State, 680 P.2d 503 (Alaska Ct. App. 1984).

Where a defendant was a first-felony offender for presumptive sentencing purposes but he had been convicted of several serious misdemeanors, and incestuous conduct with his daughter had gone on for several years and involved full intercourse, a sentence of five years with two years suspended was not excessive though his sentence exceeded two years, the presumptive sentence for a second-felony offender convicted of a class C felony, because the case could be termed exceptional. Theodore v. State, 692 P.2d 987 (Alaska Ct. App. 1985).

Scope of review. — See notes under heading "Review of presumptively imposed sentences," AS 12.55.120. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

III. AGGRAVATING AND MITIGATING FACTORS.

A. Aggravating Factors Generally.

Factors not enumerated in subsection (c). — Superior court erred in taking into consideration aggravating factors which were not enumerated in subsection (c) of this section at the time of sentencing. Woods v. State, 667 P.2d 184 (Alaska 1983).

Victim's physical injuries. — Since the victim's physical injury is not a necessary element of the crime of sexual assault in the first degree, the superior court properly considered the victim's physical injuries as an aggravating factor in sentencing the defendant. Woods v. State, 667 P.2d 184 (Alaska 1983).

Manner in which crime committed. — In evaluating a defendant as a worst offender for the purpose of imposing a maximum sentence, the manner in which the crime was committed as well as the defendant's character and background are significant. Napayonak v. State, Ct. App. Op. No. 1041 (File No. A-2672), P.2d (1990).

The term "deliberate cruelty," as used in subsection (c)(2) of this section must be restricted to instances in which pain, whether physical, psychological, or emotional, is inflicted gratuitously or as an end in itself. Conversely, when the infliction of pain or injury is merely a direct means to accomplish the crime charged, the test for establishing the aggravating factor of deliberate cruelty will not be met. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982).

Deliberate cruelty is conduct which involves gratuitously inflicted torture [illegible] olence. Jones v. State, 765 P.2d [illegible]07 (Alaska Ct. App. 1988).

Finding that defendant convicted of second-degree murder acted with deliberate cruelty was not clearly mistaken. Komakhuk v. State, 719 P.2d 1045 (Alaska Ct. App. 1986).

Applicability of (c)(4). — Mere possession of a dangerous instrument does not satisfy the requirements of (c)(4). Abdulbaqui v. State, 728 P.2d 1211 (Alaska Ct. App. 1986).

The trial court erred in concluding that the aggravator in paragraph (c)(5) had been established where the finding of vulnerability was based solely upon an environmental factor, that the victim was in her own apartment where she had a right to be protected. Branton v. State, 705 P.2d 1311 (Alaska Ct. App. 1985).

Paragraph (c)(8) construed. — While it appears that the legislature wanted the aggravating factor in paragraph (c)(8) broadened to include sufficiently verified prior criminal behavior other than convictions, there is no indication that the legislature intended to further broaden the aggravating factor to include a single prior incident of aggravated assaultive behavior. Nashoalook v. State, 744 P.2d 420 (Alaska Ct. App. 1987).

Applicability of (c)(8). — The state court of appeals interpreted the current version of paragraph (c)(8) as applying only to criminal conduct which arose after the effective date of the 1982 amendment of the paragraph to avoid an ex post facto law problem. Newsom v. State, 726 P.2d 561 (Alaska Ct. App. 1986).

Inordinate weight given to seriousness of prior conviction. — Composite term of sixty years upon conviction of two counts of sexual abuse of a minor in the first degree was clearly mistaken, and the case was remanded for imposition of a total sentence not to exceed sixty years with ten years suspended, where the sentencing court's reliance upon the seriousness of defendant's prior murder conviction placed inordinate and disproportionate weight on a single aggravating factor. Murray v. State, 770 P.2d 1131 (Alaska Ct. App. 1989).

Prior assaultive conduct considered. — Trial court, in imposing sentence upon a conviction for sexual assault in the first degree, did not err in considering the assaultive conduct which occurred during defendant's prior felony (burglary) in determining that the state established the aggravating factor set forth in subsection (c)(8). Kankanton v. State, 765 P.2d 101 (Alaska Ct. App. 1988).

"Most serious conduct included." — The legislative history of paragraph (c)(10) of this section makes it clear that the drafters of this provision intended that the determination of whether an offender's conduct "was among the most serious conduct included in the definition of that offense" was to be based on an assessment of the specific facts of each case, viewed in relation to the most serious potential conduct constituting the offense charged. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), aff'd in part, 665 P.2d 30 (Alaska Ct. App. 1983).

In order to find an aggravating factor under subsection (c)(10) of this section, it is not necessary to establish that there are no other cases involving more serious conduct; it is sufficient if the offense falls within the general class of the most serious offenses. Peetook v. State, 655 P.2d 1308 (Alaska Ct. App. 1982).

Since a finding of "most serious conduct" under paragraph (c)(10) of this section would be based partly on other specified aggravating factors, this factor should properly be viewed as subsuming the aggravating factors on which it is based. Peetook v. State, 655 P.2d 1308 (Alaska Ct. App. 1982).

AS 12.55.155(c)(10) stresses conduct involved in specific offense under consideration rather than personal characteristics of offender and requires comparison of conduct constituting crime in question with other conduct which would satisfy elements of the offense. Brezenoff v. State, 658 P.2d 1359 (Alaska Ct. App. 1983).

Defendant's repeated acts over a five-year period of sexual molestation of 12-year-old adopted daughter and resultant psychological damage to child could be considered as being "among the most serious conduct" under AS 12.55.155(c)(10) and thus may justify a sentence equal to one that could have been imposed on an offender who used a firearm or caused serious physical injury to an older victim as a result of a single isolated assault. Ecker v. State, 656 P.2d 577 (Alaska Ct. App. 1982).

While no violence was involved, trial court properly found that appellant's embezzlement of $140,000 from her employer over a one-year period was among the most serious conduct prescribed by the statute and served to distinguish it from prior cases in which substantial sentences for embezzlement were disapproved, and eight-year sentence with four years suspended was not excessive. Brezenoff v. State, 658 P.2d 1359 (Alaska Ct. App. 1983).

The court could properly consider the amount of damage caused to a commercial building, the value of the tractor-trailer the defendant took after entering the building, and the fact of its use and abandonment as circumstances constituting the "most serious conduct" for burglary in the second degree. Martin v. State, 704 P.2d 1341 (Alaska Ct. App. 1985).

In imposing sentence for attempted assault in the first degree since the trial court could find that defendant's actions were in part premeditated (i.e., that at the least he foresaw physical injury, if not serious physical injury, to victim), increasing the presumptive term by one year of incarceration was not clearly mistaken, nor was the court clearly mistaken in concluding that defendant's conduct was among the most serious within the defini-

tion of the offense to which he pled no contest. Schnecker v. State, 739 P.2d 1310 (Alaska Ct. App. 1987).

Paragraph (c)(13) reflects at least two distinct legislative interests: There is a public interest in having the duties of public safety officers carried out efficiently and free from hindrance; there is a separate interest in avoiding the additional possibility of public danger generated whenever a safety officer is challenged or hindered in the execution of his duties. Gilbreath v. State, 668 P.2d 1354 (Alaska Ct. App. 1983).

Paragraph (c)(13) construed. — Nothing in the legislative history supports the suggestion that paragraph (c)(13) is to be applied only when the offense for which the defendant is being sentenced is itself susceptible to the characterization of being "directed at" someone; rather this paragraph plainly states only that the conduct constituting the offense must be directed at a public safety officer. Gilbreath v. State, 668 P.2d 1354 (Alaska Ct. App. 1983).

The court rejected the argument that defendant's offense was "complete" when the police officer first saw defendant with the gun, before defendant was even aware of the officer's presence, so that defendant's subsequent conduct could not be considered under paragraph (c)(13) of this section. Gilbreath v. State, 668 P.2d 1354 (Alaska Ct. App. 1983).

Living situation covered by (c)(18). — Paragraph (c)(18) covers a living situation such as that where three men are living together in the house one of them owns. Komakhuk v. State, 719 P.2d 1045 (Alaska Ct. App. 1986).

Applicability of (c)(18). — That defendant's minor sexual abuse victims were members of the social unit comprised of those living together in the same dwelling as the defendant serves to aggravate the offense slightly; but this aggravating factor, standing alone, would not justify imposing a sentence on a first-felony offender equal to the presumptive term for a second-felony offender; it certainly would not justify a more severe sentence than a second-felony offender would receive. Olp v. State, 738 P.2d 1117 (Alaska Ct. App. 1987) (decided prior to 1988 amendment).

Errors in applying paragraph (c)(20). — The sentencing judge erred in applying paragraph (c)(20) as an aggravating factor where the defendant was on probation for offenses that were felonies in Oregon but were not felonies under Alaska law; AS 12.55.145 applies in defining what a "felony charge or conviction" is for purposes of paragraph (c)(20). Kuvaas v. State, 696 P.2d 684 (Alaska Ct. App. 1985).

Paragraph (c)(21) construed. — The term "criminal history" in subsection (c)(21) does not connote or denote past criminal convictions, but merely past conduct violative of criminal laws. Fagan v. State, 779 P.2d 1258 (Alaska Ct. App. 1989).

Incidents of misconduct "similar in nature". — Incidents of misconduct may fairly be said to be "similar in nature" if they involve the same type of crime. The statutory requirement of similarity is satisfied when a defendant who currently stands convicted of theft is shown to have been formerly convicted of other thefts. No additional factual showing is needed. Kelley v. State, 785 P.2d 567 (Alaska Ct. App. 1990).

Finding of aggravating factor not erroneous. — Finding of an aggravating factor, that defendant's assault was knowingly directed at a law enforcement officer, was not clearly erroneous. Smith v. State, 682 P.2d 1125 (Alaska Ct. App. 1984).

Defendant convicted as principal not minor role player. — The mitigating factor specified in subsection (d)(2) of this section, that "the defendant, although an accomplice, played only a minor role in the commission of the offense," is inapplicable to defendants convicted as principals. McReynolds v. State, 739 P.2d 175 (Alaska Ct. App. 1987).

Sentence for terroristic bombing. — Sentence of four years, with one year suspended, for terroristic bombing was excessive, where the aggravating factors of deliberate cruelty and prior repeated instances of assaultive behavior were not supported by the record. Allen v. State, 759 P.2d 541 (Alaska Ct. App. 1988).

B. Mitigating Factors Generally.

Mitigating factors must be established by clear and convincing evidence, and the trial court's rejection of a mitigating factor will be affirmed unless clearly erroneous. Degler v. State, 741 P.2d 659 (Alaska Ct. App. 1987).

Trial court should not propose nonstatutory mitigating factor to three-judge panel where legislature specifically rejected that factor for inclusion in subsection (d). Where the legislature has expressly addressed a consideration, such as the relationship between a defendant's past conduct and his present offense, and imposed limitations on the trial court's power to consider that relationship in mitigation of sentence, the trial court should not propose the same mitigating factor to the three-judge panel without complying with the limitations; to do so is to suggest a common-law development inconsistent with legislation. Totemoff v. State, 739 P.2d 769 (Alaska Ct. App. 1987).

Applicability of (d)(2) and (d)(9). — Sentencing court did not err in denying the defendant's request for consideration of (d)(2) and (d)(9) where the record supported the inference that the defendant acted as a lookout for a robbery. Abdulbaqui v. State, 728 P.2d 1211 (Alaska Ct. App. 1986).

Legislative intent in (d)(3). — Legislature intended mitigating factor provided in paragraph (d)(3) of this section to be interpreted more broadly than the defense of duress. The defense of duress and the related defense of necessity have been narrowly defined at common law to excuse criminal behavior only in very limited circumstances. Bell v. State, 658 P.2d 787 (Alaska Ct. App. 1983).

This section provides an alleviation of the code's treatment of imperfect defenses, in that evidence that defendant in good faith subjectively believed facts which if true would have established a defense justifying his conduct, but which the judge or jury concludes would have been unreasonable under circumstances, may warrant mitigation of presumptive sentence. Bell v. State, 658 P.2d 787 (Alaska Ct. App. 1983).

Acting under compulsion. — In order for a defendant to establish the mitigating factor that he acted under compulsion, the compulsion must be of a sufficiently extraordinary nature that it approaches being a defense to the crime; a trial judge could properly conclude that to the extent a stepfather convicted of having sexual relations with his stepdaughter over five years acted under compulsion, it was the sort of compulsion which would be ordinary and expected in the commission of this kind of offense. Bynum v. State, 708 P.2d 1293 (Alaska Ct. App. 1985).

Conduct influenced by serious marital problem was not action under duress or compulsion of a sufficiently extraordinary nature to approach being a defense. Nashonlook v. State, 744 P.2d 4[illegible]0 (Alaska Ct. App. 1987).

Imperfect defense test under (d)(3) met. — Where state thought enough of appellant inmate's concern over family matters to give him an eight-hour pass, and where appellant allegedly panicked and left correctional facility a few hours before his pass was scheduled to commence, under such circumstances, it could be found that appellant's criminal conduct — anticipating pass by a few hours — balanced against harm he subjectively believed would occur — permanent separation from his children — met the test of an "imperfect" defense under AS 12.55.155(d)(3) so as to reduce presumptive sentence. Bell v. State, 658 P.2d 787 (Alaska Ct. App. 1983).

Imperfect defense test not met. — In prosecution for escape in the second degree, defendant's evidence of homosexual advances toward him, by another inmate, and of his concerns about family matters failed to establish mitigating factor as would justify reduction of his sentence under AS 12.55.155(d)(3). Whitmore v. State, 657 P.2d 859 (Alaska Ct. App. 1983).

Where defendant offered to show that he had attempted to obtain money through robbery because he was desperate for money to attend an out-of-state custody hearing, it was held that the judge was not clearly erroneous in rejecting this mitigator. Degler v. State, 741 P.2d 659 (Alaska Ct. App. 1987).

Consideration of mental state and mental illness. — A trial court, in imposing a presumptive sentence, may consider the interplay between the defendant's mental state and any mental illness he may have in determining whether the defendant has proved by clear and convincing evidence the requirements of paragraph (d)(3). Hart v. State, 702 P.2d 651 (Alaska Ct. App. 1985), declining to overrule Bell v. State, 658 P.2d 787 (Alaska Ct. App. 1983).

Applicability of (d)(7). — Sentencing courts should apply the statutory language of paragraph (d)(7) on a case-by-case basis, guided by the plain and ordinary meaning of its terms, rather than applying a restrictive interpretation of the mitigating factor of provocation. Roark v. State, 758 P.2d 644 (Alaska Ct. App. 1988).

Trial court did not err in rejecting as a matter of law defendant's contention that "provocation" may be found for purposes of paragraph (d)(7) whenever the victim's conduct significantly contributes, in a

causal sense, to the commission of a crime. Roark v. State, 758 P.2d 644 (Alaska Ct. App. 1988).

Applicability of (d)(9). — Mitigating factor in (d)(9) of this section, that the offense was one of the least serious included in the offense, applies to the offense of possession of a concealable firearm by a felon. State v. LaPorte, 672 P.2d 466 (Alaska Ct. App. 1983).

Pointing an unloaded functioning .44 caliber replica cap-and-ball pistol, at another person and pulling the trigger three times is not among the "least serious" within the definition of third-degree assault. Weston v. State, 656 P.2d 1186 (Alaska Ct. App. 1982), rev'd on other grounds, 682 P.2d 1119 (Alaska 1984).

For purposes of establishing the mitigating factor specified in paragraph (d)(9), reckless conduct is not per se less serious than knowing or intentional conduct. Adams v. State, 718 P.2d 164 (Alaska Ct. App. 1986).

Where the defendant argued the mitigator of "least serious conduct" should apply, since his conduct would have constituted an attempted robbery under the former statute although AS 11.41.510 includes "attempting to take property" as robbery, it was held that since the defendant had pointed a loaded gun at the victim, the potential harm created by his conduct was not lessened because he received no property, and, therefore, the judge was not clearly erroneous in rejecting this mitigator. Degler v. State, 741 P.2d 659 (Alaska Ct. App. 1987).

The mitigating factor in (d)(9) where "the conduct constituting the offense was among the least serious conduct included in the definition of the offense" compares the defendant's conduct in committing the offense with the conduct of others committing the same offense. It does not compare classes of offenses. Aveoganna v. State, 757 P.2d 75 (Alaska Ct. App. 1988).

Paragraph (d)(9) would almost never be appropriate for consideration in a case of sexual abuse where the victim is a 10-year-old child. Johnson v. State, 762 P.2d 493 (Alaska Ct. App. 1988).

Merger of mitigating factors. — Where the defendant is a first felony offender, the mitigating factor that the conduct is among the least serious within the definition of the offense tends to merge with the mitigating factor that the harm caused by the defendant's conduct is consistently minor and inconsistent with imposition of a substantial period of imprisonment. Allen v. State, 769 P.2d 457 (Alaska Ct. App. 1989).

No error in rejecting proposed mitigating factor. — Trial judge did not err in rejecting the defendant's argument that his conduct was among the least serious within the definition of first-degree robbery, where the robberies appeared to have been well planned, were executed in a manner calculated to render the victims relatively helpless and under circumstances that tended to minimize the possibility of a report by the victims to the police; where the defendant clearly created the impression that he had a firearm that he was prepared to use; where the defendant inflicted physical injury upon one victim; and where a substantial amount of cash was taken. Davis v. State, 706 P.2d 1198 (Alaska Ct. App. 1985).

When considering whether or not the conduct of one convicted of issuing a bad check was among the least serious within the definition of the offense, the monetary value of the bad check was by no means the only relevant factor; the planned and professional manner in which he committed the offense also reflected on its seriousness. The sentencing judge did not abuse his discretion in rejecting the proposed mitigating factor. Gant v. State, 712 P.2d 906 (Alaska Ct. App. 1986).

"Least serious" finding not error. — In robbery prosecution, finding the "least serious" mitigating factor was not error given the fact that the weapon used was inoperable; the apparent lack of planning of the robbery on defendant's part; the age of the defendant; and his lack of a prior record. State v. Richards, 720 P.2d 47 (Alaska Ct. App. 1986).

Applicability of (d)(11). — Paragraph (d)(11) contemplates necessities such as food or water; it does not include the desire to attend a future court proceeding, such as an out-of-state custody hearing. Degler v. State, 741 P.2d 659 (Alaska Ct. App. 1987).

Applicability of (d)(13). — Paragraph (d)(13) requires that the trial court look not only at the defendant's past conduct but also at the relationship between that past conduct and his present offense. Totemoff v. State, 739 P.2d 769 (Alaska Ct. App. 1987).

Applicability of (d)(14). — A trial judge was clearly erroneous in rejecting the mitigating factor that an offense involved small quantities of a controlled substance where the defendant sold one-half gram of heroin on one occasion and one-quarter gram on another occasion and was in possession of two to four similar packets. Solitaire v. State, 709 P.2d 1334 (Alaska Ct. App. 1985).

Familiarity with victim. — 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, 660 P.2d 1203 (Alaska Ct. App. 1983).

C. Alcohol or Drug Intoxication.

Constitutionality. — In preventing the court from considering as a mitigating factor defendant's problems with alcohol abuse as they related to his rehabilitation, subsection (g) does not violate Alaska Const., art. I, § 12, or infringe upon the separation of powers. Koteles v. State, 660 P.2d 1199 (Alaska Ct. App. 1983).

The exclusion of voluntary intoxication and chronic alcoholism as mitigating factors in determining appropriate sentences for those subject to presumptive sentencing is not a denial of equal protection because the legislative rejection of these conditions as mitigating circumstances is consistent throughout the criminal code and there are sufficient reasons to justify the exclusion. Wright v. State, 656 P.2d 1226 (Alaska Ct. App. 1983).

Alcoholism as consideration for sentencing. — While voluntary intoxication or a history of alcoholism cannot be considered an aggravating or mitigating factor for the purposes of presumptive sentencing, when a violent crime is committed under the influence of alcohol by a person with a background of alcohol-related violence, his background should be considered by the court in determining the extent to which rehabilitation will realistically be accomplished by the sentence which it intends to impose. State v. Ahwinona, 635 P.2d 488 (Alaska Ct. App. 1981).

Increased sentence upheld. — The addition of five years suspended imprisonment to a five-year presumptive term for drunk-driving manslaughter was not clearly mistaken, where the aggravating factor for increasing the sentence was defendant's decision to operate a motor vehicle after having consumed enough intoxicating liquor to raise his blood-alcohol level to almost twice the legal maximum. Krasovich v. State, 731 P.2d 598 (Alaska Ct. App. 1987).

D. Elements of Offense as Factors.

Subsection (e) construed. — Subsection (e) does not purport to deal with limitations on the applicability of presumptive sentencing under AS 12.55.125 and does not preclude the use of a prior conviction to invoke presumptive sentencing under AS 12.55.125 when that prior conviction is a necessary element of the present offense. Fry v. State, 655 P.2d 789 (Alaska Ct. App. 1983).

The underlying policy of subsection (e) of this section is to avoid double punishment for the same conduct. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

Where violence and injury are characteristic of an offense defined by statute, the mere fact of some physical injury to the victim as a result of the defendant's conduct, though technically an aggravating factor under subsection (c)(1) of this section, will not justify a significant increase in the presumptive term. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

Since presumptive terms are intended to be applicable in typical cases, and not in aggravated or mitigated cases, the presumptive 10-year term applicable to defendant must be deemed to take into account the potential for violence and the likelihood of some degree of physical injury which is typical of the offense for which he was convicted, first-degree sexual assault. Juneby v. State, 665 P.2d 30 (Alaska Ct. App. 1983).

Merger of aggravating and mitigating factors based on same intent and conduct of accused. — See Juneby v. State, 665 P.2d 30 (Alaska Ct. App. 1983).

Conduct leading to prior conviction as a factor. — Consideration as an aggravating factor of conduct by the defendant for which a separate conviction has been entered and a separate sentence imposed is prohibited. Juneby v. State, 665 P.2d 30 (Alaska Ct. App. 1983).

IV. FINDINGS OF COURT.

The provisions of subsection (f) of this section must be read to require more than a pro forma, conclusory statement that an aggravating or mitigating factor has or has not been shown by clear and convincing evidence. Juneby v. State,

641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

Remarks must be specific. — Subsection (f) of this section, which requires that findings "be set out with specificity," calls for sentencing judges to include, in their remarks on the record, the following specific information: (1) the specific factors in aggravation and in mitigation found to have been established by clear and convincing evidence; (2) the evidence upon which the court has relied in finding the existence of aggravating or mitigating factors; (3) an explanation of the weight given by the court to each aggravating or mitigating factor, and the relative importance of each factor in comparison with other aggravating or mitigating factors established; and (4) an evaluation of the totality of the aggravating and mitigating factors in light of the State v. Chaney, 477 P.2d 441 (Alaska 1970) criteria, as expressed in AS 12.55.005, in order to determine the amount by which the presumptive sentence for the particular offense should be adjusted. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

Conclusory finding not sufficient. — Compliance with the statutory directive to set forth all findings with specificity requires more than a conclusory finding that aggravating or mitigating factors have been established by the requisite standard of proof. DeGross v. State, 768 P.2d 134 (Alaska Ct. App. 1989).

Presentence report prepared by probation office does not satisfy state's obligation under subsection (f) of this section. Nukapigak v. State, 645 P.2d 215 (Alaska Ct. App. 1982), aff'd, 663 P.2d 943 (Alaska 1983).

Lack of express findings as to aggravating factors. — In the absence of a presentence hearing to permit resolution of disputed facts pertaining to alleged aggravating factors and in the absence of express findings by the sentencing court as to the existence of aggravating factors, the three-year increase of the presumptive six-year term specified for defendant's assault conviction could not be sustained. Dunn v. State, 653 P.2d 1071 (Alaska Ct. App. 1982).

The lack of any express finding by the sentencing court as to the aggravating factors that were actually considered in imposing a nine-year sentence on the assault charge required remand of the case for resentencing in order to permit specific findings as to aggravation to be made. Dunn v. State, 653 P.2d 1071 (Alaska Ct. App. 1982).

Remand for resentencing. — Because the requirement of specific findings relates not only to the adequacy of the appellate record, but also to the appropriateness of the trial court's sentencing decision, a lack of adequate findings required a remand for resentencing, rather than merely a remand for additional findings. DeGross v. State, 768 P.2d 134 (Alaska Ct. App. 1989).

V. NOTICE.

Notice to parties of factors in question. — The parties may rely upon evidence introduced during trial to sustain their respective burdens of proving aggravating and mitigating factors, but they are entitled to notice in advance of the sentencing hearing regarding the aggravating and mitigating factors in question since this enables them to conduct orderly preparation, and gives them an opportunity to rebut trial evidence at the sentencing hearing. Hartley v. State, 653 P.2d 1052 (Alaska Ct. App. 1982).

In a prosecution for first-degree sexual assault, where the trial judge found an aggravating factor which he mentioned to the parties for the first time in the context of his closing sentencing remarks and then sentenced defendant to 15 years, the court of appeals remanded for resentencing since defendant was entitled to notice and an opportunity to be heard. Hartley v. State, 653 P.2d 1052 (Alaska Ct. App. 1982).

The trial court has the power sua sponte to alert the parties to possible aggravating and mitigating factors present in the record so long as the parties are given an opportunity to marshal the relevant evidence, pro and con, and make their arguments accordingly. Hartley v. State, 653 P.2d 1052 (Alaska Ct. App. 1982).

When a party has had insufficient time to comply with the notice requirements relating to proof of prior convictions or aggravating and mitigating factors, the appropriate remedy should normally be a continuance of the sentencing proceedings; and failure to consider prior crimes for presumptive 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, 663 P.2d 967 (Alaska Ct. App. 1983).

Sec. 12.55.165. Extraordinary circumstances. If the defendant is subject to sentencing under AS 12.55.125(c), (d), (e), 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; am § 2 ch 168 SLA 1990)

Effect of amendments. — The 1990 amendment, effective June 22, 1990, substituted "AS 12.55.125(c), (d), (e), or (i)" for "AS 12.55.125(c), (d)(1), (d)(2), (e)(1), (e)(2), or (i)" near the beginning of the section.

NOTES TO DECISIONS

Legislature intended that this section establish two separate bases for referral of a case from a trial court to a three-judge panel for sentencing. First, referral is warranted in situations where manifest injustice would result from failure to consider relevant, nonstatutory aggravating or mitigating factors in sentencing; and, second, where manifest injustice would result from imposition of a presumptive sentence, whether or not adjusted for statutory aggravating or mitigating factors. Dancer v. State, 715 P.2d 1174 (Alaska Ct. App. 1986).

This section establishes two distinct grounds for referral of a case to a three-judge panel: (1) if the presumptive term, adjusted for aggravating or mitigating factors, would be manifestly unjust or plainly unfair and, (2) if manifest injustice will result from failure to consider a nonstatutory aggravating or mitigating factor. Kirby v. State, 748 P.2d 757 (Alaska Ct. App. 1987).

Modification of presumptive term. — The presumptive one-year term imposed by AS 12.55.125(e)(3), and by extension (d)(3), are subject to modification because of aggravating or mitigating factors as well as possible referral to a three-judge panel like all other presumptive sentences. Edwin v. State, 762 P.2d 499 (Alaska Ct. App. 1988).

Constitutionality of presumptive sentencing provisions. — See notes under same heading, AS 12.55.125. Nell v. State, 642 P.2d 1361 (Alaska Ct. App. 1982).

Authority to sentence defendant. — See notes to AS 12.55.175 under catchline "Sentencing authority." Heathcock v. State, 670 P.2d 1155 (Alaska Ct. App. 1983). See also Winfree v. State, 683 P.2d 284 (Alaska Ct. App. 1984).

Authority to create new factors. — It appears that the legislature, in adopting this section, in effect delegated to the three-judge panel the authority to create new aggravating and mitigating factors under the common law, which would be available for consideration in subsequent cases. Dancer v. State, 715 P.2d 1174 (Alaska Ct. App. 1986).

Consideration of evidence of rehabilitation. — Where the sentencing record contained unusually strong evidence that a youthful first offender has a particularly favorable potential for rehabilitation, and where the absence of statutory aggravating or mitigating factors would have precluded the sentencing court from giving any consideration to that evidence in imposing a sentence, the Alaska Court of Appeals thought referral to the three-judge panel was expressly authorized under this section and AS 12.55.175. Smith v. State, 711 P.2d 561 (Alaska Ct. App. 1985).

Once the court finds the mitigating factor of unusual prospects for rehabilitation in the case of a first offender, it should evaluate the factor's impact on an appro-

riate sentence in the same way it would valuate a statutory mitigating factor nat had been established by clear and onvincing evidence. The court should eny referral to the three-judge panel only /hen it concludes that no adjustment to he presumptive term is appropriate in ght of the factor. Kirby v. State, 748 P.2d 57 (Alaska Ct. App. 1987).

Trial court should not propose a onstatutory mitigating factor where he legislature specifically rejected hat factor for inclusion in AS 2.55.155(d). Where the legislature has xpressly addressed a consideration, such s the relationship between a defendant's ast conduct and his present offense, and mposed limitations on the trial court's ower to consider that relationship in mit- gation of sentence, the trial court should ot propose the same mitigating factor to he three-judge panel without complying /ith the limitations; to do so is to suggest common-law development inconsistent /ith legislation. Totemoff v. State, 739 '.2d 769 (Alaska Ct. App. 1987).

Referrals involving presumptive erm over four years solely on basis of onstatutory mitigator. — For purposes f future cases, when a case involving a resumptive term in excess of four years s referred to the three-judge panel on the ole basis of a nonstatutory mitigating actor, imposition by the panel of a sen- ence below 50% of the presumptive term vill normally be deemed inappropriate nd clearly mistaken unless the panel ex- ressly concludes that such a sentence is equired to avoid manifest injustice, al- hough the panel has jurisdiction to im- ose a sentence of less than 50% of the resumptive sentence. State v. Price, 740 '.2d 476 (Alaska Ct. App. 1987) (not ap- lying rule in present cases).

Manifest injustice. — Manifest injus- ice is basically a subjective standard be- ause of the purpose that the standard erves in recognizing cases that will inevi- ably arise in which the subjective judg- nent of the sentencing court should take recedence over the objective limits im- osed by statute. Lloyd v. State, 672 P.2d 52 (Alaska Ct. App. 1983).

The judge did not commit error by re- using to find manifest injustice based on mposition of the adjusted presumptive erm in light of the totality of the circum- tances. Lloyd v. State, 672 P.2d 152 Alaska Ct. App. 1983).

Judge did not err in failing to refer de- endant's case to the three-judge panel to allow further reduction of defendant's sen- tence based on his lack of prior criminal convictions. Lloyd v. State, 672 P.2d 152 (Alaska Ct. App. 1983).

Judge did not apply an incorrect stan- dard in determining the question of mani- fest injustice when he defined the term as "something that's shocking to the con- science," and remand for application of the obvious unfairness standard proposed by defendant was unwarranted. Lloyd v. State, 672 P.2d 152 (Alaska Ct. App. 1983).

It was not manifestly unjust to impose a five-year presumptive term upon defen- dant's conviction of attempted sexual as- sault of a minor, and he was not automati- cally entitled as a matter of law to have his case referred to a three-judge panel for sentencing. Aveoganna v. State, 757 P.2d 75 (Alaska Ct. App. 1988).

Consideration of defendant's prior felony conviction. — The three-judge sentencing panel may consider the miti- gated nature of a defendant's prior felony conviction as a factor in the overall deter- mination of whether imposition of the pre- sumptive term for a subsequent felony conviction would be manifestly unjust. The nature and seriousness of an of- fender's prior criminal misconduct are a legitimate part of the totality of the cir- cumstances; as such, they may be consid- ered in the overall determination of mani- fest injustice. Duncan v. State, 782 P.2d 301 (Alaska Ct. App. 1989).

Denial of defendant's request for re- ferral to three-judge sentencing panel not error. — See Bartholomew v. State, 720 P.2d 54 (Alaska Ct. App. 1986); Abdulbaqui v. State, 728 P.2d 1211 (Alaska Ct. App. 1986).

Applied in McManners v. State, 650 P.2d 414 (Alaska Ct. App. 1982); Sears v. State, 653 P.2d 349 (Alaska Ct. App. 1982); Peetook v. State, 655 P.2d 1308 (Alaska Ct. App. 1982); Seymore v. State, 655 P.2d 786 (Alaska Ct. App. 1982); Shaw v. State, 673 P.2d 781 (Alaska Ct. App. 1983); Walsh v. State, 677 P.2d 912 (Alaska Ct. App. 1984); Degler v. State, 741 P.2d 659 (Alaska Ct. App. 1987); Winther v. State, 749 P.2d 1356 (Alaska Ct. App. 1988); Horton v. State, 758 P.2d 628 (Alaska Ct. App. 1988).

Stated in Erhart v. State, 656 P.2d 1199 (Alaska Ct. App. 1982); State v. Rastopsoff, 659 P.2d 630 (Alaska Ct. App. 1983); Maldonado v. State, 676 P.2d 1093 (Alaska Ct. App. 1984); Tulowetzke v.

State, Dep't of Pub. Safety, 743 P.2d 368 (Alaska 1987).

Cited in Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982); Lacquement v. State, 644 P.2d 856 (Alaska Ct. App. 1982); Wolf v. State, 647 P.2d 609 (Alaska Ct. App. 1982); Griffith v. State, 653 P.2d 1057 (Alaska Ct. App. 1982); Neakok v. State, 653 P.2d 658 (Alaska Ct. App. 1982); Wright v. State, 656 P.2d 1226 (Alaska Ct. App. 1983); Koteles v. State, 660 P.2d 1199 (Alaska Ct. App. 1983); Langton v. State, 662 P.2d 954 (Alaska Ct. App. 1983); Woods v. State, 667 P.2d 184 (Alaska 1983); Maal v. State, 670 P.2d 708 (Alaska Ct. App. 1983); State v. LaPorte, 672 P.2d 466 (Alaska Ct. App. 1983); Flink v. State, 683 P.2d 725 (Alaska Ct. App. 1984); Benboe v. State, 698 P.2d 1230 (Alaska Ct. App. 1985); Rhodes v. State, 717 P.2d 422 (Alaska Ct. App. 1986); James v. State, 739 P.2d 1314 (Alaska Ct. App. 1987); Schnecker v. State, 739 P.2d 1310 (Alaska Ct. App. 1987); Bond v. State, 747 P.2d 546 (Alaska Ct. App. 1987); Comegys v. State, 747 P.2d 554 (Alaska Ct. App. 1987); Stewart v. State, 756 P.2d 900 (Alaska Ct. App. 1988); James v. State, 754 P.2d 1336 (Alaska Ct. App. 1988) abrieloff v. State, 758 P.2d 128 (Alaska Ct. App. 1988); Juelson v. State, 758 P.2d 1294 (Alaska Ct. App. 1988); Sledge v. State, 763 P.2d 1364 (Alaska Ct. App. 1988); Luepke v. State, 765 P.2d 988 (Alaska Ct. App. 1988); Hilburn v. State, 765 P.2d 1382 (Alaska Ct. App. 1988); Fowler v. State, 766 P.2d 588 (Alaska Ct. App. 1988); DeHart v. State, 781 P.2d 989 (Alaska Ct. App. 1989).

Sec. 12.55.172. [Renumbered as AS 12.55.180.]

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.

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Article 1. Protection of the Elderly.

Section
10. Reports of harm
20. Action on reports
30. Protective services
40. Review and referral
50. Confidentiality of reports
60. Authority of the department
70. Regulations
75. Quarterly report
100. Definitions

Cross references. — For statement of legislative purpose in enacting AS 47.24.010 — 47.24.100, see § 1, ch. 36, SLA 1983, in the Temporary and Special Acts.

Sec. 47.24.010. Reports of harm. (a) The following persons who, in the performance of their professional duties, have reasonable cause to believe that an elderly person has suffered harm shall, not later than 24 hours after first having cause for the belief, report the harm to the Department of Health and Social Services:

(1) a physician or other licensed health care provider;

(2) a mental health professional as defined in AS 47.30.915(11);

(3) a pharmacist;

(4) an administrator of a nursing home, residential care or health care facility;

(5) a guardian or conservator;

(6) a police officer;

(7) a village public safety officer;

(8) a village health aide;

(9) a social worker;

(10) a member of the clergy;

(11) a staff employee of a project funded by the Older Alaskans Commission;

(12) an employee of a homemaker program or home health aide program;

(13) an emergency medical technician or a paramedic in the mobile intensive care program.

(b) A report of harm made under this section may include the name and address of the person reporting the harm and shall include

(1) the name and address of the elderly person;

(2) information relating to the nature and extent of the harm;

(3) other information that the person reporting the harm believes might be helpful in an investigation of the case or in providing protection for the elderly person.

(c) A person who fails to comply with this section is guilty of a violation as defined in AS 11.81.900(b).

AS 47.24

(d) This section does not prohibit a person listed in (a) of this section from reporting cases of economic or physical harm to an elderly person that have come to the person's attention in a nonprofessional capacity. This section does not prohibit any other person from reporting economic harm to an elderly person that the person has reasonable cause to believe is a result of theft, fraud, or coercion by a caretaker of the elderly person, or physical harm to an elderly person that the person has reasonable cause to believe is a result of abuse, neglect, or abandonment.

(e) If immediate action is necessary to protect the elderly person from imminent harm, the person shall make the report of harm to a police officer or a village public safety officer. The police officer or village public safety officer shall take immediate action to protect the elderly person and shall, at the earliest opportunity, notify the department.

(f) A person who, in good faith makes a report of economic or physical harm to an elderly person under AS 47.24.010 — 47.24.100, or who participates in judicial proceedings related to the submission of reports under AS 47.24.010 — 47.24.100, is immune from any civil or criminal liability that might otherwise be incurred or imposed.

(g) Failure to make a report under subsections (a) and (d) of this section is not the basis of civil liability unless otherwise provided by law.

(h) If a person makes a good faith report of harm under this section, an employer or supervisor of the person, or a public or private agency or entity that provides benefits, services, or housing to the person, may not discharge, demote, transfer, reduce the pay or benefits or work privileges of, prepare a negative work performance evaluation of, deny or withhold benefits or services, evict, or take other detrimental action against the person because of the report. The person making the report may bring a civil action for compensatory and punitive damages against an employer, supervisor, agency, or entity that violates this subsection. In the civil action there is a rebuttable presumption that the detrimental action was retaliatory if it was taken within 90 days after the report of harm was made. (§ 2 ch 36 SLA 1983; am § 4 ch 108 SLA 1988)

Effect of amendments. — The 1988 amendment added subsection (h).

Sec. 47.24.020. Action on reports. (a) Upon receiving a report of harm, the department shall promptly initiate an investigation to determine the economic or physical condition of the elderly person named in the report and whether action or services are needed for the protection of the elderly person. The department shall personally interview the elderly person during the investigation unless the elderly

person is unconscious or otherwise physically or mentally impaired to such an extent as to be unable to respond to questions.

(b) The department shall prepare a written report of the investigation, including findings, recommendations, and a determination of whether and what kind of protective services are to be offered to the elderly person. Upon request, the person who reported harm to the elderly person shall be notified of the status of the investigation. The department shall provide to the Department of Law a copy of each report of an investigation of harm to an elderly person if the report of harm is confirmed to be true.

(c) The department shall immediately terminate an investigation under this section upon the request of an elderly person who is the subject of a report of harm. However, if the department has reasonable cause to believe that the elderly person is incapacitated, the department may petition the superior court under AS 13.26 for appointment of a guardian or temporary guardian for the elderly person for the purpose of obtaining consent to continue the investigation. (§ 2 ch 36 SLA 1983)

Sec. 47.24.030. Protective services. (a) The department shall provide available protective services to a harmed elderly person if and to the extent to which the elderly person consents. If the department has reasonable cause to believe that the elderly person lacks the capacity to consent to receiving protective services, it may petition the superior court under AS 13.26 for appointment of a guardian or temporary guardian for the elderly person for the purpose of obtaining consent.

(b) If an elderly person who has consented to receiving protective services is prevented by a caretaker from receiving the services, the department may assist the elderly person to petition the superior court for an injunction restraining the caretaker from interfering with the provision of protective services to the elderly person. (§ 2 ch 36 SLA 1983)

Sec. 47.24.040. Review and referral. The department shall, not later than 90 days after initiating the provision of protective services to an elderly person, initiate a review of the case to determine whether continuation or modification of protective services that are being provided is warranted. The department shall reevaluate the case every 90 days thereafter until the case is closed. (§ 2 ch 36 SLA 1983)

Sec. 47.24.050. Confidentiality of reports. (a) Investigation reports and reports of harm filed under AS 47.24.010 — 47.24.100 are confidential and are not subject to public inspection and copying under AS 09.25.110 — 09.25.125. However, in accordance with AS 47.24.010 — 47.24.100 and regulations adopted under AS 47.24.010 — 47.24.100, investigation reports may be used by appropriate governmental agencies inside and outside the state, in connection with investigations or judicial proceedings involving harm to an elderly person.

(b) The department shall disclose a report of harm if the elderly person who is the subject of the report consents in writing. The department shall, upon request, disclose the number of verified reports of harm that occurred at an institution for care of the elderly. (§ 2 ch 36 SLA 1983)

Sec. 47.24.060. Authority of the department. In performing its duties under AS 47.24.010 — 47.24.100, the department may, subject to the elderly person's consent, initiate actions necessary to assure the health, safety and welfare of an elderly person, including the transfer of the elderly person from a nursing home, residential care or health care facility. (§ 2 ch 36 SLA 1983)

Sec. 47.24.070. Regulations. Regulations to implement AS 47.24.010 — 47.24.100 shall be approved by the Older Alaskans Commission (AS 44.21.200) before adoption by the department. (§ 2 ch 36 SLA 1983)

Sec. 47.24.075. Quarterly report. The department shall submit to the Older Alaskans Commission each quarter a statistical report of the department's activities related to the protection of elderly persons in the state. The report may not disclose the identity of victims or perpetrators of the harm. (§ 2 ch 36 SLA 1983)

Sec. 47.24.100. Definitions. In AS 47.24.010 — 47.24.100

(1) "abandonment" means desertion of an elderly person by a caretaker;

(2) "abuse" means the infliction of physical pain or injury, the infliction of mental anguish that requires medical attention, or the deprivation by a caretaker of services that are necessary to maintain the physical and mental health of an elderly person;

(3) "caretaker" means a person who is responsible for the care of an elderly person as a result of a family relationship, or who has assumed responsibility for the care of an elderly person voluntarily, by contract, or by court order;

(4) "department" means the Department of Health and Social Services;

(5) "economic harm" means intentional economic exploitation of an elderly person resulting from theft, fraud, or coercion by a caretaker of the elderly person;

(6) "elderly person" means a resident of Alaska who is 65 years of age or older;

(7) "harm" means physical harm or economic harm;

(8) "incapacitated" means a person's ability to receive and evaluate information or to communicate decisions is impaired for reasons other than minority to the extent that the person lacks the ability to obtain the essential requirements for physical health or safety without court-ordered assistance;

(9) "neglect" means the failure by the caretaker of an elderly person to provide services necessary to maintain the physical and mental health of the elderly person;

(10) "physical harm" means injury to the person of an elderly person resulting from abuse, neglect or abandonment;

(11) "police officer" has the meaning given in AS 18.65.290;

(12) "protective services" means services intended to prevent or alleviate harm resulting from abuse, neglect, exploitation, or abandonment. (§ 2 ch 36 SLA 1983)

Article 2. Protection of Disabled Adults.

Section
110. Reports of physical or sexual assault
120. Immunity from liability; retaliation prohibited

Sec. 47.24.110. Reports of physical or sexual assault. (a) The following persons who, in the performance of their professional duties, have reasonable cause to believe that a disabled adult is a victim of assault under AS 11.41.200 — 11.41.230 or sexual assault under AS 11.41.410 — 11.41.420, and that the disabled adult is unable to report the crime, shall promptly report the crime to the nearest law enforcement agency:

(1) a physician or other licensed health care provider;

(2) a mental health professional as defined in AS 47.30.915;

(3) a pharmacist;

(4) an administrator or employee of a nursing home, residential care, or health care facility;

(5) a caretaker of the disabled adult;

(6) a guardian or conservator of the disabled adult;

(7) a police officer as defined in AS 18.65.290;

(8) a village public safety officer;

(9) a village health aide;

(10) a social worker;

(11) a member of the clergy;

(12) a staff employee of a program or project serving disabled adults;

(13) a licensed foster care provider;

(14) a paid employee of a domestic violence and sexual assault program or a crisis intervention and prevention program as defined in AS 18.66.900;

(15) an employee of a homemaker program or home health aide program;

(16) an emergency medical technician or paramedic in the mobile intensive care program.

(b) A person who knowingly fails or refuses to make a report required under (a) of this section is guilty of a class B misdemeanor.

(c) In this section, "disabled adult" means a person 18 years of age or older who has a physical or mental disability, or physical or mental impairment, as defined in AS 18.80.300. (§ 3 ch 42 SLA 1988)

Sec. 47.24.120. Immunity from liability; retaliation prohibited. (a) A person who in good faith makes a report under AS 47.24.110, regardless of whether the person is required to do so, is immune from civil or criminal liability that might otherwise be incurred or imposed for making the report.

(b) An employer or supervisor of a person who in good faith makes a report under AS 47.24.110 may not discharge, demote, transfer, reduce pay or benefits or work privileges of, prepare a negative work performance evaluation of, or take other detrimental action against the person because the person made the report. The person making the report may bring a civil action for compensatory and punitive damages against an employer or supervisor who violates this subsection. In the civil action there is a rebuttable presumption that the detrimental action by the employer or supervisor was retaliatory if it was taken within 90 days after the report was made. (§ 3 ch 42 SLA 1988)

Chapter 25. Public Assistance.

Article

1. General Relief Assistance (§§ 47.25.120 — 47.25.300)
2. Aid to Families with Dependent Children Act (§§ 47.25.310 — 47.25.420)
3. Job Opportunity and Basic Skills Program (JOBS) (§§ 47.25.421 — 47.25.429)
4. Adult Public Assistance (§§ 47.25.430 — 47.25.615)
5. Food Stamp Program (§§ 47.25.975 — 47.25.990)

Housing and household statistics from the 1990 census show that for persons age 65 years and over, 74.3% of their housing units were owner occupied. Only 67.2% of housing units were owner occupied for the age group 35-64 years. In Alaska 22.1% of all households consist of one person living alone, with 13.7% of these households consisting of persons over the age of 65. The number of persons age 65 years or older living alone increased 108% from 1980-1990 from 2,758 to 5,737. The United States' 1990 figures show 39.1% of one person households are persons over the age of 65.

There is no single explanation for the large increase in Alaska's older population during the 1980s. However, the primary factor is likely the aging of the population that migrated to Alaska during the post statehood period. Alaska's median age has increased from 22.9 in 1970 to 29.4 in 1990. The United States' median age in 1990 was 32.9 years. Other factors that have contributed to keeping Alaska's older population in Alaska include improved health care and long term care facilities, elimination of Alaska's income tax, the Permanent Fund Dividend program, the Longevity Bonus program, and property and sales tax exemptions.

Table 1

Population Comparison for Persons 65 Years and Older for the State/Census Areas/Boroughs — 1980 & 1990

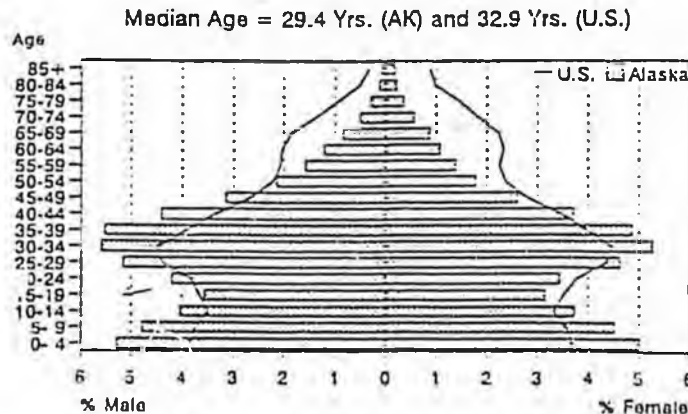
	1980	1990	Change 1980-90	Percent
Alaska	11,547	22,369	10,822	93.72
Aleutians East Borough	45	58	13	28.89
Aleutians West C.A.*	62	82	20	32.26
Anchorage Borough	3,520	8,258	4,738	134.60
Bethel C.A.	431	657	226	52.44
Bristol Bay Borough	25	42	17	68.00
Dillingham C.A.	122	205	83	68.03
Fairbanks North Star Borough	1,276	2,540	1,264	99.06
Haines Borough	78	182	104	133.33
Juneau Borough	771	1,364	593	76.91
Kenai Peninsula Borough	827	2,015	1,188	143.65
Ketchikan Gateway Borough	642	907	265	41.28
Kodiak Island Borough	255	425	170	66.67
Lake and Peninsula Borough	47	85	38	80.85
Matanuska-Susitna Borough	730	1,866	1,136	155.62
Nome C.A.	339	419	80	23.60
North Slope Borough	148	197	49	33.11
Northwest Arctic Borough	249	281	32	12.85
Prince of Wales-Outer Ketchikan C.A.	151	216	65	43.05
Sitka Borough	361	492	131	36.29
Skagway-Yakutat-Angoon C.A.	192	235	43	22.40
Southeast Fairbanks C.A.	142	223	81	57.04
Valdez-Cordova C.A.	295	463	168	56.95
Wade Hampton C.A.	178	258	80	44.94
Wrangell-Petersburg C.A.	353	507	154	43.63
Yukon-Koyukuk C.A.	308	392	84	27.27

*C.A.= Census Area

Source: 1990 Census of Population and Housing, STF1A

Alaska and U.S. Population Percent Distribution by Age and Sex 1990

Median Age = 29.4 Yrs. (AK) and 32.9 Yrs. (U.S.)



Alaska Dept. of Labor, Research and Analysis Demographics Unit

Additional Background Information

ADULT PROTECTIVE SERVICES

INCIDENCE

In the fall of 1990, the Division of Family and Youth Services in collaboration with the Older Alaskan's Commission sponsored the first Adult Protective Services Conference held in Alaska. More than 100 concerned Alaskans attended.

Dr. Sue Parkins of St. Vincent Medical Center of Toledo, Ohio, spoke on Elder Abuse: A Front Line and National Perspective. She noted that Alaska's reporting of abused and neglected elders and other vulnerable adults is higher than reporting in other states. Yet she also noted that the actual incidence of abuse and neglect to elders is believed to be much higher than the number reported in any state.

Alaska's abused and neglected vulnerable adult profile can be seen in the attached chart of statistics. Due to a transition in statistical record keeping, adult protective services reports of harm statistics after 1989 are not available.

In the 1990 conference, Dr. Parkins indicated nationally there are 9.8 incidents reported per 1000 seniors or about 10 per thousand. About one in eight cases of abuse are actually reported, so perhaps 80 cases per 1000 seniors would reflect actual incidence of abuse and neglect. National incidence data for abused disabled adults younger than age 65 is not available, however, about 1/3 of adult protectives services cases nationally and in Alaska are under age 65. Conferees set about exploring actual incidence and an Alaskan response to the problem. Rough projections done in 1990 for Alaska's elder abuse situation follow:

CITY	# SENIORS	PROJECTED ELDER ABUSE/YEAR
Statewide	20,000	1,600
Anchorage	7,300	584
Fairbanks	2,300	184
Mat-Su	1,600	128
Kenai	1,900	152
Juneau	1,200	96
Bethel	700	56
Wrangell/Petersburg	500	40

All other communities in Alaska: probably fewer than 40 cases of elder abuse.
These figures do not include abused vulnerable adults under age 65.

DEPARTMENT OF HEALTH AND SOCIAL SERVICES
Division of Family and Youth Services

Adult Protective Services Reports of Harm*

	1985	1986	1987	1988	1989	Avg.	%
Number of Reports:							
65 and over:	137		155	275	226	198	54
60 - 64	21		40	28	39	32	9
18 - 60	87		122	185	143	134	37
Sex of Victim:							
Male	85		118	185	161	137	38
Female	160		199	303	247	227	62
Type of Harm:							
Abandonment	10	11	11	17	7	11	3
Abuse	128	117	65	171	126	121	34
Economic Harm	40	69	133	127	98	93	26
Neglect	67	129	100	173	177	129	37
Relationship of Perpetrator to Victim:							
Wife	18		8	7	8	10	4
Husband	41		30	40	31	36	14
Son	40		24	43	64	43	17
Daughter	16		18	19	41	24	10
Other Male Family Member	32		10	30	34	27	10
Other Female Family Member	25		15	19	25	21	8
Other Male	31		64	46	63	51	20
Other Female	20		38	62	51	43	17
Did the Victim Request That the Investigation be Terminated?							
Yes	61		80	117	163	105	44
No	116		85	160	183	136	56
Type of Report							
Mandatory	88		123	169	151	133	67
Other	63		79	77	48	67	33
Was the Report Confirmed?							
Yes	142	202	152	150	222	174	62
No	31	94	145	124	129	105	38

REPORTS OF HARM*

	65 and older	60-65	18-59	TOTAL
FY84	(all ages combined)			72
FY85	137	21	87	245
FY86	98	39	195	332
FY87	155	40	122	317
FY88	275	28	185	488
FY89	226	39	143	408

*Due to a transition in data collection to Prober, Reports of Harm to adults data is not available after FY89.

ADULT PROTECTIVE SERVICES CLIENTS AND DFYS SERVICES

Age	FY87	FY88	FY89	FY90*	FY91*
18-59	609	577	568	362	279
60 & up	1326	1326	1272	894	846
Sex					
Female	1268	1289	1256	810	725
Male	666	656	625	446	400
Race					
AK Native	792	790	672	461	483
Black	58	59	69	42	36
Caucasian	1020	1000	976	603	511
Unknown	65	91	117	148	178
Services Turnover					
Clients Exiting System in the FY	556	438	445	177	137
Clients Began in the FY	301	487	446	122	50
Clients Continued Thru to the next FY	554	543	569	871	853
Clients Interrupted During the FY	87	47	51	2	3
Clients Entered and Exited in the FY	437	428	371	84	86
Homemaker Services					
Number of Clients	1260	1430	1363	76	61
Adult Foster Care					
Number of Clients	27	41	38	28	28
Adult Residential Care					
Number of Clients	66	69	70	77	63

*Homemaker Services were transferred to Public Health in FY90, resulting in a substantial drop in DFYS delivered homemaker services to "at risk" elders and vulnerable adults under the APS program. In addition beginning in FY90 social workers began to transition from the mainframe data system to a new system called Prober. Figures given for FY 90 and 91 are fewer than actual cases, as some cases were recorded only in the new Prober system and are not represented here.

ELDER ABUSE

WHO IS AN ELDERLY PERSON?

Under AS 47.24 an elderly person means a resident of Alaska who is 65 years of age or older.

WHAT CONSTITUTES ELDER ABUSE?

Elder abuse means the infliction of physical pain or injury that requires medical attention, or the infliction of mental anguish that requires medical attention or the deprivation by a caretaker of services which are necessary to maintain the physical and mental heath of an elderly person.

WHO IS A CARETAKER?

AS 47.24 defines a caretaker as any individual who is responsible for the care of an elderly person as a result of family relationship or who has assumed responsibility for the care of an elder person voluntarily, by contract, or by court order.

WHO SHOULD REPORT ELDER ABUSE?

Anyone who suspects that abuse may be occurring should report it. Additionally, the following persons are required to report suspected abuse within 24 hours: physicians or other licensed health care provider; mental health professionals; pharmacists; administrators of nursing homes, residential care or health care facilities; guardians/conservators; police officers; village public safety officers; village health aides; social workers; clergy; employees of a project funded by the Older Alaskans Commission; employees of a homemaker program or home health aide program; and emergency medical technicians or paramedics in the mobile intensive care program. Reports are confidential and persons reporting are immune from any civil or criminal liability.

WHERE DO I REPORT ELDER ABUSE?

Call the nearest office of the Division of Family and Youth Services. If immediate action is necessary to protect the elderly person from imminent harm, report the harm to a police officer or a village public safety officer. The police officer will take immediate action to protect the elderly person and will notify the Division.

WHAT WILL THE DIVISION OF FAMILY AND YOUTH SERVICES DO?

The social worker interviews the suspected victim to verify the report and explain possible options for resolving the problem. Together, they will decide which steps to take. It is important to remember that the social worker may act only if the elderly person consents.

WHAT RIGHTS DOES THE ELDERLY PERSON HAVE?

The elderly person has the right to privacy and self-determination and to deny the need for services. If someone is unconscious or otherwise lacks capacity to give consent, the social worker may ask the court to appoint a guardian.

WHAT IF I'M ACCUSED OF ELDER ABUSE?

The social worker would talk with you and the elderly person to determine the extent of the problem and explore possible solutions. Depending on the circumstances, the elderly person may elect to file charges. In most instances however, the problems can be resolved with adequate support services.

WHAT HAPPENS AFTER THE INVESTIGATION?

The Division only provides services with the consent of the elderly person. If the person lacks capacity to give consent, or requests Division assistance, the social worker will provide supportive services to reduce stress and prevent further abuse.

WHAT TYPES OF SERVICES WOULD BE AVAILABLE TO THE ELDERLY PERSON AND HIS FAMILY?

Individual and family counseling, respite care, homemaker or home health aide services, transportation, home delivered meals, day activity center, adult residential care, adult foster homes, etc., may be provided. However, not all services are available in all communities. Occasionally it is necessary to request the appointment of a conservator or guardian to safeguard the individual and his resources.

WILL OTHER PEOPLE KNOW?

All information will be kept confidential. The elderly person must give consent for information to be shared.

ADULT PROTECTIVE SERVICES

The state agency responsible to carry out adult protective services is the Division of Family and Youth Services or grantee in the case on Manniilaq or Kawarek. A protective services response generally should include the following activities:

(1) the operation of a system to receive reports and referrals of suspected elder abuse, as defined by state law (i.e., abandonment, abuse, neglect, and economic harm); younger vulnerable adults are included under the division's Title XX Plan;

(2) the investigation of cases of maltreatment by gathering evidence from the victim, family members, appropriate professionals, neighbors and friends, and others determined to be appropriate;

(3) the substantiation or unsubstantiation of abuse reports based on evidence and agency policy;

(4) the provision of emergency services to victims or their family members, as needed and as resources permit;

(5) the administration of assessments, tests, or evaluations, as needed;

(6) the preparation of legal procedures, as needed;

(7) the referral of cases to treatment and rehabilitation programs, substitute care programs, long-term care programs, and law enforcement agencies, as appropriate;

(8) arrangements for the removal of the victim or the perpetrator from the home, when necessary;

(9) the provision of support, protective, and advocacy services;

(10) the training of agency staff, related professions, and volunteers;

(11) the administration of public awareness programs; and

(12) the collection of statistics for clients and services.

There are currently three workers specializing in Adult Protective Services (two in Anchorage and one in Fairbanks). In all other areas of the state adult protective services are provided by staff who are assigned to provide protective services to both children and adults.

by
National Association of State Units on Aging

Individual and collective advocacy is the essential core of the Older Americans Act and a central mission of the network of state and area agencies that the Act has established across the nation. The OAA network's primary purpose is to assure that individual older people have their civil rights, autonomy and dignity protected, their claims to entitlements honored and their contracts and covenants for care and benefits fulfilled. This responsibility is paramount with respect to those who are unable to secure and protect their own interests. This advocacy mission calls for enhanced federal, state and community leadership and action to design and implement comprehensive and coordinated elder rights systems for older persons.

In our increasingly complex society, we find continuing and growing evidence of threats to and violation of the rights of older persons:

- ❑ The incidents of elder abuse and exploitation in domestic settings are estimated at approximately 1.5 million per year and only 1 in 8 individuals receives protective services. Law enforcement is reluctant to prosecute even serious cases. The interventions of key community services which address alcohol and substance abuse, domestic violence, protective service and mental health are seldom linked. Health care professionals, financial institutions and other important gatekeepers are not adequately involved in prevention, reporting and assistance activities.

- ❑ Approximately 2 million older persons reside in an estimated 90,000 long term care facilities with growing reports of abuse, loss of autonomy and complaints concerning the quality of care. Although enforcement of protections has been strengthened under OBRA, the full scope and spirit of the Nursing Home Reform Act has yet to be realized. The public is not knowledgeable of these new protections; residents are not aware of avenues of redress.

- ❑ In growing numbers, older persons lose their rights often with no due process safeguards. Guardianship may be awarded with little or no consideration of alternative services or limited orders. The availability of training or support services for guardians and the courts are limited. Required reporting is not reviewed and the courts have little capacity to exercise oversight.

- ❑ More than any other age group older persons rely on increasingly complex and

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changing public benefit programs, services and protections to meet income, housing, health and supportive service needs. Yet millions of older individuals eligible for benefits under the Supplemental Security Income (SSI), food stamp, Medicaid and the Qualified Medicare Beneficiaries (QMB) programs are not currently enrolled. Older people are shifted among various providers and levels of government in order to apply for or receive benefits. Restrictive eligibility criteria, exclusionary and complex application rules and appeal procedures deter too many eligible older people from pursuing benefits. In addition, insensitivity to racial and cultural issues further impedes access to benefits for many older persons.

- ❑ In the paramount area of health care, millions of older people are denied benefits to which they are entitled under the Medicare program. Claims processing errors, denials of benefits, provider over billing and inconsistent Medigap coverage add substantially to the confusion older persons face in attempting to pay for their health care and results in substantial and unnecessary out-of-pocket costs.

- ❑ Many older persons lose their autonomy and their financial, legal, or personal rights through actions outside the formal legal system. Family members, caregivers and medical and social service providers often assume power and control over the older person's choices and resources, both through quasi- legal transfers of authority and through failure to fully inform elders. As a result elders can not make a truly informed and dignified choice about services, treatments, residential choices, and expenditures of their resources.

- ❑ A growing number of private sector services and products are targeted to older consumers. Fraud and exploitation are on the rise in the marketing of insurance, retirement housing, investment and financial planning, private care management, homecare and medical services and supplies.

- ❑ Opportunities for employment are constricted by discriminatory practices. The recent and dramatic 12% increase in the numbers of age discrimination cases brought before the Equal Employment Opportunity Commission in 1991 illustrates that discriminating practices continue to force older people into involuntary retirement, low wage jobs, and limited employment choices.

These growing and increasingly complex threats to, and violation of, the rights of older persons call for the development of a comprehensive system of programs, services, and protections at the community, state and national levels which assist older persons to:

- ➢ Understand and exercise their rights.

- ➢ Exercise choice through informed decisionmaking.

- ➢ Benefit from support and opportunities promised by law.

- ➢ Maintain autonomy consistent with capacity.

- ➢ Resolve grievances and disputes through appropriate representation and assistance.

These emerging elder rights needs have resulted in recent years in numerous initiatives at the federal, state and community levels. Protections in federal law provide an important foundation for the rights of vulnerable citizens. The Older Americans Act, the Civil Rights Act of 1990, the Americans with Disabilities Act, the National Affordable Housing Act, the Spousal Impoverishment Protections, the Nursing Home Reform Amendments, the Age Discrimination Act, the Employee Retirement Income Security Act, the Age Discrimination in Employment Act -- all include provisions to protect the rights of older persons. However, these laws are difficult to understand, not enforced uniformly and pose a significant challenge for older persons who want to take advantage of their protections.

At the state level, laws have addressed new issues such as guardianship reform, insurance regulation, consumer protection, financial exploitation, surrogate decisionmaking, advance directives, board and care regulation, and elder abuse intervention. However, progress in these areas has been uneven and incremental, often due to a lack of coordination among agencies and a lack of available resources to ensure enforcement and compliance.

At the community level, the demand for services provided under the long term care ombudsman program, legal assistance, insurance and benefits counseling, elder abuse/protective service, employment and consumer education initiatives far exceeds the capacity to respond. Though they constitute the vanguard for elder rights, these programs are severely constricted by limited resources.

Thus, today the rights of older persons are addressed by a collection of problem specific laws, programs and services — each with its own source of limited funds, its own plan, its own administrative mechanisms, delivery system and, ultimately, its own beneficiaries. While such specialization has merit, it also contributes to the current situation which:

- discourages coordination among the various laws/programs/services;
- remains unresponsive to the vulnerable older person with multiple problems;
- hinders effective management;
- encourages competition for resources;
- lacks flexibility in responding to changing needs and priorities;
- frustrates targeting of resources;
- discourages innovation, except around service specific issues;
- diffuses responsibility and accountability for advocacy; and
- duplicates outreach and access.

NASUA recommends that a systematic effort be undertaken across the nation to address the current and emerging threats to the rights of older persons; to assess the ability of current laws, programs and services to address those threats; to improve the effectiveness of those current protections and interventions; and to make recommendations for new laws and programs as well as new resource, design and implementation strategies. The success of

such an undertaking will require leadership by the Older Americans Act network and other appropriate agencies and organizations at the federal, state and community levels working in partnership to design and develop a truly comprehensive, coordinated and responsive elder rights system for older persons.

Further, NASUA **recommends** that this national effort be built upon the following framework for action:

- ❑ Establish consumer centered elder rights programs which facilitate choice, promote autonomy and support decisionmaking with a minimum of administrative intrusion or confusion.
- ❑ Inform and empower older persons to act on their own behalf in exercising their rights.
- ❑ Give priority to older persons unable to secure benefits to which they are entitled or protect their own interests.
- ❑ Establish a full continuum of laws, programs and services responsive to elder rights needs ranging from information to legal representation and advocacy.
- ❑ Secure adequate resources to supply needed services and to enforce laws and protections.
- ❑ Identify and address emerging elder rights issues and needs.
- ❑ Ensure that new elder rights initiatives be coordinated with and built upon the strengths of the existing infrastructure.
- ❑ Identify and respond to needs for collective advocacy on behalf of older persons.
- ❑ Respond flexibly to the complex rights and diverse needs of older persons.

The way in which each state will use this framework to build an effective elder rights system will vary according to its elders' needs, current structures and prevailing customs. However, across the country each state agency on aging must assume the primary leadership role in advocating for and designing such a system. It is the aging network which must serve as a vehicle to convey policy relevant information to older people; involve older persons and their families in expressing their values and preferences about the principles, benefits and organization of elder rights systems; and be a forum through which empowered and informed older people can influence the social, economic and political directions of their communities, states and country.

NASUA recognizes the complexity of this undertaking and the need for partnerships among a wide and diverse group of organizations and agencies to quickly advance the elder rights agenda of older persons. NASUA commits itself to this important partnership in meeting the challenges of developing national, state and community strategies to address the elder rights needs of the older population.

NASUA Board of Directors
Adopted March 13, 1992

HB 4: **"An Act adding as an aggravating factor at sentencing that a victim was elderly or disabled; and relating to failure to report harm or assaults of the elderly or disabled."**

HB 4 amends the centralized licensing statutes (AS 08.01) by adding a new section allowing the department or a board to pursue disciplinary proceedings or sanctions against a licensee who has been convicted of abusing an elderly or disabled individual. The bill also mandates the court system to notify the licensing authorities of a conviction.

To promote the safety and welfare of Alaska consumers in ensuring services are delivered by competent, qualified licensees, the provisions of HB 4 enhance public safety by allowing disciplinary action to be taken against licensees convicted of abusive behavior. The result of this bill anticipates appropriate action to be taken by licensing authorities. The Division of Occupational Licensing has never been staffed to perform the now mandated procedure of monitoring licensees once rehabilitated. At the expense of investigation caseload, the division has deducted one position to act as the monitor. The current caseload is 60 to 70 licensees who have had disciplinary action taken, causing the licensee to be placed on probation monitoring for impaired practitioners. The number of cases per monitor is an unusually high number to be monitored by one position. A comparison of cases in other states finds similar positions carry a caseload of approximately 6 to 25 cases per individual monitor.

To prove and monitor abusive-type cases will require sufficient staff resources to accomplish the tasks appropriately. Therefore, although the department supports HB 4, additional staff will be necessary to properly fulfill the mandates of HB 4.

Gary Bell for

Paul Fuhs, Commissioner

3-3-93

Date

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Position Paper - CED