HB
212

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. HB 212

Revision Date:
Title: "An Act relating to a factor in aggravation of a presumptive term..
Sponsor: Representative MacLean
Requestor: House Judiciary

Dept. Affected: Corrections
BRU: Institutions
Component: Institutions
1860
COMPONENT SERIAL NO. 1860

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-

CAPITAL						

REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: $ 0

ANALYSIS: (Attach a separate page if necessary)

Pleas[illegible] ee the attached page.

Prepared by: Dana LaTour D LaTour
Division: Commissioner's Office
Phone: 465-3376
Date: 3-31-93

Approved by Commissioner: DL for Lloyd G. Rupp
Agency: Corrections
Date: 3-31-93

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(Rev 11/92) 93fisno.xls/OBR

HB 212
"An Act relating to a factor in aggravation of the presumptive term of a criminal sentence, and prohibiting the referral of a sentence based on application of that factor to a three-judge panel as an extraordinary circumstance.

Fiscal Note Analysis

This legislation adds as an aggravating factor to be considered by the sentencing court if the offense was sexual abuse of a minor, and the offender was residing in the same household as the victim, or if the offender occupied a position of authority in relation to the victim.

After reviewing the sentence lengths given to offenders of these crimes and discussing it with representatives of the Department of Law, it appears that judges generally give longer sentences to offenders convicted of these crimes than are given to offenders committing crimes in similar felony groups.

For example, the average sentence length for a first time offender of a class B felony is one year. By comparison, a first time offender convicted of sexual abuse of a minor in the 2nd degree is about 2 years.

Since it appears that offenders may already receive longer than average sentences for sex crimes against minors, and since consideration of an aggravating factor may not necessarily result in a longer sentence, the Department of Corrections has prepared a zero fiscal note.

FISCAL NOTE

STATE OF ALASKA **BILL NO.** HB 212
1993 LEGISLATIVE SESSION

Revision Date: March 22, 1993
Title: "An Act relating to a factor in aggravation of the presumptive term of a criminal sentence..."
Sponsor: Representative MacLean
Requestor: Representative MacLean

Department Affected: Department of Law
BRU: Prosecution
Component: All

COMPONENT SERIAL NO. 0085 through 0090

EXPENDITURES/REVENUES:

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

CAPITAL						

REVENUE FUND SOURCE:						

FUNDING:

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

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

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

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Prepared by: Richard I. Peques, Director
Phone: 465-3672
Division: Administrative Services Division
Date: March 22, 1993

Approved by Commissioner: Charles E. Cole, Attorney General
Agency: Department of Law
Date: March 22, 1993

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FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. HB 212

ANALYSIS (Continued):

This bill amends AS 12.55.155(c) to provide that when the offense was sexual abuse of a minor in any degree and the victim at the time of the offense resided in the same household as the offender, or when the offender occupied a position of authority in relation to the victim, the sentencing court shall consider these factors and may aggravate the presumptive term set out in AS 12.55.125. The bill also amends AS 12.55.165(b) to provide that a court may not refer a case to a three judge panel based on the defendant's potential for rehabilitation if the court finds that either of these same factors is present. These sentencing provisions occur after the conviction of a defendant and, therefore, there should not be a fiscal impact for the Department of Law.

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. HB 212

Revision Date:
Title: "An Act relating to a factor in aggravation of the presumptive . . ."
Sponsor: Representative MacLean
Requestor: House Judiciary

Dept. Affected: Administration
BRU: Public Defender
Component: Public Defender
COMPONENT SERIAL NO. 1631

Expenditures/Revenues: (Thousands of Dollars)

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

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: $ none

ANALYSIS: (attach a separate page if necessary.)

Prepared By: John Salemi, Public Defender
Phone: 274-1684
Division: Public Defender Agency
Date:

Approved by Commissioner: Nancy Bear Usera
Date: 3/19/93
Agency: Department of Administration

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FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

BILL NO. HB 212

Revision Date:
Title: "An Act relating to a factor in aggravation of the presumptive . . ."
Sponsor: Representative MacLean
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:

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: None

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: Brant McGee, Public Advocate
Division: Office of Public Advocacy
Phone: 274-1384
Date:

Approved by Commissioner: Nancy Bear Usera NBU
Agency: Administration
Date: 5/19/93

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HOUSE COMMITTEE REPORT

(7)
Date Referred: March 10, 1993

FURTHER REFERRALS: Finance

Date of Committee Action: 4-2-93

The JUDICIARY Committee considered: HB 212

HOUSE BILL NO. 212 SENTENCING:AGGRAVATING FACTORS

"An Act relating to a factor in aggravation of the presumptive term of a criminal sentence, and prohibiting the referral of a sentence based on application of that factor to a three-judge sentencing panel as an extraordinary circumstance."

RECOMMENDATIONS:
be replaced with CS HB 212 (JUD) [X] 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)
[ ] fiscal impact ______
5 [X] zero fiscal note LAW, COURT ADMIN (2), CORRECTIONS,

APPROVES PREVIOUS: (Dept/Date)
[ ] fiscal note(s) ______
[ ] zero fiscal note(s) ______

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Jeannette James	✓	Jim Nordlund		✓	
Pete Kott	✓				
[illegible]	✓				
Brian S. Porter	✓				
Gail Phillips	✓				

Brian Porter
CHAIRMAN'S SIGNATURE

House Judic. Comm. amends HB 212 as shown: #1

1 pecuniary gain and the risk of prosecution and punishment for the conduct is slight;

2 (17) the offense was one of a continuing series of criminal offenses

3 committed in furtherance of illegal business activities from which the defendant derives

4 a major portion of the defendant's income;

5 (18) the offense was a ~~crime~~ felony

6 (A) specified in AS 11.41 and was committed against a spouse,

7 a former spouse, or a member of the social unit comprised of those living

8 together in the same dwelling as the defendant;

9 (B) specified in AS 11.41.410 - 11.41.460 and was committed

10 against a minor, and the defendant has engaged in the same or similar conduct

11 involving the same or another victim who was a minor; or

12 (C) specified in AS 11.41.410 - 11.41.425 or 11.41.455, and the

13 defendant has previously engaged in conduct covered by one of those sections

14 involving the same or another victim; **or**

15 **(D) specified in AS 11.41.434, 11.41.436,** or **11.41.438, ~~or~~**

16 **~~11.41.440~~ and the**

17 **~~(i) victim at the time of the offense resided in the~~**

18 **~~same household as the offender; or~~**

19 **~~(ii)~~ offender occupied a position of authority in**

20 **relation to the victim; in this subparagraph, "position of authority"**

21 **has the meaning given in AS 11.41.470;**

22 (19) the defendant's prior criminal history includes an adjudication as

23 a delinquent for conduct that would have been a felony if committed by an adult;

24 (20) the defendant was on furlough under AS 33.30 or on parole or

25 probation for another felony charge or conviction that would be considered a prior

26 felony conviction under AS 12.55.145(a)(2);

27 (21) the defendant has a criminal history of repeated instances of

28 conduct violative of criminal laws, whether punishable as felonies or misdemeanors,

29 similar in nature to the offense for which the defendant is being sentenced under this

30 section;

31 (22) the defendant knowingly directed the conduct constituting the

HOUSE COMMITTEE REPORT

(7)
Date Referred: March 10, 1993 FURTHER REFERRALS: Finance

Date of Committee Action: 4-2-93

The JUDICIARY Committee considered: HB 212

HOUSE BILL NO. 212 SENTENCING:AGGRAVATING FACTORS

"An Act relating to a factor in aggravation of the presumptive term of a criminal sentence, and prohibiting the referral of a sentence based on application of that factor to a three-judge sentencing panel as an extraordinary circumstance."

RECOMMENDATIONS:
be replaced with CS HB 212 (JUD) [X] 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) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact ______ [ ] fiscal note(s) ______

5 [X] zero fiscal note ADMIN (2), LAW, COURT, CORRECTIONS, [ ] zero fiscal note(s) ______

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
Jeannette James	✓	Jim Nordlund		✓	
Pete Kott	✓				
[illegible]	✓				
Brian D. Porter	✓				
Gail Phillips	✓				

Brian Porter
CHAIRMAN'S SIGNATURE

HB 217 Native Corporation Dividends to Minors
HJR 27 Desecration of U. S. Flag
HB 231 Aggravating/Mitigating Factors/Sex Crimes

Rep. Brian Porter, Chairman

House Judiciary Committee

Date: April 2, 1993
Place: Capitol Room 120

Subject of Meeting: HB 54 Telephone Consumer Protection; HB 212 Sentencing: Aggravating Factors

HB 214 Disclosure of a Minor's Record by Parent

Please Print Name	Representing	Business/Personal Mailing Address	Zip	(H) Phone	(W) Phone	Do you Want to Testify?	Which Subject/ Which Bill?
Randall Hines	DHSS	Box 110630	99811	—	465-3187	(Y) N	HB 217
Marcia McKenzie	CDVSA	Box 111200	99811		465-4356	(Y) N	HB 54
Susan Fowler	Ombudsman	Box 113000	99811		5581	(Y) N	HB 214
Kay Brown	bill sponsor					(Y) N	HB 54
Margot Knuth	Law - Crim	113000			4049	(Y) N	HB 212 HB 231
Janine Reep	Law - Civil	"			3603	to answer questions Y N	HB 214
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	

Page __ of__

ALASKA STATE LEGISLATURE

Representative Eileen Panigeo MacLean
Co-Chair House Finance Committee
P.O. Box 830
Barrow, Alaska 99723
(907) 852-7111

WHILE IN JUNEAU
State Capitol, Room 507
Juneau, Alaska 99801-1182
465-4833
465-4525
463-3241 FAX

HOUSE OF REPRESENTATIVES

District 37

North Slope Borough

Anaktuvuk Pass
Atqasuk
Barrow
Kaktovik
Nuiqsut
Point Hope
Point Lay
Wainwright

Northwest Arctic Borough

Ambler
Buckland
Deering
Kiana
Kivalina
Kobuk
Kotzebue
Noatak
Noorvik
Selawik
Shungnak

Seward Peninsula

Brevig Mission
Diomede
Shishmaref
Teller
Wales

TO: Representative Brian Porter, Chair
House Judiciary Committee

FROM: Representative Eileen MacLean

DATE: April 1, 1993

RE: House Bill 212

This memo requests a hearing for House Bill 212 in the House Judiciary Committee.

This bill accomplishes two ends. It adds an element of the crime of sexual abuse against a minor to the list of aggravating factors in our statutes. It also prevents this kind of crime from being referred to the three judge panel for consideration of an altered sentence.

The crime being addressed in this legislation is found in Alaska Statutes 11.41.434, 11.41.436, 11,41,438 and 11.41.440. These are the sexual abuse of a minor statutes, first through fourth degree. The bill addresses a particular element of these crimes- when the offender resides in the same household or occupies a position of authority in relation to the victim. Of note, as a drafting matter, it is not appropriate to have AS 11.41.440 included in this legislation as it is a misdemeanor offense not subject to presumptive terms. I recommend the bill be amended to omit reference to this crime.

The following scale demonstrates the presumptive terms for the first through third degree offenses:

Sex Abuse of Minor statutory sentence (in years)

	1°	2°	3°
1st offense	8	1-4 (benchmark)	none
2nd offense	15	4	2
3rd offense	25	6	3

Sexual abuse of a minor is an offensive societal crime in itself, but more so when the adult is in a position of authority to the child. In my view, the importance of condemning this kind of behavior by way of limiting statutory direction to the judicial branch is important. The strictest of sentencing circumstances should be applied here.

The bill also prevents referral of these cases to the three judge sentencing panel. This removes the possibility of the court giving more lenient sentences to those accused of these crimes.

Enclosed with this memorandum are statutes that cover this kind of crime, the list of aggravators and mitigators, statutes that refer to the three judge panel and a copy of the State v Jackson case. Also enclosed is a resolution from the North Slope Borough School District. Although that resolution requests making this kind of crime a first degree felony, I felt a better way to meet the request was to add the crime to the aggravating factors.

Fiscal notes have been requested from the Departments of Law, Administration (Public Defender Agency and Office of Public Advocacy) Corrections and the Alaska Court System.

Thank you for your consideration.

DIVISION OF LEGAL SERVICES

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STATE OF ALASKA

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Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

M E M O R A N D U M   March 30, 1993

SUBJECT: Purpose and use of three-judge criminal sentencing panels

TO: Representative Eileen MacLean
ATTN: Rena Bukovich

FROM: Jack Chenoweth
Legislative Counsel

This memo is by way of response to your request of last week for a brief explanation of the purpose and use to be made of the three-judge criminal sentencing panel. Use of the panel is authorized by AS 12.55.175.

As I understand, under the former criminal code--in place in this state until 1980--sentencing authority was vested principally in the trial judge who would impose a criminal sentence generally within very broad statutory limits. The revised criminal code put into place a more detailed sentencing framework that set down tougher, more regular guidelines for imposing criminal sentences. Under the revised code, with the exception of particularly serious crimes, the sentencing judge continues to enjoy considerable discretion in sentencing first felony offenders. However, as to subsequent or repeat felony offenders, the statutes establish a series of presumptive sentences that the sentencing judge must follow, within constraints.

One set of constraints applicable to presumptive sentences goes to the finding and application of certain factors. The sentencing judge may increase a presumptive sentence because of the presence of so-called aggravating factors or reduce a presumptive sentence because of the presence of mitigating factors.

The second set of constraints under the revised Criminal Code is the referral of a sentence to a three-judge sentencing panel. That referral may be made if, under AS 12.55.165, the judge determines that manifest injustice would result from following the strict presumptive sentencing scheme. [1] The sentencing panel apparently has

---

[1] AS 12.55.165(a), captioned "Extraordinary Circumstances," provides:

(continued...)

two choices. If, after consideration of the record and opportunity for argument, the three-judge panel agrees with the sentencing court that a departure from strict application of the adjusted presumptive sentence is necessary, the panel may impose a different sentence. If the three-judge sentencing panel does not agree that a departure is necessary, it is to return the matter to the sentencing judge so that he or she may carry through and impose a sentence. So, in Heathcock v. State, 670 P.2d 1155 (Alaska App. 1983), the Court of Appeals observed:

> ... [A] departure from the presumptive sentencing scheme will not turn on the evaluation of one judge. Rather, a departure from the presumptive sentencing scheme under the provisions of AS 12.55.165 and AS 12.55.175 will involve the decision of four judges. First, the original trial judge makes the decision to refer the matter to the three-judge panel. Then the three-judge panel, if it agrees with the evaluation of the trial judge, imposes sentence.

670 P.2d at 1158.

In 1992, the Seventeenth Legislature started to take away from the authority of the trial court judge to make referrals to the three-judge panel. Those limitations have been set out in AS 12.55.165(b) and are in the nature of cross-references to aggravating factors that do not warrant referral of a criminal sentence to a three-judge panel. [2] By my reading of this new provision, if these aggravating factors are present, then the sentencing judge must determine, among other factors, the defendant's prospects for rehabilitation and enter a sentence. The judge may not find that "manifest injustice" will occur, so that the "extraordinary" remedy of referral of the matter to the sentencing panel is not available.

JBC:gc:mi
93-288.glc

---

[1](...continued)

> (a) If the defendant is subject to sentencing under AS 12.55.125(c), (d), (e), or (i) [, the presumptive sentencing subsections,] 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.

[2] Under AS 12.55.165(b):

> (b) In making a determination under (a) of this section, the court may not refer a case to a three-judge panel based on the defendant's potential for rehabilitation if the court finds that a factor in aggravation set out in AS 12.55.155(c)(2), (8), (10), (12), (15), (17), (18)(B), (20), (21), or (28) is present.

FISCAL NOTE

STATE OF ALASKA
1993 LEGISLATIVE SESSION

Bill No. HB 212

Revision Date:
Title: Sentencing: Aggravating Factors
Sponsor: MacLean
Requestor:

Department Affected: Alaska Court System
BRU: Trial Courts
Components:
COMPONENT SERIAL NO. 768

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
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	0.0	0.0	0.0	0.0	0.0	0.0
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 (FY 93) impact: None

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: C. S. Christensen III, Staff Counsel   Phone: 264-8228
Division: Alaska Court System   Date: 04/01/93

Approved by: Arthur H. Snowden, II, Administrative Director
Agency: Alaska Court System   Date: 04/01/93

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

Rev 1/93

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LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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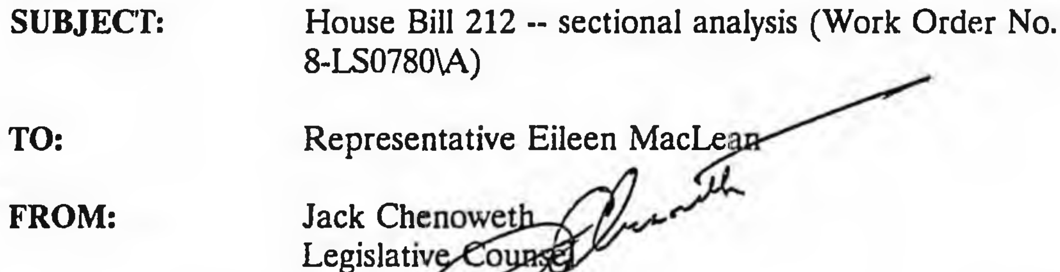
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

M E M O R A N D U M March 9, 1993

SUBJECT: House Bill 212 -- sectional analysis (Work Order No. 8-LS0780\A)



TO: Representative Eileen MacLean

FROM: Jack Chenoweth
Legislative Counsel

You have introduced House Bill 212 and, through staff, have asked me to prepare a sectional analysis of the measure.

To reduce or eliminate disparity in criminal sentences, the criminal procedure code, AS 12, subjects offenders convicted of certain specified crimes to presumptive sentences. Presumptive sentences may be extended or reduced if the sentencing judge, by a decision based on clear and convincing evidence, identifies factors in aggravation or factors in mitigation of the sentence. AS 12.55.155(c) identifies a series of factors to be considered by the court in aggravation or extension of a presumptive sentence. **Bill section 1** amends AS 12.55.155(c)(18) by adding a new subparagraph under which the court may consider, as a factor in aggravation of a criminal sentence based on a conviction for sexual abuse of a minor in any degree (AS 11.41.434 - 11.41.440), evidence that the victim of the offense resided in the same household as the offender or evidence that the offender occupied a position of authority over the victim. The bill section offers a definition of the phrase "position of authority" by cross-reference to a definition of that term in the criminal code.

The criminal procedure code also provides for referral of certain criminal sentences by the sentencing judge to a three-judge sentencing panel. Under AS 12.55.165(a)

> (a) If the defendant is subject to sentencing under [a presumptive sentencing provision] and the court finds by clear and convincing evidence that manifest injustice would result 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.

However, subsection (b) of that section, added in 1992, limits the ability of the sentencing court to make a referral of a sentencing decision to a three-judge review panel in cases involving the application of certain aggravating factors. The amendment to AS 12.55.165(b) made by **bill section 2** places the aggravating factor added in the previous bill section to the list of aggravating factors whose application would not allow a sentencing judge to make a referral to a sentencing panel.

JBC:pl
93-176.plm

NORTH SLOPE BOROUGH SCHOOL DISTRICT

Box 169 • Barrow, Alaska 99723 • (907) 852-5311 • FAX (907) 852-5984

Patsy Aamodt, Superintendent

Nunamiut Wolves
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Alaska 99721
(907) 661-3226
FAX (907) 661-3402

Atqasuk Eagles
Meade River School
Atqasuk, Alaska 99791
(907) 633-6315
FAX (907) 633-6215

Barrow Whalers
Barrow High School
Pouch 8950
Barrow, Alaska 99723
(907) 852-8950
FAX (907) 852-8969

BMS Wolves
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Arctic Fox
Fred Ipalook
Elementary School
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(907) 852-4711
FAX (907) 852-4713

Kaveolook Rams
Harold Kaveolook School
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Kaktovik, Alaska 99747
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FAX (907) 640-6718

Nuiqsut Trappers
Trapper School
Nuiqsut, Alaska 99789
(907) 480-6712
FAX (907) 480-6621

Tikigaq Harpooners
Tikigaq School
Box 148
Point Hope, Alaska 99766
(907) 368-2662 or 2663
FAX (907) 368-2770

Cully Qavviks
Cully School
Point Lay, Alaska 99759
(907) 833-2311
FAX (907) 833-2315

Alak Huskies
Alak School
Box 10
Wainwright, Alaska 99782
(907) 763-2541
FAX (907) 763-2550

March 30, 1993

The Honorable Brian Porter, Chairman
Judiciary Committee
Alaska State House of Representatives
Juneau, Alaska 99811

Dear Representative Porter:

I support House Bill 212 which amends the Alaska Statutes.

It is very important that people in positions of authority over minor children not be allowed to abuse that authority.

Thank you. If I can do anything to assist you in passing this legislation, please contact me.

Sincerely,

Pat Aamodt
Superintendent

PAA/cms

cc: Senator Al Adams
cc: Representative Eileen MacLean

North Slope Borough School District

RESOLUTION 93-12
AMENDMENT TO TITLE ELEVEN
OF THE ALASKA STATUTES

WHEREAS the North Slope Borough School District is strongly committed to the education and safety of its students; and

WHEREAS the NSBSD and the people of Alaska entrust the education and safety of their students to the teachers of the State; and

WHEREAS a breach of that trust involving the sexual contact of a student by a teacher causes irreparable harm to the student and society and, further, undermines the educational mission of the NSBSD and the State of Alaska; and

WHEREAS the NSBSD does not believe the criminal code sufficiently addresses sexual contact between a teacher and a student and, further, that likely punishments for teachers who have sexual contact with students who have been entrusted to them by the State and their families neither sufficiently reflects the trauma suffered by the student and society nor the intolerance which the people of the State of Alaska have for such conduct.

NOW, THEREFORE, BE IT RESOLVED that the NSBSD Board of Education strongly urges the Legislature of the State of Alaska to amend the criminal code (Title 11) so as to designate sexual contact of a student by a teacher as sexual abuse of a minor in the first degree; and

BE IT FURTHER RESOLVED that the Superintendent shall take such action as is necessary to make known and urge the immediate adoption of this position of the NSBSD to the Legislature and the Association of Alaska School Boards and the Alaska Association of School Administrators

Introduced: 2/09/93

Adopted: 2/09/93

Edith Vorderstrasse, Acting President, Board of Education

Pat Aamodt, Superintendent

ery charges were properly joined, where the state's theory of the murder, kidnapping, and robbery offenses was that defendants committed the murder and carried out the kidnapping and robbery in defense of their cocaine distribution business. Mathis v. State, 778 P.2d 1161 (Alaska Ct. App. 1989).

Sexual assault and kidnapping, etc. Convictions for kidnapping and sexual assault do not merge. Yearty v. State, 805 P.2d 987 (Alaska Ct. App. 1991).

Sentences upheld.

In accord with first paragraph. Yearty v. State, 805 P.2d 987 (Alaska Ct. App. 1991).

A total term of twenty-five years with ten years suspended was not excessive where sentence represented conviction of one class A felony (convictions of alternative counts of attempted kidnapping were merged into a single count), three class C felonies (third-degree assault), and two class A misdemeanors (reckless endangerment); this was so under the circumstances of this case, even though defendant was a first offender. Ramsey v. State, Ct. App. Op. No. 1227 (File No. A-2610), ___ P.2d ___ (1992).

Cited in Brandon v. State, 778 P.2d 221 (Alaska Ct. App. 1989).

Sec. 11.41.320. Custodial interference in the first degree.

NOTES TO DECISIONS

Prosecution not barred. — Alaska prosecution for custodial interference, based on defendant's act of taking his son out of the state on or about August 2, 1988, was not barred by an Arizona conviction for custodial interference on or about March 9, 1990, and based upon defendant's act of keeping his son from the lawful custody of the son's natural mother. The two charges encompassed different acts and could support different charges. Seaman v. State, 826 P.2d 907 (Alaska Ct. App. 1992).

Sec. 11.41.370. Definitions.

NOTES TO DECISIONS

Quoted in Alam v. State, 793 P.2d 1081 (Alaska Ct. App. 1990).

Article 4. Sexual Offenses.

Section
410. Sexual assault in the first degree
420. Sexual assault in the second degree
425. Sexual assault in the third degree
434. Sexual abuse of a minor in the first degree
436. Sexual abuse of a minor in the second degree
438. Sexual abuse of a minor in the third degree
440. Sexual abuse of a minor in the fourth degree
455. Unlawful exploitation of a minor
470. Definitions

Sec. 11.41.410. Sexual assault in the first degree. (a) An offender commits the crime of sexual assault in the first degree if

(1) the offender engages in sexual penetration with another person without consent of that person;

(2) the offender attempts to engage in sexual penetration with another person without consent of that person and causes serious physical injury to that person;

(3) the offender engages in sexual penetration with another person

(A) who the offender knows is mentally incapable; and

(B) who is entrusted to the offender's care

(i) by authority of law; or

(ii) in a facility or program that is required by law to be licensed by the Department of Health and Social Services; or

(4) the offender engages in sexual penetration with a person who the offender knows is unaware that a sexual act is being committed and

(A) the offender is a health care worker; and

(B) the offense takes place during the course of professional treatment of the victim.

(b) Sexual assault in the first degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 3 ch 166 SLA 1978; am § 8 ch 102 SLA 1980; am § 6 ch 143 SLA 1982; am § 10 ch 78 SLA 1983; am § 1 ch 96 SLA 1988; am § 7 ch 4 SLA 1990; am § 6 ch 79 SLA 1992)

Effect of amendments. — The 1990 amendment, effective February 2, 1990, deleted "Being any age" at the beginning of paragraphs (a)(1) and (a)(2); added "or" at the end of paragraph (a)(2); deleted "Being over the age of 18" at the beginning of paragraph (a)(3); and made a minor change in punctuation.

The 1992 amendment, effective September 14, 1992, in subsection (a), substituted "offender" for "person" and "defendant" throughout the subsection, added paragraph (4), and made related stylistic changes.

NOTES TO DECISIONS

I. General Consideration.

I. GENERAL CONSIDERATION.

Convictions for two separate offenses did not constitute double jeopardy. — Where evidence showed that defendant had slightly penetrated the victim's vagina one evening and forced her to perform fellatio on him the next morning, the two acts were sufficiently distinct, for double jeopardy purposes, to support convictions for two separate offenses. Kepley v. State, 791 P.2d 1020 (Alaska Ct. App. 1990).

Merger of sexual assault and sexual abuse convictions. — Defendant's convictions for sexually assaulting a twelve year old boy and sexually abusing the boy merged, where a single act of sexual penetration with a child could not properly support separate sentences and convictions for both offenses. Yearty v. State, 805 P.2d 987 (Alaska Ct. App. 1991).

Sexual assault and kidnapping, etc. Convictions for kidnapping and sexual assault do not merge. Yearty v. State, 805 P.2d 987 (Alaska Ct. App. 1991).

Sentence upheld.

See Fagan v. State, 779 P.2d 1258 (Alaska Ct. App. 1989); Yearty v. State, 805 P.2d 987 (Alaska Ct. App. 1991).

Quoted in Marcy v. State, 823 P.2d 660 (Alaska Ct. App. 1991).

Cited in Parker v. State, 779 P.2d 1245 (Alaska Ct. App. 1989); Capwell v. State, 823 P.2d 1250 (Alaska Ct. App. 1991).

Sec. 11.41.420. Sexual assault in the second degree. (a) An offender commits the crime of sexual assault in the second degree if

(1) the offender engages in sexual contact with another person without consent of that person;

(2) the offender engages in sexual contact with a person

(A) who the offender knows is mentally incapable; and

(B) who is entrusted to the offender's care

(i) by authority of law; or

(ii) in a facility or program that is required by law to be licensed by the Department of Health and Social Services;

(3) the offender engages in sexual penetration with a person who the offender knows is

(A) mentally incapable;

(B) incapacitated; or

(C) unaware that a sexual act is being committed; or

(4) the offender engages in sexual contact with a person who the offender knows is unaware that a sexual act is being committed and

(A) the offender is a health care worker; and

(B) the offense takes place during the course of professional treatment of the victim.

(b) Sexual assault in the second degree is a class B felony. (§ 3 ch 166 SLA 1978; am § 1 ch 78 SLA 1983; am § 2 ch 96 SLA 1988; am § 8 ch 4 SLA 1990; am § 6 ch 79 SLA 1992)

Effect of amendments. — The 1990 amendment, effective February 2, 1990, deleted "Being over the age of 16" at the beginning of paragraphs (a)(2) and (a)(3).

The 1992 amendment, effective September 14, 1992, in subsection (a), added subparagraph (3)(C) and paragraph (4) and made related stylistic changes.

Sec. 11.41.425. Sexual assault in the third degree. (a) An offender commits the crime of sexual assault in the third degree if the offender engages in sexual contact with a person who the offender knows is

(1) mentally incapable;

(2) incapacitated; or

(3) unaware that a sexual act is being committed.

(b) Sexual assault in the third degree is a class C felony. (§ 3 ch 96 SLA 1988; am § 9 ch 4 SLA 1990; am § 7 ch 79 SLA 1992)

Effect of amendments. — The 1990 amendment, effective February 2, 1990, deleted "being over the age of 18" preceding "the offender" in subsection (a) and rewrote paragraph (a)(2).

The 1992 amendment, effective September 14, 1992, added paragraph (a)(3) and made related stylistic changes.

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

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

(2) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 18 years of age, and the offender is the victim's natural parent, stepparent, adopted parent, or legal guardian; or

(3) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 16 years of age, and

(A) the victim at the time of the offense is residing in the same household as the offender and the offender has authority over the victim; or

(B) the offender occupies a position of authority in relation to the victim.

(b) Sexual abuse of a minor in the first degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 2 ch 78 SLA 1983; am § 3 ch 66 SLA 1988; am § 1 ch 151 SLA 1990)

Effect of amendments. — The 1990 amendment rewrote paragraphs (a)(2) and (a)(3).

Legislative history reports. — For legislative letter of intent in connection with the amendment of subsection (a) by § 1, ch. 151, SLA 1990 (HCS CSSB 355 (Jud)), see 1990 House Journal, p. 4199.

NOTES TO DECISIONS

Specific intent is no longer an element of sexual abuse of a minor. Boggess v. State, 783 P.2d 1173 (Alaska Ct. App. 1989).

Conviction upheld. — Evidence supported defendant's conviction of attempted sexual assault in the first degree, where he brought his eight-year old stepdaughter and some syrup into a bathroom and asked the child if she would lick the syrup from his penis, and the fact that a wet drop of syrup was found on the counter supported the conclusion that he actually opened the syrup and poured some amount of it. Mitchell v. State, 818 P.2d 1163 (Alaska Ct. App. 1991).

Conviction reversed. — Defendant's jury trial conviction was reversed, where a psychologist's rebuttal testimony that because the victim gave a detailed account of the sexual abuse, she had been sexually abused, approached plain error and the trial court refused to allow defendant to put on surrebuttal. Cox v. State, 805 P.2d 374 (Alaska Ct. App. 1991).

Merger of sexual assault and sexual abuse convictions. — Defendant's convictions for sexually assaulting a twelve year old boy and sexually abusing the boy merged, where a single act of sexual penetration with a child could not properly support separate sentences and convictions for both offenses. Yearty v. State, 805 P.2d 987 (Alaska Ct. App. 1991).

Sentence upheld.

In accord with first paragraph. Yearty v. State, 805 P.2d 987 (Alaska Ct. App. 1991).

Applied in Simpson v. State, 796 P.2d 840 (Alaska Ct. App. 1990).

Quoted in Harris v. State, 790 P.2d 1379 (Alaska Ct. App. 1990).

Cited in Osterback v. State, 789 P.2d 1037 (Alaska Ct. App. 1990); Cook v. State, 792 P.2d 682 (Alaska Ct. App. 1990); Capwell v. State, 823 P.2d 1250 (Alaska Ct. App. 1991).

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

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

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

(3) being 18 years of age or older, the offender engages in sexual contact with a person who is under 18 years of age, and the offender is the victim's natural parent, stepparent, adopted parent, or legal guardian;

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

(5) being 18 years of age or older, the offender engages in sexual contact with a person who is under 16 years of age, and

(A) the victim at the time of the offense is residing in the same household as the offender and the offender has authority over the victim; or

(B) the offender occupies a position of authority in relation to the victim.

(b) Sexual abuse of a minor in the second degree is a class B felony. (§ 2 ch 78 SLA 1983; am § 4 ch 66 SLA 1988; am § 2 ch 151 SLA 1990)

Effect of amendments. — The 1990 amendment rewrote paragraphs (a)(3) and (a)(5).

Legislative history reports. — For legislative letter of intent in connection with the amendment of subsection (a) by § 2, ch. 151, SLA 1990 (HCS CSSB 355 (Jud)), see 1990 House Journal, p. 4199.

NOTES TO DECISIONS

"Female breast." — The legislature intended that the term "female breast," as used in the statutory definition of "sexual contact" contained in AS 11.81.900(b)(53), be applied according to its plain meaning — referring to all females regardless of age or degree of development. Stephan v. State, 810 P.2d 664 (Alaska Ct. App. 1991).

Defense of misunderstanding as to victim's age. — Defendant was entitled to defend on the ground that he reasonably believed the thirteen year old victim was sixteen years of age or older, where most of the information he knew about her came from a telephone conversation with her in which he claimed she discussed her prior sexual history and experience in detail. Bibbs v. State, 814 P.2d 738 (Alaska Ct. App. 1991).

Merger of counts. — Defendant's convictions for sexual abuse of a minor in the second degree for digital penetration, sexual abuse of a minor in the third degree

for touching the victim's breasts, and sexual abuse of a minor in the second degree for cunnilingus merged, and he should have been sentenced only on a single count of sexual abuse of a minor in the second degree. Newsome v. State, 782 P.2d 689 (Alaska Ct. App. 1989).

Erroneous admission of witness's testimony, over defense objection, that defendant had once admitted being sexually abused as a boy by his father necessitated reversal of defendant's conviction, where such error, when considered in combination with other errors, appreciably affected the jury's verdict and deprived defendant of a fair trial. Nelson v. State, 782 P.2d 290 (Alaska Ct. App. 1989).

Conviction upheld. — Evidence was sufficient to sustain defendant's conviction where the state relied substantially upon the seven-year old victim's grand jury testimony and her interview with an investigating officer which was videotaped and played to the jury to sustain the burden of proof. Sheldon v. State, 796 P.2d 831 (Alaska Ct. App. 1990).

Sentence upheld.

See State v. Clark, 782 P.2d 308 (Alaska Ct. App. 1989).

Sentences of ten years with four years suspended on each of two counts of sexual abuse of a minor in the second degree, such sentences to run consecutively to each other and consecutively to defendant's seven-year sentence which he was serving in another state, were affirmed where the record established that he had a long history of sexual involvement with children. Kirlin v. State, 779 P.2d 1261 (Alaska Ct. App. 1989).

Sentence of 180 days, with 180 days suspended and probation, was affirmed, where there was no evidence that the victim suffered any physical or psychological injury, and appropriate therapy to resolve defendant's problems was available in his community. State v. Capjohn, 779 P.2d 1266 (Alaska Ct. App. 1989).

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).

Sentence held excessive.

See Weiss v. State, 784 P.2d 261 (Alaska Ct. App. 1989); Davis v. State, 793 P.2d 1064 (Alaska Ct. App. 1990).

Sentence held inadequate. — Sentence requiring 1,000 hours of community work, while suspending the entire term of three years' incarceration imposed upon a 27-year-old gym teacher convicted of sexually abusing a 14-year-old female student, was disapproved, where the sentence unduly depreciated the significance of his misconduct and inadequately served the sentencing goal of community condemnation. State v. Jackson, 776 P.2d 320 (Alaska Ct. App. 1989).

Cited in Geer v. State, 778 P.2d 609 (Alaska Ct. App. 1989); Hayes v. State, 790 P.2d 713 (Alaska Ct. App. 1990).

Sec. 11.41.438. Sexual abuse of a minor in the third degree. (a) An offender commits the crime of sexual abuse of a minor in the third degree if

(1) being 16 years of age or older, the offender engages in sexual contact with a person who is 13, 14, or 15 years of age and at least three years younger than the offender; or

(2) being 18 years of age or older, the offender engages in sexual penetration with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim.

(b) Sexual abuse of a minor in the third degree is a class C felony. (§ 2 ch 78 SLA 1983; am § 3 ch 151 SLA 1990)

Effect of amendments. — The 1990 amendment added paragraph (a)(2) and made related stylistic changes.

Legislative history reports. — For legislative letter of intent in connection with the amendment of subsection (a) by § 3, ch. 161, SLA 1990 (HCS CSSB 355 (Jud)), see 1990 House Journal, p. 4199.

NOTES TO DECISIONS

Merger of counts. — Defendant's convictions for sexual abuse of a minor in the second degree for digital penetration, sexual abuse of a minor in the third degree for touching the victim's breasts, and sexual abuse of a minor in the second degree for cunnilingus merged, and he should have been sentenced only on a single count of sexual abuse of a minor in the second degree. Newsome v. State, 782 P.2d 689 (Alaska Ct. App. 1989).

Sec. 11.41.440. Sexual abuse of a minor in the fourth degree. (a) An offender commits the crime of sexual abuse of a minor in the fourth degree if

(1) being under 16 years of age, the offender engages in sexual penetration or sexual contact with a person who is under 13 years of age and at least three years younger than the offender; or

(2) being 18 years of age or older, the offender engages in sexual contact with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim.

(b) Sexual abuse of a minor in the fourth degree is a class A misdemeanor. (§ 3 ch 166 SLA 1978; am § 9 ch 102 SLA 1980; am § 3 ch 78 SLA 1983; am § 4 ch 161 SLA 1990)

Effect of amendments. — The 1990 amendment added paragraph (a)(2) and made related stylistic changes.

Legislative history reports. — For legislative letter of intent in connection with the amendment of subsection (a) by § 4, ch. 161, SLA 1990 (HCS CSSB 355 (Jud)), see 1990 House Journal, p. 4199.

Sec. 11.41.455. Unlawful exploitation of a minor. (a) A person commits the crime of unlawful exploitation of a minor if, in the state and with the intent of producing a live performance, film, audio recording, photograph, negative, slide, book, newspaper, magazine, or other printed material that visually depicts the conduct listed in (1) — (7) of this subsection, the person knowingly induces or employs a child under 18 years of age to engage in, or photographs, films, records, or televises a child under 18 years of age engaged in, the following actual or simulated conduct:

(1) sexual penetration;

(2) the lewd touching of another person's genitals, anus, or breast;

(3) the lewd touching by another person of the child's genitals, anus, or breast;

(4) masturbation;

(5) bestiality;

(6) the lewd exhibition of the child's genitals; or

(7) sexual masochism or sadism.

(b) A parent, legal guardian, or person having custody or control of a child under 18 years of age commits the crime of unlawful exploitation of a minor if, in the state, the person permits the child to engage in conduct described in (a) of this section knowing that the conduct is intended to be used in producing a live performance, film, audio recording, photograph, negative, slide, book, newspaper, magazine, or other printed material that visually depicts the conduct.

(c) Unlawful exploitation of a minor is a class B felony.

(d) In this section, "audio recording" means a nonbook prerecorded item without a visual component, and includes a record, tape, cassette, and compact disc. (§ 3 ch 166 SLA 1978; am § 1 ch 67 SLA 1983; am §§ 1 — 2, 3 ch 161 SLA 1990; am § 8 ch 79 SLA 1992)

Effect of amendments. — The 1990 amendment inserted "audio recording" in subsections (a) and (b); inserted "records" near the end of the introductory paragraph in subsection (a); and added subsection (d).

The 1992 amendment, effective September 14, 1992, added paragraph (a)(7) and made related stylistic changes.

NOTES TO DECISIONS

Applied in Harris v. State, 790 P.2d 1379 (Alaska Ct. App. 1990).

Sec. 11.41.470. Definitions. For purposes of AS 11.41.410 — 11.41.470, unless the context requires otherwise,

(1) "health care worker" includes a person who is or purports to be an anesthesiologist, acupuncturist, chiropractor, dentist, health aide, hypnotist, massage therapist, mental health counselor, midwife, nurse, nurse practitioner, osteopath, naturopath, physical therapist, physical therapy assistant, physician, physician's assistant, psychiatrist, psychologist, psychological associate, radiologist, religious healing practitioner, surgeon, x-ray technician, or a substantially similar position;

(2) "incapacitated" means temporarily incapable of appraising the nature of one's own conduct and physically unable to express unwillingness to act;

(3) "legal guardian" means a person who is under a duty to exercise general supervision over a minor as a result of a court order, statute, or regulation, and includes foster parents and staff members and other employees of group homes or youth correctional facilities where a child is placed as a result of a court order or the action of the division of family and youth services, and police officers and probation officers when those officers are exercising custodial control over a minor;

(4) "mentally incapable" means suffering from a mental disease or defect that renders the person incapable of understanding the nature or consequences of the person's conduct, including the potential for harm to that person;

(5) "position of authority" means an employer, youth leader, scout leader, coach, teacher, counselor, school administrator, religious leader, doctor, nurse, psychologist, guardian ad litem, babysitter, or a substantially similar position, and a police officer or probation officer other than when the officer is exercising custodial control over a minor;

(6) "sexual act" means sexual penetration or sexual contact.

(7) "victim" means the person alleged to have been subjected to sexual assault in any degree or sexual abuse of a minor in any degree;

(8) "without consent" means that a person

(A) with or without resisting, is coerced by the use of force against a person or property, or by the express or implied threat of death, imminent physical injury, or kidnapping to be inflicted on anyone; or

(B) is incapacitated as a result of an act of the defendant. (§ 3 ch 166 SLA 1978; am § 5 ch 78 SLA 1983; am § 5 ch 96 SLA 1988; am § 28 ch 50 SLA 1989; am § 5 ch 151 SLA 1990; am § 9 ch 79 SLA 1992)

Revisor's notes. — Reorganized in 1988 to alphabetize the defined terms and in 1990 and 1992 to maintain alphabetical order.

Effect of amendments. — The 1990 amendment added paragraphs (2) and (4) (now (3) and (5)).

The 1992 amendment, effective September 14, 1992, added paragraphs (1) and (6).

Article 5. Robbery, Extortion, and Coercion.

Section
500. Robbery in the first degree

Sec. 11.41.500. Robbery in the first degree. (a) A person commits the crime of robbery in the first degree if the person violates AS 11.41.510 and, in the course of violating that section or in immediate flight thereafter, that person or another participant

(1) is armed with a deadly weapon or represents by words or other conduct that either that person or another participant is so armed;

(2) uses or attempts to use a dangerous instrument or a defensive weapon or represents by words or other conduct that either that person or another participant is armed with a dangerous instrument or a defensive weapon; or

(3) causes or attempts to cause serious physical injury to any person.

(b) Robbery in the first degree is a class A felony. (§ 3 ch 166 SLA 1978; am § 1 ch 59 SLA 1991)

Effect of amendments. — The 1991 amendment, effective September 15, 1991, inserted "or a defensive weapon" in two places in paragraph (a)(2).

NOTES TO DECISIONS

I. General Consideration.

I. GENERAL CONSIDERATION.

Admissibility of evidence. — Where evidence of cocaine possession and sale would have been admissible on murder, kidnapping, and robbery charges, but the murder, robbery, and kidnapping evidence would not have been admissible on the cocaine charges, the appropriate action upon appeal from conviction on all counts was to vacate the cocaine convictions but affirm the other convictions. Mathis v. State, 778 P.2d 1161 (Alaska Ct. App. 1989).

Joinder of charges. — Cocaine charges and murder, kidnapping, and robbery charges were properly joined, where the state's theory of the murder, kidnapping, and robbery offenses was that defendants committed the murder and carried out the kidnapping and robbery in defense of their cocaine distribution business. Mathis v. State, 778 P.2d 1161 (Alaska Ct. App. 1989).

Evidence supported defendant's conviction, where, although the victim, whose head was covered by a pillowcase, did not see defendant remove money from her jacket, she heard the velcro on the jacket being ripped open and was therefore aware that defendant was taking her money. Napayonak v. State, 793 P.2d 1059 (Alaska Ct. App. 1990).

Sentence upheld.

In accord with main pamphlet. Marker v. State, 829 P.2d 1191 (Alaska Ct. App 1992).

Sentence reversed.

Total sentence of fifty years, imposed after convictions of two counts of first-degree robbery and two counts of third-degree assault, was clearly mistaken, where defendant was a youthful offender who had never before demonstrated a proclivity toward comparable acts of aggravated violence and the court's decision to base defendant's sentence on the assumption that he was incorrigible was unjustified. DeGross v. State, 810 P.2d 212 (Alaska Ct. App. 1991).

Cited in Newcomb v. State, 779 P.2d 1240 (Alaska Ct. App. 1989); Billingsley v. State, 807 P.2d 1102 (Alaska Ct. App. 1991).

Sec. 11.41.510. Robbery in the second degree.

NOTES TO DECISIONS

Quoted in Napayonak v. State, 793 P.2d 1059 (Alaska Ct. App. 1990).

Chapter 46. Offenses Against Property.

Article
1. Theft and Related Offenses (§§ 11.46.130, 11.46.295)
3. Arson, Criminal Mischief, and Related Offenses (§ 11.46.482)

Article 1. Theft and Related Offenses.

Section
130. Theft in the second degree
295. Prior convictions

(h) If a victim desires notice under this section, the victim shall maintain a current, valid mailing address on file with the commissioner of corrections. The commissioner shall send the notice to the victim's last known address. The victim's address may not be disclosed to the offender or to the offender's attorney. (§ 12 ch 166 SLA 1978; am § 27 ch 143 SLA 1982; am § 5 ch 59 SLA 1989; am §§ 7 — 9 ch 57 SLA 1991)

Effect of amendments. — The 1991 amendment, effective September 15, 1991, in subsection (d), added the language beginning "and has the right to give sworn testimony" to the end of the subsection; in subsection (f), inserted "written"; and, in subsection (g), inserted "testimony, or unsworn oral presentation."

Sec. 12.55.090. Granting of probation.

NOTES TO DECISIONS

I. General Consideration.

I. GENERAL CONSIDERATION.

Good cause for revocation. — Where the record establishes that, after two separate stints on probation, one probation revocation action, and a substantial period of counseling, the defendant has persisted in the same pattern of criminal misconduct that led to his original convictions, the sentencing court properly found good cause to revoke probation. Krier v. State, 798 P.2d 359 (Alaska Ct. App. 1990).

Quoted in State v. Staael, 807 P.2d 513 (Alaska Ct. App. 1991).

Cited in Wylie v. State, 797 P.2d 651 (Alaska Ct. App. 1990); Burt v. State, 823 P.2d 14 (Alaska Ct. App. 1991).

Sec. 12.55.100. Conditions of probation.

NOTES TO DECISIONS

I. General Consideration.

I. GENERAL CONSIDERATION.

Cited in Burt v. State, 823 P.2d 14 (Alaska Ct. App. 1991).

Sec. 12.55.115. Fixing eligibility for discretionary parole at sentencing.

NOTES TO DECISIONS

Judge must set forth reasons for restriction with particularity. — When a sentencing judge restricts parole eligibility, the judge must specifically address the issue of parole restriction, setting forth with particularity his or her reasons for concluding that the parole eligibility prescribed by AS 33.16.090 and AS 33.16.100(c)-(d) is insufficient to protect the public and insure the defendant's reformation. Stern v. State, 824 P.2d 442 (Alaska Ct. App. 1992).

Sentence upheld. — Denial of parole eligibility for defendant, who received a 99-year sentence after being convicted of murder, was not clearly mistaken, where the record showed him to be a racist, a man full of anger, a man with a severe

alcohol problem, and a man with a proclivity for assaulting people with firearms, and showed that he had just been released on felony probation a few days before the murder. Stern v. State, 824 P.2d 442 (Alaska Ct. App. 1992).

Cited in Weltz v. State, 794 P.2d 952 (Alaska Ct. App. 1990).

Sec. 12.55.120. Appeal of sentence.

NOTES TO DECISIONS

I. General Consideration.
II. Sentencing.
C. Factors for Consideration.

I. GENERAL CONSIDERATION.

Cited in Wylie v. State, 797 P.2d 651 (Alaska Ct. App. 1990).

II. SENTENCING.

C. Factors for Consideration.

Judicial recommendation to parole board. — Where the trial court's written judgment did not legally restrict defendant's parole, did not specifically provide that defendant would be eligible for parole after serving the mandatory minimum period of time required by statute, and took into consideration defendant's prior favorable record, but considered his prospects for rehabilitation to be guarded because of the serious nature of the offense and defendant's failure to accept full responsibility for the crime, and also emphasized the need to deter similar offenses, such reasons were sufficient to justify the recommendation. Dunkin v. State, 818 P.2d 1159 (Alaska Ct. App. 1991).

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

(1) the defendant is convicted of the murder of a uniformed or otherwise clearly identified peace officer, fire fighter, or correctional officer who was engaged in the performance of official duties at the time of the murder;

(2) the defendant has been previously convicted of

(A) murder in the first degree under AS 11.41.100 or former AS 11.15.010 or 11.15.020;

(B) murder in the second degree under AS 11.41.110 or former AS 11.15.030; or

(C) homicide under the laws of another jurisdiction when the offense of which the defendant was convicted contains elements similar to first degree murder under AS 11.41.100 or second degree murder under AS 11.41.110; or

(3) the court finds by clear and convincing evidence that the defendant subjected the murder victim to substantial physical torture.

(b) A defendant convicted of murder in the second degree, attempted murder in the first degree, kidnapping, or misconduct involving a controlled substance in the first degree shall be sentenced to a

definite term of imprisonment of at least five years but not more than 99 years.

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) if the offense is a first felony conviction, and the defendant violated AS 08.54.620(a)(7) — (10), one year.

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

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

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

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

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

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

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

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

(h) Nothing in this section or AS 12.55.135 limits the discretion of the sentencing judge except as specifically provided. Nothing in (a) of this section limits the court's discretion to impose a sentence of 99 years imprisonment, or to limit parole eligibility, for a person convicted of murder in the first or second degree in circumstances other than those enumerated in (a).

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

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

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

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

(4) if the offense is a third felony conviction, 25 years.

(j) A defendant sentenced to a mandatory term of imprisonment of 99 years under (a) of this section may apply for a modification or reduction of sentence under the Alaska Rules of Criminal Procedure after serving one-half of the mandatory term without consideration of good time earned under AS 33.20.010.

(k) A first felony offender convicted of an offense for which a presumptive term of imprisonment is not specified under this section may not be sentenced to a term of unsuspended imprisonment that exceeds the presumptive term for a second felony offender convicted of the same crime unless the court finds by clear and convincing evidence that an aggravating factor under AS 12.55.155(c) is present, or that circumstances exist that would warrant a referral to the three-judge panel under AS 12.55.165. (§ 12 ch 166 SLA 1978; am § 18 ch 45 SLA 1982; am §§ 28-30 ch 143 SLA 1982; am § 8 ch 78 SLA 1983; am

§§ 1-3 ch 92 SLA 1983; am § 5 ch 59 SLA 1988; am § 4 ch 37 SLA 1989; am §§ 23-25 ch 79 SLA 1992)

Cross references. — For effect of the enactment of (j) of this section on Alaska Rule of Criminal Procedure 35, see § 34, ch 79, SLA 1992 in the Temporary and Special Acts.

Effect of amendments. — The 1992 amendment, effective September 14, 1992, in subsection (a), added the second sentence and paragraphs (1) to (3); added the second sentence in subsection (h); and added subsections (j) and (k).

NOTES TO DECISIONS

I. General Consideration.
II. Sentencing.
  A. In General.
  B. Specific Crimes.
III. Presumptive Sentencing.
  A. In General.
  B. First-Offenders.

I. GENERAL CONSIDERATION.

Applied in Machado v. State, 797 P.2d 677 (Alaska Ct. App. 1990); McGahan v. State, 807 P.2d 506 (Alaska Ct. App. 1991); Noblit v. State, 808 P.2d 280 (Alaska Ct. App. 1991); Looney v. State, 826 P.2d 775 (Alaska Ct. App. 1992); Marker v. State, 829 P.2d 1191 (Alaska Ct. App. 1992).

Cited in Lepley v. State, 807 P.2d 1095 (Alaska Ct. App. 1991); Collins v. State, 816 P.2d 1383 (Alaska Ct. App. 1991).

II. SENTENCING.

A. In General.

ABA Standards' recommended 10-year benchmark.

Where the sentence is more than twice the maximum sentence for the most serious offense committed, and the composite sentence exceeds ten years of imprisonment, the sentence is improper under the ABA Standards unless the offender is particularly dangerous. Neff v. State, 799 P.2d 782 (Alaska Ct. App. 1990).

Sentencing of "worst offender."

Sentence of 169 years without possibility of parole was not clearly mistaken, where the circumstances surrounding defendant's offenses of murder, robbery and assault plainly justified a worst offender finding and defendant had four times been convicted of felony offenses and had served substantial prior time in prison and on parole. Waltz v. State, 794 P.2d 952 (Alaska Ct. App. 1990).

Sentencing for comparable crimes as point of reference. — It is appropriate for the court to consider drunken driving manslaughter cases as a point of reference for determining an appropriate sentence for an offender convicted of second-degree murder for comparable conduct. Ratliff v. State, 798 P.2d 1288 (Alaska Ct. App. 1990).

Imposition of sentence upon revocation for violation of probation. — Where a convicted criminal's original sentence on his first felony offenses was four years of imprisonment for possession of cocaine for purposes of sale and a suspended imposition of sentence for a period of five years for possession of marijuana for purposes of sale, and the criminal had served his four-year sentence for possession of cocaine for purposes of sale, the judge should only have been able to sentence the criminal to an additional two years of imprisonment on revocation for a violation of his probation. Bayne v. State, 799 P.2d 1347 (Alaska Ct. App. 1990).

"Clearly mistaken" test for court review. — The "clearly mistaken" test implies a permissible range of reasonable sentences which a reviewing court, after an independent review of the record, will not modify. This "range of reasonableness" should be determined not by imposition of an artificial ceiling which limits a large class of offenses to the lower end of the sentencing spectrum, but, rather, by an examination of the particular facts of the individual case in light of the total range of sentences authorized by the legislature for the particular offense. State v. Wentz, 805 P.2d 962 (Alaska Ct. App. 1991).

B. Specific Crimes.

Assault.

Trial court was not clearly mistaken when it suspended three years of defendant's fifteen-year sentence for first-degree assault, where the victim was defendant's deaf and mute wife, who was severely beaten and suffered permanent brain damage, and defendant had a substantial record of alcohol-related misdemeanor offenses, including numerous instances of disorderly conduct and property damage. State v. Wentz, 805 P.2d 962 (Alaska Ct. App. 1991).

Misconduct involving controlled substance.

Where the evidence showed that the one ounce sale was consistent with a lower-level wholesale transaction, the sale was not an isolated transaction, the stolen handgun and the large amounts of cash discovered by the police upon the defendant's arrest lent support to the conclusion that his involvement in cocaine trafficking was neither casual nor at the lowest levels of the trade, and the sentence for a mid-level trafficker was proper. Vasquez-Villegas v. State, 798 P.2d 362 (Alaska Ct. App. 1990).

Sentence of 20 years imprisonment for sale of cocaine to a minor was excessive, where the offense involved the sale of approximately two grams of cocaine to an undercover agent who appeared relatively mature and who was within a month of his 19th birthday, and the case was remanded with directions to impose a sentence of not greater than 15 years of imprisonment, including suspended time. McPherson v. State, 800 P.2d 928 (Alaska Ct. App. 1990).

Sentence upheld.

In accord with first paragraph. Leavitt v. State, 806 P.2d 342 (Alaska Ct. App. 1991); Erickson v. State, 824 P.2d 725 (Alaska Ct. App. 1992); Wiley v. State, 822 P.2d 940 (Alaska Ct. App. 1991).

Composite sentence of 40 years of imprisonment for solicitation of murder in the first degree, attempted murder in the first degree, and assault in the first degree was not clearly mistaken. Marzak v. State, 796 P.2d 1374 (Alaska Ct. App. 1990).

Sentence not upheld.

Total sentence of fifty years, imposed after convictions of two counts of first-degree robbery and two counts of third-degree assault, was clearly mistaken, where defendant was a youthful offender who had never before demonstrated a proclivity toward comparable acts of aggravated violence and the court's decision to base defendant's sentence on the assumption that he was incorrigible was unjustified. DeGross v. State, 816 P.2d 212 (Alaska Ct. App. 1991).

III. PRESUMPTIVE SENTENCING.

A. In General.

The mandatory consecutive sentencing provisions of AS 12.55.025(h) have no integral relation to Alaska's presumptive sentencing scheme, AS 12.55.125 — 12.55.175. The legislature enacted the consecutive sentencing statute independently of the presumptive sentencing statutes, and application of the provision does not turn on the applicability of presumptive sentencing. State v. Wagner, Ct. App. Op. No. 1229 (File No. A-3932), P.2d (1992).

Deviation from presumptive sentences.

Where a criminal defendant was convicted of two counts of misconduct involving a controlled substance in the fourth degree, a class C felony punishable by a maximum sentence of five years, for which the legislature had established a presumptive sentence of two years for a second-felony offender and three years for a third-felony offender, and the trial judge properly found that the case was aggravated, particularly since the defendant was on felony probation at the time that he committed the new offenses, and his prior conviction was for a more serious class of felony offense, the judge could not properly impose a sentence greater than five years, the maximum sentence for a class C felony. Bayne v. State, 799 P.2d 1347 (Alaska Ct. App. 1990).

B. First-Offenders.

Sentence for first-time offender in excess of presumptive sentence for second or third offenders.

Composite term of eight years with four years suspended, for a first felony offender convicted for selling cocaine in 1/16 or 1/8 ounce packages on nine occasions, was clearly mistaken, and the sentence was therefore remanded for imposition of a composite term not exceeding six years with three years suspended. Major v. State, 798 P.2d 341 (Alaska Ct. App. 1990).

Standard for finding exception to Austin rule. — The clear and convincing

evidence standard should be applied to finding an exception to the rule in Austin v. State, 627 P.2d 657 (Alaska Ct. App. 1981), which held that first felony offenders convicted of offenses for which no presumptive term is specified should normally receive more favorable sentences than the presumptive term for second felony offenders convicted of like crimes. Buoy v. State, 818 P.2d 1165 (Alaska Ct. App. 1991).

When conduct amounting to a probation violation is the sole basis for a finding of extraordinary circumstances, the conduct should be established by clear and convincing evidence (not merely a preponderance of the evidence) before an exceptional sentence under Austin (i.e., a sentence for a first offender which is greater than the presumptive sentence for a second offender) is imposed. Andrew v. State, Ct. App. Op. No. 1231 (File No. A-3949), P.2d (1992).

Use of circumstance established by preponderance of evidence. — In probation violation cases, because the defendant's poor potential for rehabilitation, and not the probation violation itself, was the circumstance justifying an Austin rule exception, it was the former, not the latter, that had to be established by clear and convincing evidence. Hence, even when established by a mere preponderance of evidence, a probation violation could be factored together with other evidence concerning the defendant's rehabilitative potential. Andrew v. State, Ct. App. Op. No. 1231 (File No. A-3949), P.2d (1992).

Sec. 12.55.135. Sentences of imprisonment for misdemeanors. (a) A defendant convicted of a class A misdemeanor may be sentenced to a definite term of imprisonment of not more than one year.

(b) A defendant convicted of a class B misdemeanor may be sentenced to a definite term of imprisonment of not more than 90 days unless otherwise specified in the provision of law defining the offense.

(c) A defendant convicted of assault in the fourth degree committed in violation of the provisions of an order issued under AS 25.35.010 or 25.35.020 shall be sentenced to a minimum term of imprisonment of 20 days.

(d) A defendant convicted of assault in the fourth degree upon a uniformed or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the assault shall be sentenced to a minimum term of imprisonment of 30 days.

(e) Except as provided in AS 12.55.055(f), if a defendant is sentenced under (c), (d), or (f) of this section,

(1) execution of sentence may not be suspended and probation or parole may not be granted until the minimum term of imprisonment has been served;

(2) imposition of a sentence may not be suspended except upon condition that the defendant be imprisoned for no less than the minimum term of imprisonment provided in the section; and

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

(f) A defendant convicted of criminal mischief in the third degree in violation of AS 11.46.484(a)(2), whose conviction is not a felony under AS 11.46.484(c), shall be sentenced to a definite term of imprisonment of at least 72 hours but not more than one year. (§ 12 ch 166 SLA

1978; am § 2 ch 139 SLA 1980; am § 22 ch 59 SLA 1982; am § 13 ch 61 SLA 1982; am § 31 ch 143 SLA 1982; am §§ 4, 5 ch 92 SLA 1983; am §§ 5, 6 ch 53 SLA 1991)

Cross references. — For legislative findings and purpose in connection with the enactment of subsection (f), see §§ 1 and 2, ch. 53, SLA 1991 in the Temporary and Special Acts.

Effect of amendments. — The 1991 amendment, effective September 13, 1991, rewrote subsection (e) and added subsection (f).

Sec. 12.55.145. Prior convictions.

NOTES TO DECISIONS

Prior conviction out of state.

Defendant's Oregon convictions for "unauthorized use of a vehicle" did not constitute a prior felony for presumptive sentencing purposes under this section, because the Oregon and Alaska offenses did not have similar elements, in view of the fact that the Oregon statute did not require the state to prove a prior offense while the Alaska statute did have such a requirement. Harlow v. State, 820 P.2d 307 (Alaska Ct. App. 1991).

Cited in Wiley v. State, 822 P.2d 940 (Alaska Ct. App. 1991).

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, ambulance attendant, or other emergency responder during or because of the exercise of official duties;

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

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

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

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

(18) the offense was a crime

(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;

(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; or

(C) specified in AS 11.41.410 — 11.41.425 or 11.41.455, and the defendant has previously engaged in conduct covered by one of those sections involving the same or another victim;

(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 — 11.41.220, 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;

(17) in a conviction for assault or attempted assault or for homicide or attempted homicide, the defendant acted in response to domestic violence perpetrated by the victim against the defendant and the domestic violence consisted of aggravated or repeated instances of assaultive behavior.

(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; am § 13 ch 21 SLA 1991; am § 5 ch 64 SLA 1991; am § 26 ch 79 SLA 1992)

Effect of amendments. — The first 1991 amendment, effective June 11, 1991, in paragraph (d)(6), made a reference substitution.

The second 1991 amendment, effective September 16, 1991, added paragraph (d)(17).

The 1992 amendment, effective September 14, 1992, added subparagraph (c)(18)(C) and made related stylistic changes.

NOTES TO DECISIONS

I. General Consideration.
II. Adjustment of Presumptive Sentences Generally.
III. Aggravating and Mitigating Factors.
A. Aggravating Factors Generally.
B. Mitigating Factors Generally.
V. Notice.

I. GENERAL CONSIDERATION.

Standard for finding exception to Austin rule. — The clear and convincing evidence standard should be applied to finding an exception to the rule in Austin v. State, 627 P.2d 657 (Alaska Ct. App. 1981), which held that first felony offenders convicted of offenses for which no presumptive term is specified should normally receive more favorable sentences than the presumptive term for second felony offenders convicted of like crimes. Buoy v. State, 818 P.2d 1165 (Alaska Ct. App. 1991).

Maximum sentence. — The purposes of sentence review are better served by the interpretation that a defendant receives a "maximum sentence" if he or she is sentenced to the maximum term of imprisonment, whether or not the sentencing judge restricts or denies parole eligibility. Capwell v. State, 823 P.2d 1250 (Alaska Ct. App. 1991).

Sentence upheld.

In accord with first paragraph. Leavitt v. State, 800 P.2d 342 (Alaska Ct. App. 1991).

Sentence not upheld.

Case was remanded for resentencing on convictions of failing to stop, render aid, and contact authorities, where the trial court aggravated a first felony offender's

sentence on the basis of aggravating factors without giving advance notice and the court's findings included a finding of physical injury, which appeared to be an element of the offenses. Wylie v. State, 797 P.2d 651 (Alaska Ct. App. 1990).

Sentence of 20 years imprisonment for sale of cocaine to a minor was excessive, where the offense involved the sale of approximately two grams of cocaine to an undercover agent who appeared relatively mature and who was within a month of his 19th birthday, and the case was remanded with directions to impose a sentence of not greater than 15 years of imprisonment, including suspended time. McPherson v. State, 800 P.2d 928 (Alaska Ct. App. 1990).

Applied in Marzak v. State, 790 P.2d 1374 (Alaska Ct. App. 1990); Simpson v. State, 790 P.2d 849 (Alaska Ct. App. 1990); Kanulie v. State, 796 P.2d 844 (Alaska Ct. App. 1990); McGahan v. State, 807 P.2d 506 (Alaska Ct. App. 1991); Lepley v. State, 807 P.2d 1095 (Alaska Ct. App. 1991); DeGross v. State, 816 P.2d 212 (Alaska Ct. App. 1991); Looney v. State, 826 P.2d 775 (Alaska Ct. App. 1992); Marker v. State, 829 P.2d 1191 (Alaska Ct. App. 1992).

Cited in Weitz v. State, 794 P.2d 952 (Alaska Ct. App. 1990).

II. ADJUSTMENT OF PRESUMPTIVE SENTENCES GENERALLY.

"Clearly mistaken" test for court review. — The "clearly mistaken" test implies a permissible range of reasonable sentences which a reviewing court, after an independent review of the record, will not modify. This "range of reasonableness" should be determined not by imposition of an artificial ceiling which limits a large class of offenses to the lower end of the sentencing spectrum, but, rather, by an examination of the particular facts of the individual case in light of the total range of sentences authorized by the legislature for the particular offense. State v. Wentz, 805 P.2d 962 (Alaska Ct. App. 1991).

III. AGGRAVATING AND MITIGATING FACTORS.

A. Aggravating Factors Generally.

Victim's physical injuries.

A sentencing judge could properly consider that a defendant's use of a dangerous instrument against his victim was exceptionally brutal and involved deliberate cruelty, could consider the extraordinary level of both physical and sexual violence involved in defendant's assault (violence that led to profound and lasting injuries, which went well beyond what might be considered typical even in cases of serious physical injury), and could properly consider the protracted and repeated nature of defendant's assaultive conduct (a consideration wholly independent of his use of a dangerous instrument and his infliction of serious physical injury). Wiley v. State, 822 P.2d 940 (Alaska Ct. App. 1991).

Commission of heinous offenses while on parole. — The sentencing judge could have properly concluded that defendant was a person from whom society may never be safe if released from custody, where defendant committed heinous offenses within a few weeks of being paroled, and when not incarcerated, defendant repeatedly committed crimes and violated probation and parole conditions, and his offenses continually increased in severity. Marcy v. State, 823 P.2d 660 (Alaska Ct. App. 1991).

The term "deliberate cruelty," etc.

"Deliberate cruelty", as referred to in paragraph (c)(2), is conduct which involves gratuitously inflicted torture or violence. However, when the relevant conduct is merely a direct means to accomplish the crime charged, the conduct may not also be included as a separate aggravating factor. Machado v. State, 797 P.2d 677 (Alaska Ct. App. 1990).

Felonies committed under prior law. — When applying the aggravator in paragraph (c)(7) to felonies committed under prior law, the court of appeals looks to the offense defined by current law that is the nearest equivalent to the defendant's prior felony. Capwell v. State, 823 P.2d 1250 (Alaska Ct. App. 1991).

"Most serious conduct included."

Trial court's finding that defendant's perjury "was among the most serious conduct included in the definition of the offense", as referred to in paragraph (c)(10), was not clearly erroneous, where his false testimony at a search warrant hearing concerned the events surrounding a car bombing for which he was subsequently prosecuted and convicted. Machado v. State, 797 P.2d 677 (Alaska Ct. App. 1990).

B. Mitigating Factors Generally.

A mitigator may be outweighed by the existence of other factors. Machado v. State, 797 P.2d 677 (Alaska Ct. App. 1990).

Although an offender's mental illness is a factor that the judge can properly take into account to decide the extent to which his offense was mitigated, an offender whose crime is the product of a mental illness should not automatically be entitled to a more mitigated sentence than would have been appropriate had no mental illness existed. Washington v. State, 828 P.2d 172 (Alaska Ct. App. 1992).

Applicability of (d)(12). — Trial court properly declined to reduce defendant's sentence, where his "assistance" in a police investigation also attempted to divert attention from his own role in a car bombing and thus in fact hampered and hindered authorities. Machado v. State, 797 P.2d 677 (Alaska Ct. App. 1990).

V. NOTICE.

Notice to parties of factors, etc.

Both the defendant and the government are entitled to notice that the judge is considering previously unmentioned aggravating or mitigating factors before the parties present their sentencing arguments. Collins v. State, 816 P.2d 1383 (Alaska Ct. App. 1991).

Preservation of issue of lack of notice. — Absent plain error, a defendant will not be heard to complain on appeal that he or she lacked advance notice of aggravating factors unless the issue has been preserved by a timely objection in the trial court. Collins v. State, 816 P.2d 1383 (Alaska Ct. App. 1991).

Sec. 12.55.165. Extraordinary circumstances. (a) 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.

(b) In making a determination under (a) of this section, the court may not refer a case to a three-judge panel based on the defendant's potential for rehabilitation if the court finds that a factor in aggravation set out in AS 12.55.155(c)(2), (8), (10), (12), (15), (17), (18)(B), (20), (21), or (28) is present. (§ 12 ch 166 SLA 1978; am § 37 ch 143 SLA 1982; am § 2 ch 168 SLA 1990; am § 27 ch 79 SLA 1992)

Effect of amendments. — The 1992 amendment, effective September 14, 1992, added subsection (b).

NOTES TO DECISIONS

Consideration of evidence of rehabilitation.

The superior court is justified in concluding that a defendant has unusually good potential for rehabilitation only when the court is satisfied, after reviewing the totality of the circumstances, that the defendant can adequately be treated in the community and need not be incarcerated for the full presumptive term in order to prevent future criminal activity. Lepley v. State, 807 P.2d 1095 (Alaska Ct. App. 1991).

The defendant has the burden to prove the mitigating factor of uncommonly good potential for rehabilitation by clear and convincing evidence. Lepley v. State, 807 P.2d 1095 (Alaska Ct. App. 1991).

Quoted in Wiley v. State, 822 P.2d 940 (Alaska Ct. App. 1991); State v. Wagner, Ct. App. Op. No. 1229 (File No. A-3932), P.2d (1992).

Cited in Collins v. State, 816 P.2d 1383 (Alaska Ct. App. 1991).

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

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

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

(d) Sentencing of a defendant or remanding of a case under this section shall be by a majority of the three-judge panel.

(e) If the three-judge panel determines under (b) of this section that manifest injustice would result from imposition of the presumptive term and the panel also finds that the defendant has an exceptional potential for rehabilitation and that a sentence of less than the presumptive term should be imposed because of the defendant's exceptional potential for rehabilitation, the panel

(1) shall sentence the defendant to the presumptive term required under AS 12.55.125;

(2) shall order the defendant under AS 12.55.015 to engage in appropriate programs of rehabilitation; and

(3) may provide that the defendant is eligible for discretionary parole under AS 33.16.090 during the second half of the sentence imposed under this subsection if the defendant successfully completes all rehabilitation programs ordered under (2) of this subsection. (§ 12 ch 166 SLA 1978; am § 28 ch 79 SLA 1992)

Effect of amendments. — The 1992 amendment, effective September 14, 1992, added subsection (e).

NOTES TO DECISIONS

Consecutive sentences. — AS 12.55.025(h), which imposes mandatory consecutive sentences in certain instances, applies to sentencing decisions made by the three-judge panel. State v. Wagner, Ct. App. Op. No. 1229 (File No. A-3932), P.2d (1992).

Under subsection (e), the three-judge panel has broad discretion to determine the sentence appropriate for multiple offenses over which it has jurisdiction and to determine what portion of each sentence should be consecutively imposed; the scope of this discretion is not affected by AS 12.55.025(h). State v. Wagner, Ct. App. Op. No. 1229 (File No. A-3932), P.2d (1992).

Quoted in Wiley v. State, 822 P.2d 940 (Alaska Ct. App. 1991).

Sec. 12.55.185. Definitions. In this chapter, unless the context requires otherwise,

(1) "crime against a person" has the meaning given in AS 33.30.901;

(2) "dangerous instrument" has the meaning given in AS 11.81.900;

(3) "domestic violence" has the meaning given in AS 25.35.060;

(4) "firearm" has the meaning given in AS 11.81.900;

(5) "first felony conviction" means that the defendant has not been previously convicted of a felony;

(6) "judicial officer" has the meaning given in AS 11.56.900;

(7) "pecuniary gain" means the amount of money or value of property at the time of commission of the offense derived by the defendant from the commission of the offense, less the amount of money or value of property returned to the victim of the offense or seized by or surrendered to lawful authority before sentence is imposed;

(8) "second felony conviction" means that the defendant previously has been convicted of a felony;

(9) "serious physical injury" has the meaning given in AS 11.81.900;

(10) "third felony conviction" means that the defendant has been at least twice previously convicted of a felony;

(11) "unconditional discharge" means that a defendant is released from all disability arising under a sentence, including probation and parole;

(12) "victim" means

(A) a person against whom an offense has been perpetrated;

(B) one of the following, not the perpetrator, if the person specified in (A) of this paragraph is a minor, incompetent, or incapacitated:

(i) an individual living in a spousal relationship with the person specified in (A) of this paragraph; or

(ii) a parent, adult child, guardian, or custodian of the person;

(C) one of the following, not the perpetrator, if the person specified in (A) of this paragraph is dead:

(i) a person living in a spousal relationship with the deceased before the deceased died;

(ii) an adult child, parent, brother, sister, grandparent, or grandchild of the deceased; or

(iii) any other interested person, as may be designated by a person having authority in law to do so. (§ 12 ch 166 SLA 1978; am E.O. No. 55, § 9 (1984); am § 3 ch 154 SLA 1984; § 7 ch 59 SLA 1989; am § 6 ch 64 SLA 1991)

Revisor's notes. — Paragraph (3) was enacted as paragraph (12). Renumbered in 1991, at which time former paragraphs (3)-(11) were renumbered as (4)-(12).

Effect of amendments. — The 1991 amendment, effective September 16, 1991, added paragraph (3).

NOTES TO DECISIONS

Quoted in Capwell v. State, 823 P.2d 1250 (Alaska Ct. App. 1991).

Chapter 61. Rights of Victims.

Article
1. Rights and Duties (§§ 12.61.010, 12.61.015)
2. Victim and Witness Information Confidentiality (§§ 12.61.100 — 12.61.160)

Article 1. Rights and Duties.

Section
10. Rights of crime victims
15. Duties of prosecuting attorney

Sec. 12.61.010. Rights of crime victims. (a) Victims of crimes have the following rights:

(1) the right to be informed by the appropriate law enforcement agency or the prosecuting attorney of the date of trial and the date of sentencing of the case in which the victim is involved;

(2) the right to be notified that a sentencing hearing or a court proceeding to which the victim has been subpoenaed will not occur as scheduled;

(3) the right to receive protection from harm and threats of harm arising out of cooperation with law enforcement and prosecution efforts, and to be provided with information as to the protection available;

(4) the right to be informed of the procedure to be followed to apply for and receive any compensation under AS 18.67;

(5) at the request of the prosecution or a law enforcement agency, the right to cooperate with the criminal justice process without loss of pay and other employee benefits except as authorized by AS 12.61.017 and without interference in any form by the employer of the victim of crime;

(6) the right to obtain access to immediate medical assistance and not to be detained for an unreasonable length of time by a law enforcement agency before having medical assistance administered; however, an employee of the law enforcement agency may, if necessary, accompany the person to a medical facility to question the person about the criminal incident if the questioning does not hinder the administration of medical assistance;

(7) the right to make a written or oral statement for use in preparation of the presentence report of a felony defendant;

(8) the right to appear personally at the defendant's sentencing hearing to present a written statement, and to give sworn testimony or an unsworn oral presentation; and

(9) the right to be informed by the prosecuting attorney, at any time after the defendant's conviction, about the complete record of the defendant's convictions.

(b) Law enforcement agencies, prosecutors, and the courts shall make every reasonable effort to ensure that victims of crimes have the rights set out in (a) of this section. However, a failure to ensure these rights does not give rise to a separate cause of action against law enforcement agencies, other agencies of the state, or a political subdivision of the state. (§ 4 ch 154 SLA 1984; am § 8 ch 59 SLA 1989; am § 10 ch 57 SLA 1991)

Effect of amendments. — The 1991 amendment, effective September 17, 1991, rewrote paragraph (a)(8).

Sec. 12.61.015. Duties of prosecuting attorney. (a) If a victim of a felony or a domestic violence assault requests, the prosecuting attorney shall make a reasonable effort to

(1) confer with the person against whom the offense has been perpetrated about that person's testimony before the defendant's trial;

(2) in a manner reasonably calculated to give prompt actual notice, notify the victim

(A) of the defendant's conviction and the crimes of which the defendant was convicted;

(B) of the victim's right in a case that is a felony to make a written or oral statement for use in preparation of the defendant's presentence report, and of the victim's right to appear personally at the defendant's sentencing hearing to present a written statement and to give sworn testimony or an unsworn oral presentation;

(C) of the address and telephone number of the office that will prepare the presentence report; and

(D) of the time and place of the sentencing proceeding;

(3) notify the victim in writing of the final disposition of the case within 30 days after final disposition of the case.

maintenance or design of the taxiways and runways of Anchorage International Airport.

III.

In conclusion, the judgment of the trial court is affirmed on the alternative ground that the public duty exception bars the State from seeking indemnification for its own negligence in the operation, maintenance or design of the runways and taxiways.

AFFIRMED.

STATE of Alaska, Appellant,

v.

Matthew JACKSON, Appellee.

No. A-2806.

Court of Appeals of Alaska.

June 16, 1989.

Defendant was convicted in the Superior Court, Third Judicial District, Anchorage, Karl S. Johnstone, J., of second-degree sexual abuse of a minor. The State appealed, claiming that the sentence was too lenient. The Court of Appeals, Bryner, C.J., held that a three-year suspended sentence, with the defendant placed on probation on condition that he complete an outpatient program of sexual offender counseling and perform 1,000 hours of community service, was too lenient for the sexual abuse of a victim who was 13 or 14 years old at the times of multiple incidents of sexual contact.

Sentence disapproved.

1. Criminal Law ⇐1208.1(1)

Typical first offender who commits typical or moderately aggravated Class B felony should receive unsuspended term of one year or more, with four-year upper limit. AS 11.46.130.

2. Criminal Law ⇐1208.1(1)

For Class B felony that is exceptionally aggravated, but committed by first offender, term of up to six years of unsuspended incarceration would be justified, equal to presumptive term for third felony offender. AS 11.46.130.

3. Criminal Law ⇐1208.1(1)

For first-time felony offender who commits Class B felony in case that is less serious than typical offense, either because it involves mitigated conduct or offender whose probation indicates particularly favorable prospects for rehabilitation, nonprobationary sentence below one-year to four-year range for typical offenses would be appropriate. AS 11.46.130.

4. Criminal Law ⇐982.4(1)

Probationary sentence involving less than 90 days of unsuspended incarceration would be appropriate for first-time offender who commits Class B felony only in cases that are significantly mitigated in terms of both offender and offense. AS 11.46.130.

5. Infants ⇐20

Three-year suspended sentence, with defendant to complete three years of probation, to complete outpatient treatment of sexual offender counseling, and to perform 1,000 hours of community service, was too lenient for second-degree sexual abuse of minor; although defendant's favorable prospects for rehabilitation would have justified sentence below one-year to four-year range for typical first offense, offense involved victim who was 13 or 14 years old at time of repeated incidents occurring over lengthy period of time, defendant violated trust placed in him by victim and her parents, and absence of force or coercion did not mitigate offense. AS 11.41.436(a)(1), (b), 12.55.125(d).

Elizabeth H. Sheley, Asst. Dist. Atty., Dwayne W. McConnell, Dist. Atty., Anchorage, and Grace Berg Schaible, Atty. Gen., Juneau, for appellant.

William W. Whitaker and Kenneth A. Norsworthy & Associates, Anchorage, for appellee.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

OPINION

BRYNER, Chief Judge.

Matthew Jackson was convicted upon his plea of no contest to a charge of sexual abuse of a minor in the second degree, a class B felony. AS 11.41.436(a)(1). Superior Court Judge Karl S. Johnstone sentenced Jackson to a term of three years and suspended the entire term, requiring Jackson to complete three years of probation. As special conditions of probation, Judge Johnstone ordered Jackson to complete an outpatient program of sexual offender counseling and to perform 1,000 hours of community service. The state appeals the sentence as too lenient. We conclude that the sentence is too lenient and disapprove it.[1]

THE OFFENSE

In the summer of 1987, Matthew Jackson became romantically involved with thirteen-year-old M.S. Jackson was a teacher at a private gymnastics school. M.S. was one of his students. The relationship between Jackson and M.S. progressed during the fall of 1987, and, in December or January, approximately the time M.S. turned fourteen, Jackson engaged in sexual intercourse with her for the first time. The incident occurred at Jackson's home, where Jackson stopped in the course of giving M.S. a ride home from a gymnastics class.

From December of 1987 until March of 1988, Jackson had sexual intercourse with M.S. on five or six additional occasions. Jackson and M.S. also engaged in oral sex on several other occasions. One of these occasions occurred in March, 1988, while Jackson and M.S. were in Seattle, Washington, attending a gymnastics meet.

Sexual relations between Jackson and M.S. ended sometime in March, 1988; they were apparently stopped by Jackson. During the summer of 1988, M.S. reported her sexual involvement with Jackson. Jackson encouraged her to report their relationship, and, once it was reported, he admitted his involvement and acknowledged responsibility.

None of the incidents of sexual intercourse between Jackson and M.S. involved any force or coercion. Jackson and M.S. were mutually attracted to each other. After reporting the relationship, M.S. felt guilty and suffered some emotional difficulty. She indicated that she was still in love with Jackson and expressed a desire to marry him when she turned eighteen. Disclosure of the relationship also had a significant impact on the relationship between M.S. and her parents. As a result of the disclosure, M.S. and her parents found it necessary to undergo regular family counseling sessions.

THE OFFENDER

At the time of his involvement with M.S., Jackson was twenty-seven years of age. He had graduated from high school in Anchorage with above average grades and had attended three years of college.

Jackson had ten years' experience as a gymnastics instructor and coach for both private organizations and public schools. He was highly regarded by his employers, his students, and their parents. In addition to his work in gymnastics, Jackson had a steady record of employment as a laborer in his own maintenance and janitorial business.

Jackson had no prior criminal record. He was married in June of 1986, but felt his marriage was breaking up by the time he got involved in the relationship with

1. When the state appeals a sentence as too lenient, we are authorized only to express approval or disapproval of the sentence and have no authority to modify the sentence. AS 12.55.120(b). *See State v. Woods*, 680 P.2d 1195, 1196 n. 1 (Alaska App.1984); *State v. Coats*, 669 P.2d 1329, 1330 n. 1 (Alaska App.1983).

M.S. Jackson separated from his wife in January of 1988 and obtained a divorce later that year. Jackson maintains strong family ties in Anchorage, and his parents have continued to be very supportive of him.

Although there are indications in the record that Jackson is somewhat emotionally immature, there is no evidence to indicate that he suffers from any significant psychological or emotional disorder. Since his relationship with M.S. was reported, Jackson has consistently accepted responsibility for his conduct and has acknowledged its wrongfulness. He has expressed remorse for the damage that he has caused M.S. and her family.

SENTENCING PROCEEDINGS

Jackson was charged with one count of sexual abuse of a minor in the second degree. The statute governing the offense, AS 11.41.436, proscribes several distinct forms of sexual contact between adults and minors.[2] Jackson was charged under AS 11.41.436(a)(1), which covers conduct formerly called statutory rape. The relevant portion of AS 11.41.436(a)(1) provides that the offense of sexual abuse of a minor in the second degree occurs when an offender who is sixteen years of age or older "engages in sexual penetration with a person who is 13, 14, or 15 years of age and at least three years younger than the offender."

Sexual abuse of a minor in the second degree is a class B felony, AS 11.41.436(b), and is punishable by a maximum term of ten years' imprisonment. Presumptive terms for second and subsequent felony offenders are four and six years. No presumptive term is prescribed for individuals who, like Jackson, have not previously been convicted of a felony. *See* AS 12.55.125(d).

Jackson entered a plea of no contest to the charge and appeared for sentencing before Superior Court Judge Karl S. Johnstone. At the sentencing hearing, the state urged the court to impose a substantial term of imprisonment. The state relied in part on *State v. Coats*, 669 P.2d 1329 (Alaska App.1983), in which we disapproved as too lenient a sentence of sixty days for an offender convicted of a single incident of sexual contact with his twelve-year-old stepdaughter. The state also relied on several appellate decisions dealing with sentences for offenders convicted of statutory rape. In particular, the state cited *Goulden v. State*, 656 P.2d 1218 (Alaska App. 1983) (affirming a first offense sentence of five years with three years suspended); *Skrepich v. State*, 740 P.2d 950 (Alaska App.1987) (reversing maximum sentence of ten years, but remanding for imposition of a sentence of ten years with four years suspended); and *Foster v. State*, 761 P.2d

2. Alaska Statute 11.41.436 provides:

Sexual abuse of a minor in the second degree.

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

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

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

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

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

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

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

(5) being 18 years of age or older, the offender engages in sexual contact with a person who is under 16 years of age, and the victim at the time of the offense is

(A) residing as a m[illegible]er of the social unit in the same household as the offender and the offender is in a position of authority over the victim; or

(B) temporarily entrusted to the offender's care.

1388 (Alaska App.1988) (indicating appropriateness of a term of four years with two and one-half years suspended).

At the conclusion of the hearing, Judge Johnstone found that Jackson's conduct toward M.S. had resulted from genuine and reciprocal affection between Jackson and M.S. The judge also found Jackson to be sincerely remorseful and contrite and noted that there was no evidence to indicate that Jackson had engaged in similarly inappropriate behavior toward other minors. Judge Johnstone concluded that Jackson was not a person who had an abnormal affinity toward children or who was prone to deviant sexual behavior. The judge believed that, instead, Jackson's offense was situational and that it was consequently unlikely to recur.

In determining an appropriate sentence for Jackson, the judge carefully considered the sentencing criteria articulated by the Alaska Supreme Court in *State v. Chaney*, 477 P.2d 441, 443–44 (Alaska 1970), focusing primarily on Jackson's strong potential for rehabilitation. Relying on Jackson's favorable background, his remorse and contrition, and the situational nature of the offense, Judge Johnstone expressed the belief that Jackson was essentially rehabilitated, that there was little danger of subsequent offenses, and that he was in need of no further deterrence.

These findings led Judge Johnstone to conclude that no further incarceration was necessary for Jackson's deterrence or rehabilitation, and that there was no need to isolate him for the protection of the public. The judge stated that, to the extent that there was any additional need for rehabilitation, that need could be addressed by requiring Jackson to seek outpatient treatment as a condition of probation.

Judge Johnstone recognized that Jackson's offense had significant psychological effects on M.S. and her parents and consequent financial harm. The judge characterized Jackson's misconduct as serious. While Judge Johnstone acknowledged the need to express community condemnation in imposing a sentence, he concluded that this goal could adequately be provided by requiring Jackson to perform a substantial period of community service as a condition of probation.

Judge Johnstone found significant factual distinctions between the cases relied on by the state and Jackson's case. The judge thus concluded that existing case law dealing with statutory rape provided little useful guidance and did not mandate the imposition of a substantial term of imprisonment. Accordingly, the judge sentenced Jackson to a term of three years, suspended the entire term, and ordered Jackson to complete a three-year period of probation. As special conditions of probation, the judge required Jackson to complete a course of outpatient counseling for sexual offenders and to perform 1,000 hours of community service.

ANALYSIS

On appeal, the state argues that the sentence imposed below is clearly mistaken, *McClain v. State*, 519 P.2d 811, 813–14 (Alaska 1974), in that it gives insufficient attention to the seriousness of Jackson's criminal misconduct and fails to make adequate provision for the sentencing goal of community condemnation. We find that the state's argument has merit. In our view, a probationary sentence was clearly mistaken under the circumstances of Jackson's case.

A. *Relevant Case Law*

Our analysis must begin with *State v. Coats*, 669 P.2d 1329 (Alaska App.1983). In *Coats*, we had occasion to discuss the seriousness of the harm that results from sexual abuse of minors and the consequent need for emphasis on the sentencing goal of community condemnation, or reaffirmation of societal norms:

> [T]his court has consistently expressed the view that sexual abuse of children cannot be condoned. There is a compelling need in such cases to express community condemnation of those who sexually abuse children and to make clear to offenders that conduct is abhorrent to contemporary social norms.

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In most sexual abuse cases, the young victims are particularly vulnerable to abuse and are as a practical matter incapable of effectively defending themselves. Innocent children who have been the victims of sexual abuse may suffer serious, long-term emotional and psychological injuries; the nature and scope of the injuries is often difficult to predict with accuracy. In almost all cases, a sexual abuse victim must have tremendous courage and determination simply to cope with the emotional trauma involved as the primary witness in the adversary process of a formal prosecution. And often the disruption of normal family life occasioned by a prosecution will lead a youthful victim to feel confused and guilty.

669 P.2d at 1334 (citations omitted).

Coats involved a conviction under Alaska's former sexual abuse of children statute, AS 11.41.440, which ranked the offense as a class C felony—the lowest category of felony offenses. Nevertheless, given the seriousness of the harm in child sexual abuse cases, we specifically concluded in *Coats* that, even for first offenders, probationary sentences are appropriate only under limited circumstances:

> All of these considerations demand that due emphasis be placed on expressing community condemnation of offenders who sexually abuse children, sentences must make it clear to the offender and the victim alike that the offender, not the victim, has committed the crime. Although we think that a probationary sentence may properly be used when a first offender is convicted of a class C felony involving sexual abuse of a child, such a sentence will be appropriate only if mitigating circumstances exist and the offender is a promising candidate for rehabilitation through probationary supervision.

669 P.2d at 1334.

Coats thus makes it clear that, to justify a probationary sentence, the sentencing court must find not only that the offender has an unusually strong potential for rehabilitation, but also that the circumstances surrounding the commission of the offense are mitigated.

Since this court decided *Coats,* Alaska's statutes dealing with sexual abuse of children have undergone significant revision, bolstering the conclusion that we reached in *Coats.* Conduct traditionally referred to as statutory rape and formerly designated as a class C felony has now been defined as sexual abuse of a minor in the second degree, a class B felony. The reclassification of the offense underscores the need for adherence to our decision in *Coats,* for, as we said in *State v. Woods,* 680 P.2d 1195, 1197 (Alaska App.1984): "Other things being equal, one convicted of a class B felony should receive a greater sentence than one convicted of a class C felony."

Since deciding *Coats,* we have consistently emphasized that mitigated circumstances and a strong potential for rehabilitation are both prerequisites for probationary sentences in class B felonies. In *State v. Karnos,* 696 P.2d 685 (Alaska App.1985), we disapproved a probationary sentence for a first felony offender convicted of first-degree theft, a class B felony. The sentencing record indicated that the defendant had unusually strong prospects for rehabilitation, but the factual circumstances surrounding the theft were not particularly mitigated. We concluded that, absent significant mitigating circumstances, the seriousness of the offense required imposition of a sentence involving a substantial period of incarceration.

We reached a like conclusion in *State v. Hooper,* 760 P.2d 840 (Alaska App.1988). Hooper was convicted of the class B felony of misconduct involving a controlled substance in the third degree for possessing two ounces of cocaine with intent to deliver. He was initially sentenced to four years with two and one-half years suspended. Subsequently, Hooper moved for reduction of the sentence. He made a compelling showing that he had been rehabilitated while his case was pending on appeal. Based on Hooper's demonstrated rehabilitation, the sentencing court reduced the original sentence, suspending the full four-year term of imprisonment.

On appeal, we disapproved the imposition of a probationary term in Hooper's case. We did not quarrel with the sentencing court's conclusion that Hooper had made an adequate showing of actual rehabilitation. Rather, we emphasized that Hooper's rehabilitation could not alone justify a probationary sentence for a class B felony. While we declined to hold that probationary sentences could never be appropriate for class B felonies, we reiterated that a probationary term could be justified only when the crime itself was mitigated. Because the circumstances involved in Hooper's offense were neither particularly aggravated nor mitigated, we held that a substantial sentence of imprisonment was necessary to avoid depreciating the seriousness of the offense and to express community condemnation. *Id.* at 842–43.

We have reached similar conclusions when considering class B felonies involving sexual abuse of children. In *State v. Woods,* 680 P.2d 1195 (Alaska App.1984), the defendant was convicted of a single episode of sexually abusing his five-year-old daughter. The sentencing court found Woods' conduct to be comparable to the conduct involved in *State v. Coats,* and found that Woods' prospects for rehabilitation were comparable to Coats'. Accordingly, the court imposed an unsuspended sentence of six months' imprisonment—the sentence that this court had indicated as minimally appropriate for Coats. *See State v. Coats,* 669 P.2d at 1334. We disapproved Woods' six-month sentence as too lenient, noting that Woods' offense involved a child younger than the child involved in the Coats' case and emphasizing that Woods had been convicted of a class B felony instead of a class C felony. We concluded that an unsuspended term of at least eighteen months to serve should have been imposed. *Id.* at 1197–98.

In *Foster v. State,* 761 P.2d 1388 (Alaska App.1988), a statutory rape case like Jackson, the defendant, a twenty-five-year-old first offender, was convicted of a single incident of sexual intercourse with a fourteen-year-old girl. Foster was sentenced to serve four years with two and one-half years suspended. The superior court thereafter declined Foster's motion to reduce the sentence. We upheld the superior court's decision, noting that the sentencing record supported the court's apparent conclusion that Foster's conduct was not particularly mitigated and that his prospects for rehabilitation were not particularly favorable.

When significant aggravating circumstances have been established or when an offender's potential for rehabilitation has been shown to be particularly bad, we have not hesitated to approve first offense child sexual abuse sentences substantially exceeding eighteen months of unsuspended incarceration. For example, in *Goulden v. State,* 656 P.2d 1218 (Alaska App.1988), the defendant, a forty-three-year-old school principal and teacher, was convicted of a single incident of statutory rape involving a fourteen-year-old student. The incident occurred after a party at Goulden's house and not during school hours. It involved no force or coercion. While alcohol and marijuana had been consumed by some of the guests at Goulden's party, there was nothing to indicate that Goulden had provided those substances, and it was not clear whether the victim had consumed any intoxicants.

Goulden was convicted of sexual abuse of a minor under Alaska's former statute, which made the offense a class C felony. In imposing sentence, the superior court found Goulden's background and prospects for rehabilitation to be favorable and concluded that, in most respects, his offense was mitigated. Although Goulden's victim was characterized as slightly retarded, the sentencing court expressly found that she was sexually experienced, that no force was used against her, and that she had sustained no lasting damage. *Goulden* 656 P.2d at 1221.

[illegible] *Smith v. State,* 745 P.2d 1375, 1378 (Alaska App.1987), we had occasion to review Alaska sentencing decisions dealing with drug offenses. Our review of the drug cases, particularly those dealing with convictions for misconduct involving a controlled substance in the third degree, a class B felony, lends further support to the conclusions that we reached in *Hooper* and *Karnos*

Nevertheless, the sentencing court concluded that Goulden's conduct was particularly serious because he had breached his trust as a teacher by engaging in sexual relations with one of his students. On this basis the court imposed a term of five years with three years suspended. On appeal, this court approved the sentence, relying principally on the breach of trust inherent in Goulden's relationship to the victim.

Skrepich v. State, 740 P.2d 950 (Alaska App.1987), provides another useful example. Skrepich was convicted of sexual abuse of a minor in the second degree. Like Jackson, he was convicted for conduct amounting to statutory rape. A thirty-seven-year-old karate instructor, Skrepich became romantically and sexually involved with a fifteen-year-old student. The relationship lasted several months. The sentencing court imposed the maximum term of ten years' imprisonment. On appeal, although we noted that in some respects Skrepich's conduct was not particularly aggravated, we found it significant under *Goulden* that Skrepich had violated his trust as a teacher in committing the offense. We also found that Skrepich's background of prior similar misconduct, for which he had never been convicted, made him a particularly poor candidate for rehabilitation. On these grounds, although concluding that a sentence of ten years was excessive, we held that a sentence of up to ten years with four years suspended would be justified.

Our review of these cases suggests four distinct sentencing ranges for first offenders convicted of class B felonies:

[1] 1. A typical offender committing a typical or moderately aggravated offense should receive an unsuspended term of a year or more to serve.[4] The upper limit in such cases should be four years, reflecting our decision in *Austin v. State*, 627 P.2d 657, 657–58 (Alaska App.1981). In *Austin*, we indicated that first offenders should normally receive a sentence more lenient than the presumptive term for a second felony offender.

[2] 2. For an offense that is exceptionally aggravated—one that involves the existence of significant statutorily specified aggravating factors or other extraordinarily aggravated circumstances—a term of up to six years of unsuspended incarceration, the presumptive term for a third felony offender, would be justified.

[3] 3. For a case that is less serious than the norm for the offense, either because it involves mitigated conduct or an offender whose background indicates particularly favorable prospects for rehabilitation, a nonprobationary sentence below the one-year to four-year range for typical offenses will be appropriate. By "nonprobationary," we mean a sentence involving at least ninety days of unsuspended incarceration—in other words, a term that exceeds the sixty-day limit of a sentence involving

4. Our conclusion that a significant term of incarceration will be appropriate for typical first offenders who commit class B felonies is not inconsistent with the supreme court's decision in *Leuch v. State*, 633 P.2d 1006 (Alaska 1981). In *Leuch*, the court indicated that, for first offenders convicted of crimes against property, "probation, coupled with restitution, is the appropriate sentence unless other factors militate against it." 633 P.2d at 1013–14. *Leuch*, however, dealt with convictions for grand theft under our former criminal code. The convictions involved conduct that would have amounted to theft in the second degree, a class C felony under our current criminal code. *See* AS 11.46.130. The decision in *Leuch* expressly recognized that, even with property crimes, the seriousness of any given offense is a legitimate consideration in determining the appropriateness of a probationary term. In fact, in Leuch's case, the court declined to apply the rule favoring imposition of a probationary term. The court concluded that, because Leuch had a misdemeanor record and because one of the two felony thefts for which he was convicted involved "large-scale crime and had a severe impact on the uninsured victim," 633 P.2d at 1014, a period of incarceration was appropriate. Under Alaska's revised criminal code, only aggravated property crimes are designated as class B felonies. In contrast to *Leuch*, in which the most serious theft involved property valued at approximately $12,500, under the current code theft in the first degree, a class B felony, is restricted to cases involving property valued at $25,000 or more. *See* AS 11.46.130. Thus, in most cases, the inherent seriousness of property offenses that qualify as class B felonies will justify an exception to the rule in *Leuch* and call for the imposition of a nonprobationary term. *See Karr v. State*, 686 P.2d 1192, 1195–96 (Alaska 1984).

"shock probation." *See Langton v. State*, 662 P.2d 954, 959 (Alaska App.1983); *State v. Hooper*, 750 P.2d 840, 842 n. 3 (Alaska App.1988); *Leuch v. State*, 633 P.2d 1006, 1014 n. 22 (Alaska 1981). In such cases, sentencing courts have broad discretion to require that any period of incarceration be served as a condition of a suspended imposition of sentence.

[4] 4. A probationary sentence—a term involving less than ninety days of unsuspended incarceration—should be reserved for cases that are significantly mitigated in terms of both the offender and the offense. When an offense involves mitigated conduct but is committed by an offender who does not show unusually good prospects for rehabilitation, the imposition of a nonprobationary sentence will further the sentencing goals of both community condemnation and personal deterrence. When an offender who has good prospects for rehabilitation commits a crime involving conduct typical for the offense, the seriousness of the conduct and the resulting need to express community condemnation will militate in favor of a nonprobationary sentence. Thus, a probationary sentence will be appropriate only when an offender's conduct is significantly less serious than typical conduct for the offense and only when the offender's prospects for rehabilitation are shown to be significantly better than the typical first offender's conduct.[5]

We emphasize that these benchmarks are just that. They are not inflexible categories to be rigidly adhered to. Rather, they are general guidelines that should serve as a starting point for analysis. In each case, the sentencing court must decide upon an appropriate sentence based on the totality of the circumstances before it. It is to be expected that many cases will not fit neatly into any one of the specific categories that we have enumerated.

B. *Application of Case Law to Ja son's Case*

[5] It remains to be determined wh Jackson's case falls within these ben mark ranges. The sentencing court's mary focus was on Jackson's potential rehabilitation. Given the court's findin there seems little doubt concerning Ja son's unusually favorable prospects for habilitation. Jackson's strong family community ties, his solid educational employment history, his lack of any pr criminal record, the situational nature his offense, and his genuine remorse contrition all support the conclusion t incarceration is unnecessary to further sentencing goals of rehabilitation, perso deterrence, or isolation.

In contrast to the attention it gave Jackson's background and prospects for habilitation, the sentencing court m comparatively few specific findings c cerning the seriousness of Jacksons' c duct. We see little if anything in this c to justify the conclusion that Jackson's c duct was significantly less serious than norm for the offense.

M.S. was thirteen and fourteen years age at the time of the offense. Her falls within the lower range of the stat rily specified limits for the offense. C versely, while Jackson was not particul advanced in age, neither was he a youth offender. At age 27, Jackson was a thirteen years older than M.S.

It is also significant that Jackson not convicted for an isolated instance misconduct. His offense involved mult incidents occurring over a lengthy perio time. *See, e.g., Smith v. State*, 745 1875, 1877 n. 2 (Alaska App.1987); *Higg State*, 676 P.2d 610 (Alaska App.19 *See also State v. Karnos*, 696 P.2d at

5. In most cases, the imposition of a substantial but relatively moderate period of incarceration—a period within the range of ninety days to eighteen months—would be unlikely to conflict with an offender's rehabilitation. In some truly exceptional cases, however, specific circumstances might warrant the conclusion that even a relatively brief period of incarceration would substantially jeopardize an offender's prospects for rehabilitation. We do not clude the imposition of a probationary when case-specific circumstances place the tencing goal of community condemnatio actual conflict with the goal of rehabilit and when the sentencing record support conclusion that the offender's rehabilit must be given priority.

It is even more significant that, in sexually abusing M.S., who was one of his gymnastics students, Jackson violated the trust placed in him by M.S. and her parents. *See Goulden v. State*, 656 P.2d at 1221; *State v. Andrews*, 707 P.2d 900, 911 (Alaska App. 1985); *Depp v. State*, 686 P.2d 712, 721 (Alaska App.1984). While this breach of trust might not have been as significant as it would have been had Jackson been M.S.'s teacher at school, or her parent or guardian, the breach nonetheless contributes markedly to the seriousness of the offense and, in our view, precludes the conclusion that Jackson's conduct was significantly less serious than the norm for the offense. *See Skrepich v. State*, 740 P.2d at 954.

It is true, as Jackson points out, that his conduct toward M.S. was motivated by genuine reciprocal affection and involved no coercion or force. However, while the sincerity of Jackson's feelings toward M.S. may to a limited extent be viewed as an extenuating circumstance, the absence of force or coercion cannot. Neither force nor lack of consent is an element of sexual abuse of a minor in the second degree. In cases of statutory rape, the typical offense involves mutually consensual conduct. It is precisely because the law deems children to be incapable of rendering meaningful consent in such situations that the offense has been defined to make consent irrelevant. Thus, had Jackson used force or coercion in committing his offense, his conduct would have been significantly aggravated. The absence of such conduct, however, does not mitigate the offense.[6]

Jackson's conduct would qualify as less serious than the typical conduct within the definition of sexual abuse of a minor in the second degree only if we assumed that the conduct involved in statutory rape is *per se* less serious than the other types of conduct that are proscribed in the statutory definition of sexual abuse of a minor in the second degree. Such an assumption, however, would be untenable. It is well established that all of the categories of conduct classified within a single statutory provision must, in the abstract, be presumed equally serious; differences in seriousness between similarly classified offenses must thus be evaluated on a case-by-case basis. *See, e.g., Walsh v. State*, 677 P.2d 912, 916–17 (Alaska App.1984); *Juneby v. State*, 641 P.2d 823, 841 (Alaska App.1982), *modified in part*, 665 P.2d 30 (Alaska App. 1983).

In summary, Jackson's actual conduct in committing the offense for which he was convicted was at best only slightly mitigated. Thus, while Jackson's favorable prospects for rehabilitation would have justified a sentence below the one-year to four-year range for typical first offenses, the absence of significantly mitigated conduct calls for imposition of a nonprobationary term—one equivalent to at least ninety days of incarceration.

Jackson's sentence does not provide for any unsuspended term of incarceration. However, in imposing sentence, Judge Johnstone did require, as a condition of probation, that Jackson complete 1,000 hours of community work. The 1,000-hour community work requirement cannot, in our view, be dismissed as wholly inconsequential or insubstantial. We have previously emphasized that in cases involving first offenders convicted of class B felonies, sentencing courts have broad discretion to provide for periodic confinement on weekends or at other suitable intervals, and to substitute community work for incarceration. *See State v. Hooper*, 760 P.2d at 848 n. 5; *State v. Karnos*, 690 P.2d at 687.

6. In this regard, *Smith v. State*, 745 P.2d 1375 (Alaska App.1987), is relevant. Smith was a forty-five-year-old second offender. He had previously been convicted of sexually abusing a minor. The conviction involved conduct similar to that in Jackson's case. In considering his prior offense, we stated:

> Smith had sexual intercourse on numerous occasions, during a four month period, with a fourteen-year-old daughter of a friend. It appears that the "victim" was a willing participant and may have even instigated the contact. There was no evidence of violence, and up until that time Smith had an exemplary record. Nevertheless, the offense was serious, given the substantial age disparity between the participants.

745 P.2d at 1377 n. 2 (citations omitted).

The legislature has also clearly expressed the view that community work may constitute an appropriate substitute for incarceration. In AS 12.55.055(d), the legislature has provided:

> The court may offer a defendant convicted of an offense the option of performing community work in lieu of a sentence of imprisonment. Substitution of community work shall be at a rate of 8 hours per each day of imprisonment. A court may not offer substitution of community work for any mandatory minimum period of imprisonment or for any period of a presumptive term of imprisonment.

Gauging Jackson's sentence by the statutory formula set forth in AS 12.55.055(d), the community work requirement imposed below is equivalent to 125 days of imprisonment. At least arguably, then, the community work requirement substantially exceeds the ninety-day jail term that would qualify Jackson's sentence as nonprobationary.

In our view, however, the language of AS 12.55.055(d) makes it reasonably clear that the legislature did not regard community work as the functional equivalent of incarceration in all situations. Had the legislature desired to make community work interchangeable with incarceration, it would not have enacted a restriction against offering community work as an alternative to minimum and presumptive terms. The fact that the legislature chose to restrict the use of community work provides a strong indication that, in its view, the goals of sentencing could not adequately be fulfilled under some circumstances by a sentence involving community work rather than imprisonment. By analogy to the expression of legislative intent embodied in AS 12.55.055(d), we conclude that community work cannot properly be relied on to replace jail time altogether when the circumstances surrounding an offender's conviction for a class B felony, and the consequent need to emphasize community condemnation, would require the imposition of a nonprobationary term. In such cases, reliance by the sentencing court on community work to the exclusion of incarceration would unduly depreciate the seriousness of the offense and underemphasize the community's condemnation of the offender's misconduct.

Despite the significant community work requirement imposed by the sentencing court, we are constrained to find that, because it fails to incorporate any actual period of confinement, Jackson's sentence unduly depreciates the significance of his misconduct and inadequately serves the sentencing goal of community condemnation. Our independent review of the sentencing record convinces us that the sentence imposed below was clearly mistaken. *McClain v. State*, 519 P.2d 811, 813–14 (Alaska 1974).

Accordingly, this sentence is DISAPPROVED.

Donald L. BUMPUS, Appellant,

v.

STATE of Alaska, Appellee.

No. A-2606.

Court of Appeals of Alaska.

June 23, 1989.

Defendant was convicted after pleading no contest to two counts of burglary in first degree, in the Superior Court, Third Judicial District, Palmer, J. Justin Ripley, J., and received sentence of adjusted presumptive terms of seven years for each count, which were made consecutive to each other and to nine-year sentence defendant received in another court for related burglary and theft convictions, which sentences were to be served without eligibility for parole. Defendant appealed. The Court of Appeals, Bryner, C.J., held that (1) defendant was properly characterized as worst offender and dangerous offender