HJR
43

Rep. Brian Porter, Chairman

House Judiciary Committee

Date: 1-12-94
Place: Rm 120

Subject of Meeting:
HJR 43 SB 45

Please Print Name	Representing	Business/Personal Mailing Address	Zip	(H) Phone	(W) Phone	Do you Want to Testify?	Which Subject/ Which Bill?
Betty Jo Engelman	Juneau Youth Services	P.O. Box 32839	99803	789-7610		(Y) N	SB 45
Sherrie Goll	ALASKA WOMEN'S LOBBY KIDPAC	P.O. Box 22156	99802		463-6744	(Y) N	SB 45
Dean Guaneli	LAW	BOX 100300 Juneau			3428	(Y) N	HJR 43
Donna Schultz	Div. Family + Youth Ser	P.O. Box 110630 Juneau	99811-0630		465-2112	Y (N)	Available to answer questions
Elmer Lindstrom	DHSS; Comm office	Juneau		789-2662	465-3030	Y (N)	
Jerry Burnett	Senator Phillips	State Capitol	99801		465-4949	(Y) N	SB45
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HJR 43

Revision Date:

Title: Amendment to the Constitution RE: Penal Administration

Sponsor: Reps. Porter, Phillips & Barnes

Requestor:

Department Affected: Office of the Governor

BRU: Division of Elections

Component: General and Primary Elections

COMPONENT SERIAL NO. 22

EXPENDITURES/REVENUES:

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	2.2*	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND &	0	0	0	0	0	0
GRANTS,	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL	2.2*	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE						

FUNDING:

	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
1002 Federal	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	2.2*	0	0	0	0	0
1005 GF/Program	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	2.2*	0	0	0	0	0

POSITIONS:

	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
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 (FY94) impact: 0

ANALYSIS: (Attach a separate page if necessary.)*This figure covers cost of inclusion of information about this issue in the Official Elections Pamphlet as required by AS 15.58, and programming for DataVote counting of votes cast on the measure. However, only 4 measures can be printed on a single ballot card. Should this measure require printing an additional ballot card, the fiscal impact would be 53.4.

Prepared by: Joseph L. Swanson, Director
Phone: 465-4611
Division: Division of Elections
Date: 1/11/94

Approved by Commissioner: Lt. Governor John B. Coghill
Agency: Office of the Lt. Governor
Date: 1/11/94

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Rev 12/93

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HJR 43

ANALYSIS:

This figure covers cost of inclusion of information about this issue in the Official Elections Pamphlet as required by AS 15.58., and programming for DataVote counting of votes cast on the measure. However, only 4 measures can be printed on a single ballot card. Should this measure require printing an additional ballot card, the fiscal impact would be 53.4.

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO: CSHJR43 (JUD)

Revision Date:
Title: Relating to Penal Administration and the Rights of Crime Victims"
Sponsor: Representative Porter
Requestor: Representative Porter

Dept. Affected: Public Safety
BRU: Alaska State Troopers
Component: Detachments
COMPONENT SERIAL NO. 799

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
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						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0	0	0	0	0	0

Estimate of current year (FY 94) impact: $0.00

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

No fiscal impact is anticipated.

Prepared By: Francis C. Allan
Division: Alaska State Troopers
Phone: 269-5691
Date: 11/10/93

Alaska State Legislature

House of Representatives

House Judiciary Committee

State Capitol, Room 120
Juneau, Alaska 99801-1182
(907) 465-4990

Date: November 4, 1993

To: Members of the House

From: Representative Brian Porter

Re: HJR 43 - Sponsor Statement

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The purpose of a victim's rights amendment to the Alaska Constitution is to provide the basic right of due process (the right to proper notification and the opportunity to be heard) to victims of crime throughout criminal justice proceedings. The history of our nation teaches us that **constitutions** and not the mere protection of changing statutes or the courts discretion, are needed to protect the basic rights of the people. Basic rights, such as due process for victims, needs to be in our basic law, the Alaska Constitution.

The Alaska Constitution establishes the right of due process, "No person shall be deprived of life, liberty, or property, without due process of law." Historically, the due process clause was interpreted in the context of criminal law to protect the offenders, **not the victims.** The due process clause, and other Alaska constitutional provisions presently provide offenders with volumes of protection. Yet, **victims are afforded no constitutional protection**. For victims, this amendment will provide rights of notice and participation at all critical stages of a criminal case, including post-arrest release hearings, pretrial motions, trial and sentencing.

The legislature has the authority to reasonably restrict judicial discretion in order to accomplish the goal of eliminating unjustified sentencing disparity. Our penal administration is based on the need to protect the public and reformation. Alaska's supreme court has enunciated

specific sentencing goals inherent in the twin constitutional principles of prisoner reformation and public protection, that being - community condemnation of the individual offender, or reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves. The Alaska Constitution should reflect on the hierarchy of Alaska's penal administration goals - the need to protect the public, community condemnation of the offender and the principle of reformation.

The victim's rights amendment does not deny any existing constitutional right to defendants, but simply **establishes due process rights for the victims**. Currently, specific rights are afforded to victims by statute. However, these specific statutory rights do not afford the victim the right to proper notification and the opportunity to be heard **throughout** the criminal justice process. Without this restoration of fundamental rights, the balance of the judicial system remains tilted. **This amendment will restore the criminal justice system to its original purpose: to serve and protect the law abiding, to be fair, and to seek justice**. At this time, victims are powerless without a right to be notified of all proceedings and a right to be heard throughout the criminal justice process. Victims have no constitutional rights and no constitutional standing. To date, fourteen (14) states recognizing the lack of due process rights afforded to victims, amended their constitutions to provide these fundamental rights to victims of crime.

Crime makes victims of us all. Yet, victims of crime have no constitutional right to justice or due process, no right to respect or fair treatment as their case proceeds, no right to either be heard or informed at all the critical stages throughout the criminal justice process. Victims have no constitutitonal rights at all. It is time to return to a system that is about protecting innocence and order - about perserving liberty.

I appreciate your consideration and support of this needed resolution. If you have any questions or concerns, please let me know or phone my Committee Aide, Daniella Loper at 258-8197.

LAWS OF ALASKA

1989

Source | **Chapter No.**

CSHB 36(Fin) am | 59

AN ACT

Relating to crimes, the rights, entitlements, and services that are due to victims of crime, and to service of process on prisoners; redefining the term 'crime against a person'; and amending Rules 32 and 35 of the Alaska Rules of Criminal Procedure.

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

THE ACT FOLLOWS ON PAGE 1, LINE 12

UNDERLINED MATERIAL INDICATES TEXT THAT IS BEING ADDED TO THE LAW AND BRACKETED MATERIAL IN CAPITAL LETTERS INDICATES DELETIONS FROM THE LAW; COMPLETELY NEW TEXT OR MATERIAL REPEALED AND RE-ENACTED IS IDENTIFIED IN THE INTRODUCTORY LINE OF EACH BILL SECTION.

Approved by the Governor: May 30, 1989
Actual Effective Date: August 28, 1989

AN ACT

Relating to crimes, the rights, entitlements, and services that are due to victims of crime, and to service of process on prisoners; redefining the term 'crime against a person'; and amending Rules 32 and 35 of the Alaska Rules of Criminal Procedure.

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* Section 1. SHORT TITLE. This Act may be referred to as the "Alaska Crime Victim's Rights Act."

* Sec. 2. AS 09.05 is amended by adding a new section to read:

Sec. 09.05.050. SERVICE OF PROCESS ON STATE PRISONERS. (a) In a civil action to which a person committed to the custody of the commissioner of corrections is a party or witness, service of process shall be made by delivering a copy of the summons and the complaint or pleadings, together with a form for affidavit of proof of service, to the shift supervisor of the correctional facility in which the person is housed. The shift supervisor shall

(1) immediately hand deliver the summons and complaint or pleadings to the person whose name appears on the summons; and

(2) promptly complete the affidavit of proof of service on the form provided and return it to the party requesting service of process.

(b) A party requesting service of process under this section may locate a person committed to the custody of the commissioner of corrections by contacting the chief classification officer of the

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Department of Corrections during that officer's regular hours of work.

* Sec. 3. AS 12.47 is amended by adding a new section to read:

Sec. 12.47.095. NOTICE TO VICTIMS. (a) If an offender has been committed to the custody of the commissioner of health and social services under AS 12.47.090, the victim of that crime is entitled to notice of a pending change in the status of the offender. The commissioner of health and social services shall give notice as required by this section if

(1) the offender has been continued in commitment following expiration of the maximum term of imprisonment under AS 12.47.090(f) and the commissioner gives notice of release of the offender;

(2) the court is to consider modification of an order of conditional release for the offender under AS 12.47.092(e);

(3) a court is to consider conditional release of the offender under AS 12.47.090(k) and 12.47.092(a); or

(4) the offender petitions for discharge under AS 12.47.-092(f).

(b) If a victim desires notice under this section, the victim shall maintain a current, valid mailing address on file with the commissioner of health and social services. The commissioner shall send the notice required by this section to the victim's last known address. The victim's address may not be disclosed to the offender or offender's attorney.

(c) The commissioner of health and social services is required to give notice of a change in the status of an offender under this section to any victim who has requested notice.

(d) If more than one person who qualifies as a victim under AS 12.55.185 desires notice, the commissioner of health and social services shall designate one person for purposes of receiving any

notice required and exercising the rights granted by this section.

(e) In this section

(1) "offender" has the meaning given in AS 12.61.020;

(2) "victim" has the meaning given in AS 12.55.185.

* Sec. 4. AS 12.55 is amended by adding a new section to read:

Sec. 12.55.023. PARTICIPATION BY VICTIM IN SENTENCING. (a) If a victim requests, the prosecuting attorney shall provide the victim, before the sentencing hearing, with a copy of the following portions of the presentence report:

(1) the summary of the offense prepared by the Department of Corrections;

(2) the defendant's version of the offense;

(3) all statements and summaries of statements of the victim; and

(4) the sentence recommendation of the Department of Corrections.

(b) A victim may submit to the sentencing court a written statement that the victim believes is relevant to the sentencing decision.

* Sec. 5. AS 12.55.088 is amended by adding new subsections to read:

(d) A victim has the right to comment in writing to the court on a motion to modify or reduce a sentence filed by the person who perpetrated the offense against the victim.

(e) If a motion is filed to modify or reduce a sentence by a defendant who perpetrated a crime against a person or arson in the first degree, the court shall, if feasible, send a copy of the motion to the Department of Corrections sufficiently in advance of any scheduled hearing or briefing deadline to enable the department to notify the victim of that crime. If that victim has earlier requested to be notified, the Department of Corrections shall send the victim a

copy of the motion and inform the person of that person's rights under this section, the deadline for receipt of written comments, the hearing date, and the court's address.

(f) The court shall provide copies of the victim's comments to the prosecuting attorney, the person filing the motion to reduce or modify a sentence, and that person's attorney.

(g) In deciding whether to modify or reduce a sentence, the court shall consider the victim's comments, when relevant, and any response by the prosecuting attorney and the person filing the motion.

(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.

* Sec. 6. AS 12.55 is amended by adding a new section to read:

Sec. 12.55.172. DESIGNATION OF REPRESENTATIVE. If more than one person who qualifies as a victim under AS 12.55.185 desires notice under AS 12.55.088, the prosecuting attorney shall designate one person to represent all victims for purposes of receiving the notice required and exercising the rights granted under this chapter.

* Sec. 7. AS 12.55.185 is repealed and reenacted to read:

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

(1) "crime against a person" has the meaning given in AS 11.30.901;

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

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

(4) "first felony conviction" means that the defendant has

not been previously convicted of a felony;

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

(6) "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;

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

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

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

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

(11) "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.

* Sec. 8. AS 12.61.010 is amended to read:

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 [VICTIM] 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; [AND]

(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) if the crime for which the defendant was convicted was a felony or a domestic violence assault, the right to appear personally at the defendant's sentencing hearing to present a written or oral statement; 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 [VICTIMS' EMPLOYERS, 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 [VICTIMS' EMPLOYERS,] law enforcement agencies, other agencies of the state, or a political subdivision of the state.

* Sec. 9. AS 12.61 is amended by adding new sections to read:

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 to appear personally at the defendant's sentencing hearing to present a written or oral statement;

(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.

(b) The notice given under (a)(2) of this section must inform the victim that the statement of the victim may contain any relevant information including

(1) an explanation of the nature and extent of physical, psychological, or emotional harm or trauma suffered by the victim;

(2) an explanation of the extent of economic loss or property damage suffered by the victim;

(3) an opinion of the need for and extent of restitution and whether the victim has applied for or received compensation for loss or damage; and

(4) the recommendation of the victim for an appropriate sentence.

(c) The state and the prosecuting attorney may not be held liable in damages for any failure to comply with the requirements of this section.

Sec. 12.61.017. INTERFERENCE BY VICTIM'S EMPLOYER. (a) An employer may not penalize or threaten to penalize a victim because the victim is subpoenaed or requested by the prosecuting attorney to attend a court proceeding for the purpose of giving testimony. In this section, "penalize" means to take action affecting the employment status, wages, and benefits payable to the victim, including:

(1) demotion or suspension;

(2) dismissal from employment; and

(3) loss of pay or benefits, except pay and benefits that are directly attributable to the victim's absence from employment to attend the court proceeding.

(b) A person who violates (a) of this section is guilty of a violation.

(c) A victim who suffers a pecuniary loss as a result of an employer's act prohibited by this section may bring a civil action to recover actual damages and punitive damages of three times the actual damages sustained.

* Sec. 10. AS 12.61 is amended by adding a new section to read:

Sec. 12.61.030. DESIGNATION OF REPRESENTATIVE. If more than one person who qualifies as a victim under AS 12.55.185 makes a request under this chapter, the prosecuting attorney shall designate one person for purposes of receiving the notice required and exercising the rights granted under this chapter.

* Sec. 11. AS 12.61 is amended by adding a new section to read:

Sec. 12.61.900. DEFINITIONS. In this chapter

(1) "domestic violence assault" means an assault under AS 11.41.200 - 11.41.230 or 11.41.[illegible] - 11.41.[illegible] constituting a domestic violence offense under AS 25.35.060;

(2) "victim" has the meaning given in AS 12.55.185.

* Sec. 12. AS 33.16.120(a) is repealed and reenacted to read:

(a) If the victim of a crime against a person or arson in the first degree requests notice of a scheduled hearing to review or consider discretionary parole for a prisoner convicted of that crime, the board shall send notice of the hearing to the victim at least 30 days before the hearing. The notice must be accompanied by a copy of the prisoner's application for parole submitted under AS 33.16.130(a). However, the copy of the application sent to the victim may not include the prisoner's proposed residence and employment addresses.

* Sec. 13. AS 33.16.120(b) is repealed and reenacted to read:

(b) A victim who requests notice under this section shall maintain a current, valid mailing address on file with the board. The board shall send the notice required by this section to the last known address of the victim. The victim's address may not be disclosed to the prisoner or the prisoner's attorney.

* Sec. 14. AS 33.16.120(c) is amended to read:

(c) The victim has a right to attend meetings of the parole board in which the status of the prisoner [illegible]cted of the crime against that victim is officially considered and to comment, in writing or in person, on the proposed action of the board. Copies of any written [THE] comments shall be provided to the prisoner and the prisoner's attorney before action by the board.

* Sec. 15. AS 33.16.120(e) is repealed and reenacted to read:

(e) If the victim requests, the board shall make every reasonable effort to notify the victim as soon as practicable in writing of its decision to grant or deny discretionary parole or to release the prisoner under AS 33.16.010(c). The notice under this subsection must include the expected date of the prisoner's release, the geographic area in which the prisoner is required to reside, and other pertinent

information concerning the prisoner's conditions of parole that may affect the victim.

* Sec. 16. AS 33.16.150(b) is amended to read:

(b) The board may require as a condition of discretionary or mandatory parole that a prisoner released on parole

(1) meet family obligations;

(2) pursue employment, education, counseling, or training;

(3) remain within stated geographic limits unless written permission to depart from the stated limits is granted the parolee;

(4) report upon release to the parole officer assigned to the parolee;

(5) report as required to the parole officer assigned to the parolee;

(6) reside at a stated place and notify the board of any change in place of residence;

(7) not possess or control firearms or other dangerous weapons;

(8) refrain from possessing or consuming alcoholic beverages;

(9) submit to reasonable searches and seizures by a parole officer, or a peace officer acting under the direction of a parole officer;

(10) submit to appropriate medical, mental health, or controlled substance or alcohol examination, treatment, or counseling;

(11) submit to periodic examinations designed to detect the use of alcohol or controlled substances;

(12) make restitution ordered by the court [TO A VICTIM OF THE PRISONER'S CRIME,] according to a schedule established by the board;

(13) refrain from opening, maintaining, or using a checking account or charge account;

(14) refrain from entering into a contract other than a prenuptial contract or a marriage contract;

(15) refrain from operating a motor vehicle;

(16) refrain from entering an establishment where alcoholic beverages are served, sold, or otherwise dispensed;

(17) refrain from participating in any other activity or associating with any other person that the board determines is reasonably likely to diminish the rehabilitative goals of parole, or that may endanger the public.

* Sec. 17. AS 33.16 is amended by adding a new section to read:

Sec. 33.16.260. DESIGNATION OF REPRESENTATIVE. If more than one person who qualifies as a victim under AS 12.55.185 requests notice under this chapter, the commissioner shall designate one person for purposes of receiving the notice required and exercising the rights granted by this chapter.

* Sec. 18. AS 33.20.080 is amended to read:

Sec. 33.20.080. BOARD OF PAROLE TO INVESTIGATE APPLICATIONS FOR EXECUTIVE CLEMENCY. The governor may refer applications for executive clemency to the board of parole. The board shall investigate each case and submit to the governor a report of the investigation, together with all other information the board has regarding the applicant. <u>When the report or investigation is submitted, the board shall also transmit to the governor the comments it has received under (b) of this section.</u>

* Sec. 19. AS 33.20.080 is amended by adding new subsections to read:

(b) If requested by the victim of a crime against a person or arson in the first degree, the board shall send notice of an

application for executive clemency submitted by the state prisoner who was convicted of that crime. The victim may comment in writing to the board on the application for executive clemency.

(c) If the victim desires notice under (b) of this section, the victim shall maintain a current, valid mailing address on file with the board. The board shall send the notice required under this section to the victim's last known address. The victim's address may not be disclosed to the applicant for executive clemency or the applicant's attorney.

(d) In this section,

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

(2) "victim" has the meaning given in AS 12.55.185.

* Sec. 20. AS 33.30 is amended by adding a new section to read:

Sec. 33.30.013. COMMISSIONER TO NOTIFY VICTIMS. (a) The commissioner shall notify the victim if the offender

(1) escapes from custody;

(2) is released to the community on a furlough; or

(3) is released on an early release program.

(b) The commissioner is required to give notice of a change in the status of an offender under this section only if the victim has requested notice of the change.

(c) A victim who has requested notice under (b) of this section shall maintain a current, valid mailing address on file with the commissioner. The commissioner shall send the notice from the department required by this section to the victim's last known address. The victim's address may not be disclosed to the offender or the offender's attorney.

(d) The state may not be held liable in damages for the failure

of the commissioner to comply with the requirements of this section.

* Sec. 21. AS 33.30.111(f) is repealed and reenacted to read:

(f) If the commissioner considers a prisoner convicted of a crime against a person or arson in the first degree for a prerelease furlough and the victim has requested notice under AS 33.30.013, the commissioner shall send notice of intent to consider the prisoner for a prerelease furlough to the victim. The victim may comment in writing on the commissioner's intent to release the prisoner on prerelease furlough status. The commissioner shall consider the victim's comments before making a final decision to release a prisoner on a prerelease furlough. The commissioner shall make a reasonable effort to notify the victim of an intent to release the prisoner on a prerelease furlough. The notice must contain the expected date of the prisoner's release, the geographic area in which the prisoner will reside, and other pertinent information concerning the prisoner's release that may affect the victim.

* Sec. 22. AS 33.30 is amended by adding a new section to read:

Sec. 33.30.292. DESIGNATION OF REPRESENTATIVE. If more than one person who qualifies as a victim under AS 12.55.185 requests notice under this chapter, the commissioner shall designate one person for purposes of receiving the notice required and of exercising the rights granted by this chapter.

* Sec. 23. AS 33.30.901(6) is amended to read:

(6) "crime against a person" means a crime as set out in AS 11.41, [EXCEPT CUSTODIAL INTERFERENCE UNDER AS 11.41.320 AND 11.41.330;] or a crime against a person in this or another jurisdiction having elements substantially identical to those of a crime as set out in AS 11.41 [, EXCEPT CUSTODIAL INTERFERENCE UNDER AS 11.41.320 AND 11.41.330];

* Sec. 24. AS 47.10 is amended by adding a new section to read:

Sec. 47.10.077. ACCESS TO HEARING BY VICTIM. (a) If a crime was committed by a minor who is scheduled for a hearing under AS 47.10.070, the victim may request from the court permission to attend the hearing. If the victim requests, the department shall provide technical assistance to the victim in preparing a written submission to the court requesting access to the hearing. The department shall make reasonable efforts to inform victims of the availability of this assistance.

(b) If more than one person who qualifies as a victim under AS 12.55.185 makes a request, the commissioner of health and social services shall designate one person for purposes of receiving the notice and exercising the rights granted by this section.

(c) In this section, "victim" has the meaning given in AS 12.55.185.

* Sec. 25. AS 12.61.020(e)(2) is repealed.

* Sec. 26. Rule 32(d)(1), Alaska Rules of Criminal Procedure, is amended to read:

(1) WHEN MADE. The probation service shall make a presentence investigation and report before the court imposes sentence or grants probation. The presentence investigation and report shall be completed and made available to the court. The report shall not be submitted to the court or its contents disclosed to any one except counsel unless the defendant has tendered a plea of guilty or nolo contendere or has been found guilty. If the crime for which the person is to be sentenced is a felony, the contents shall be disclosed to counsel for the parties before the time of the hearing on the aggravator and mitigator factors and sentencing. The court may utilize the report in determining if a bargained sentence recommendation

will be followed pursuant to Rule 11. In the event the attorneys for the parties request the preparation of a presentence report to aid them in plea bargaining the court may order such report to be made prior to the time stated in this rule.

* Sec. 27. Rule 32, Alaska Rules of Criminal Procedure, is amended by adding new paragraphs to read:

(g) WRITTEN STATEMENT SUBMITTED BY VICTIM OR VICTIM'S REPRESENTATIVE. If a written statement is prepared and submitted by the victim of a felony offense or a domestic violence assault under AS 12.55.023, the trial court

(1) shall take the content of the written statement into consideration

(A) when preparing those elements of the sentencing report required by AS 12.55.025 that relate to the effect of the offense on the victim;

(B) when considering the need for restitution under AS 12.55.045; and

(2) may take the content of the written statement into consideration in any other circumstance that the court believes necessary.

(h) In (g) of this rule,

(1) "domestic violence assault" has the meaning given in AS 12.61.900;

(2) "victim" has the meaning given in AS 12.55.185.

* Sec. 28. Rule 35, Alaska Rules of Criminal Procedure, is amended by adding new paragraphs to read:

(c) The victim may comment on motions made under this rule as follows:

(1) When an individual convicted of a crime against a

person or arson in the first degree files a motion to modify or reduce a sentence, the court shall, if feasible, send a copy of the motion to the Department of Corrections sufficiently in advance of any scheduled hearing or briefing deadline to enable the department to notify the victim, as directed by AS 12.55.088(e).

(2) The court shall provide copies of the victim's comments to the prosecuting attorney and to the person filing the motion to reduce or modify a sentence, or the person's attorney.

(3) The court shall consider the comments of the victim when relevant, and any response offered by the prosecuting attorney or the person filing the motion, in deciding whether to reduce or modify a sentence.

(4) If more than one person who qualifies as a victim under paragraph (d)(2) of this rule requests the opportunity to exercise rights under this paragraph, the court shall allow the person designated under AS 12.55.172 to exercise those rights, or if a person has not been designated under AS 12.55.172, the court shall designate one person for purposes of exercising rights under this paragraph.

(d) In this rule,

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

(2) "victim" has the meaning given in AS 12.55.185.

* Sec. 29. APPLICABILITY. The provisions of this Act prescribing the rights of a crime victim and of a crime victim's relative or survivor during the course of criminal, civil, and administrative proceedings apply to proceedings against defendants initiated on or after the effective date of this Act.

Legislative Research Agency

Alaska State Legislature

130 Seward Street, Suite 218
Juneau, Alaska 99801-2196

Phone: (907) 465-3991
Fax: (907) 463-3351

September 16, 1993

Received
... 1993
BRIAN PORTER

MEMORANDUM

TO: Representative Brian Porter

FROM: Paula d. Scavera
Legislative Analyst

RE: **Constitutional Rights for Victims of Crime**
Research Request 94.039

Your office requested copies of constitutional provisions from states that have constitutional rights for crime victims. Attached you will find copies of pertinent constitutional provisions from California, Colorado, Florida, Illinois, Kansas, Michigan, Missouri, New Jersey, New Mexico, Rhode Island, Texas and Washington.

These "Victims Bill of Rights" became constitutional amendments through various political methods. California's began as a statewide initiative measure, which became Proposition 8, was voted on by the people and became effective June 9, 1992. Other constitutional amendments such as Missouri's, started out as a Senate Joint Resolution, which was ratified by the electorate. New Mexico's constitutional amendment is still a proposed amendment which will be submitted to the people for their approval or rejection at the next general election in 1994.

We hope this information is useful to you. If you need further assistance, please contact this office.

Attachments

DELANEY, WILES, HAYES, REITMAN & BRUBAKER, INC.
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JAMES J. DELANEY
GEORGE N. HAYES
STANLEY H. REITMAN

EUGENE F. WILES
1922-1990

JOHN K. BRUBAKER
1937-1992

HAND-DELIVERED

October 22, 1993

Ms. Daniella Loper
Legislative Assistant to
Rep. Brian Porter
716 W. 4th Ave, Suite 640

Dear Ms. Loper:

Enclosed for your review in connection with your work regarding the proposed constitutional amendment being sponsored by Representatives Porter, Barnes, and Phillips, is a copy of the implementing legislation relating to Arizona's victims rights constitutional amendment. Attorney Linda Akers of Crimestrike kindly provided this information to me earlier today.

Reviewing these statutes should serve to assist you and the sponsors of the Resolution in understanding how one other state (Arizona) implemented its victims rights constitutional amendment. I think reviewing the enclosed statutes will assist in responding to questions which will foreseeably be presented to you and/or the sponsors concerning actual implementation of the proposed constitutional amendment (e.g., the enclosed Arizona statutes specifically address which department or division of government has the responsibility of keeping the victim informed throughout the criminal proceedings). During the process of getting the Resolution passed to amend the Alaska Constitution, I foresee questions being presented by legislators concerning the actual implementation of a victim's constitutional rights. I think if the major questions can be answered satisfactorily by referring to specifics of other states implementation as an example, I believe legislators will generally be more inclined to vote in favor of the Resolution. A review of the enclosed statutes should provide you with a guide and a fairly good working knowledge of how a victim's constitutional rights have been implemented in another state's criminal justice system. I found the language of the implementing statutes to be clear and concise and the length succinct - which helps in quickly gaining an understanding of the overall scheme of implementing victims' constitutional rights in a state criminal justice system.

Sincerely,

Deborah Ivy

cc Sharon Nahorney
Janice Lienhart

Constitutional Provisions of:

California
Colorado
Florida
Illinois
Kansas
Michigan
Missouri
New Jersey
New Mexico
Rhode Island
Texas and Washington

Arizona

§ 1. Fundamental principles. recurrence to

Law Review Commentaries

Double security of federalism: Protecting individual liberty under the Arizona Constitution. Stanley G. Feldman and David L. Abney, 20 Ariz.State L.J. 115 (1988).

Fundamental rights and judicial review. 26 Ariz.L.Rev. 5 (1984); 26 Ariz.L.Rev. 237 (1984).

Role the supreme court in the adjudication of constitutional rights. Ariz.State L.J. 2, 1984, p. 283.

Library References

Constitutional Law ⚬=12 et seq., 44 et seq.
C.J.S. Constitutional Law §§ 17 et seq., 86 et seq.

§ 2. Political power; purpose of government

Library References

Constitutional Law ⚬=1.
C.J.S. Constitutional Law § 2 et seq.

Notes of Decisions

1. In general

State constitutional amendment which permitted victims of crime to refuse interviews with defendants was procedural, rather than substantive, even though amendment deprived defendants of method of discovery, since amendment did not affect defendant's right to confront and cross-examine witnesses at trial, and thus application of amendment to pending cases did not impair any substantive or vested rights of defendants. State v. Warner (App.1990) 168 Ariz. 261, 812 P.2d 1079, review denied.

The power to grant franchises resides in the state and a city in granting a franchise acts as an agent for the state. City of Mesa v. Salt River Project Agr. Imp. and Power Dist. (1962) 92 Ariz. 91, 373 P.2d 722, appeal dismissed 83 S.Ct. 1018, 372 U.S. 704, 10 L.Ed.2d 124.

§ 2.1. Victims' Bill of Rights

Section 2.1. (A) To preserve and protect victims' rights to justice and due process, a victim of crime has a right:

✓1. To be treated with fairness, respect, and dignity, and to be free from intimidation, harassment, or abuse, throughout the criminal justice process.

✓2. To be informed, upon request, when the accused or convicted person is released from custody or has escaped.

✓3. To be present at and, upon request, to be informed of all criminal proceedings where the defendant has the right to be present.

✓4. To be heard at any proceeding involving a post-arrest release decision, a negotiated plea, and sentencing.

5. To refuse an interview, deposition, or other discovery request by the defendant, the defendant's attorney, or other person acting on behalf of the defendant.

✓6. To confer with the prosecution, after the crime against the victim has been charged, before trial or before any disposition of the case and to be informed of the disposition.

7. To read pre-sentence reports relating to the crime against the victim when they are available to the defendant.

8. To receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury.

9. To be heard at any proceeding when any post-conviction release from confinement is being considered.

10. To a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence.

11. To have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights and to have these rules be subject to amendment or repeal by the legislature to ensure the protection of these rights.

12. To be informed of victims' constitutional rights.

(B) A victim's exercise of any right granted by this section shall not be grounds for dismissing any criminal proceeding or setting aside any conviction or sentence.

(C) "Victim" means a person against whom the criminal offense has been committed or, if the person is killed or incapacitated, the person's spouse, parent, child or other lawful representative, except if the person is in custody for an offense or is the accused.

(D) The legislature, or the people by initiative or referendum, have the authority to enact substantive and procedural laws to define, implement, preserve and protect the rights guaranteed to victims by this section, including the authority to extend any of these rights to juvenile proceedings.

(E) The enumeration in the constitution of certain rights for victims shall not be construed to deny or disparage others granted by the legislature or retained by victims.

Addition approved election Nov. 6, 1990, eff. Nov. 26, 1990.

Historical Notes

Proposition 104, based on an initiative measure, proposing an amendment of Article 2 of the Arizona Constitution by the addition of § 2.1, providing for a victims' Bill of Rights, was approved by the electors at the November 6, 1990 general election, as proclaimed by the governor on November 26, 1990.

Laws 1991, Ch. 229, § 2, effective January 1, 1992, provides:

"Sec. 2. **Legislative intent**

"The legislature recognizes that many innocent persons suffer economic loss and personal injury or death as a result of criminal acts. It is the intent of the legislature of this state to:

"1. Enact laws that define, implement, preserve and protect the rights guaranteed to crime victims by article II, § 2.1, Constitution of Arizona.

"2. Ensure that article II, § 2.1, Constitution of Arizona, is fully and fairly implemented and that all crime victims are provided with basic rights of respect, protection, participation and healing of their ordeals.

"3. Ensure at all stages of the criminal justice process that the duties established by article II, § 2.1, Constitution of Arizona, are fairly apportioned among all law enforcement agencies, prosecution agencies, courts and corrections agencies in this state.

"4. Ensure that employees of this state and its [illegible]ical subdivisions who engage in the de[illegible], investigation, prosecution and adjudication of crime use reasonable efforts to see that crime victims are accorded the rights established by article II, § 2.1, Constitution of Arizona."

Laws 1991, 4th S.S., Ch. 1, § 3, eff. Dec. 4, 1991, provides:

"Sec. 3. **Liability under victims' bill of rights**

"Until October 15, 1992 this state, a political subdivision, agency, board or committee of this state or an employee or agent of this state or a political subdivision of this state is not liable for a violation of the victims' bill of rights pursuant to article II, § 2.1, Constitution of Arizona, title 13, chapter 40, Arizona Revised Statutes or court rule."

Cross References

Victims' Rights Implementation Act, see § 13-4401 et seq.

Law Review Commentaries

Arizona criminal procedure after the victim's Bill of Rights Amendment: Implications of a victim's absolute right to refuse a defendant's discovery request. Thomas B. Dixon, 23 Ariz.St. L.J. 531 (1991).

Notes of Decisions

In general 1
Victim 2

1. In general

Trial judge could not order that dual juries be empaneled in first-degree murder case in which state had requested imposition of death penalty, in the absence of approved guidelines or trial court's obtaining approval from Supreme Court. Hedlund v. Superior Court In and For Maricopa County, 1992, 832 P.2d 219.

State constitutional provision which affords victims right to speedy trial or disposition does not provide crime victims with any substantive right to have dual juries empaneled; it does not make any reference to procedures by which right to speedy trial or disposition is to be enforced. Hedlund v. Superior Court In and For Maricopa County, 1992, 832 P.2d 219.

Victims' bill of rights does not give crime victim right to refuse to testify at accused's criminal trial. S.A. v. Superior Court, In and For County of Maricopa, 1992, 831 P.2d 1297.

Victims' Bill of Rights applied to case filed before effective date of the Bill of Rights. Knapp v. Martone (1992) 170 Ariz. 237, 823 P.2d 685.

Trial courts must follow and apply plain language of Victims' Bill of Rights, rather than making ad hoc exceptions. Knapp v. Martone (1992) 170 Ariz. 237, 823 P.2d 685.

Although trial court orders which required victims of crime to be interviewed by defendant may have been valid when entered, legal basis for order was supplanted and no longer existed when constitutional amendment which provided victims right to refuse interviews became effective and, thus, orders were no longer valid. State v. Warner (App.1990) 168 Ariz. 261, 812 P.2d 1079, review denied.

Victims who presently asserted right to preclude any interview with defendants after effective date of amended state constitutional article granting such right did not present issue of retroactivity in special action to enforce right, since amendment was not invoked for refusal to be interviewed prior to amendment's effective date. State v. Warner (App.1990) 168 Ariz. 261, 812 P.2d 1079, review denied.

2. Victim

Mother of two children alleged to have been murdered was "victim" under Victims' Bill of Rights and thus could properly refuse request of defendant, her husband, to depose her, even though defendant was charged with murder and as an accessory, and mother was unnamed and uncharged coconspirator; mother was not an "accused." Knapp v. Martone (1992) 170 Ariz. 237, 823 P.2d 685.

§ 4. Due process of law

Law Review Commentaries

Fundamental rights and judicial review. 26 Ariz.L.Rev. 5 (1984); 26 Ariz.L.Rev. 237 (1984).

Role of the supreme court in the adjudication of constitutional rights. Ariz.State L.J. 2, 1984, p. 283.

Library References

Constitutional Law ⟹251 et seq., 255.
C.J.S. Constitutional Law §§ 704 et seq., 977.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.

United States Supreme Court

Abortion

Minors, two-parent notification requirement, delay period, see Hodgson v. Minnesota, 1990, 110 S.Ct. 2926, 497 U.S. 417, 111 L.Ed.2d 344.

Parental notification by minors and physicians, judicial bypass procedures, complaint forms, time limits, and confidentiality, see Ohio v. Akron Center for Reproductive Health, 1990, 110 S.Ct. 2972, 497 U.S. 502, 111 L.Ed.2d 405, on remand 911 F.2d 731, 733.

Unmarried natural father's right to prevent, see Doe v. Smith, 1988, 108 S.Ct. 2136, 486 U.S. 1308, 100 L.Ed.2d 909.

Use of public employees and facilities, see Webster v. Reproductive Health Services,

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

576(2/77)

Notes of Decisions

In general 1
Victim 2

1. In general

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§ 4. Due process of law

Law Review Commentaries

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- Parental notification by minors and physicians, judicial bypass procedures, complaint forms, time limits, and confidentiality, see Ohio v. Akron Center for Reproductive Health, 1990, 110 S.Ct. 2972, 497 U.S. 502, 111 L.Ed.2d 405, on remand 911 F.2d 731, 733.
- Unmarried natural father's right to prevent, see Doe v. Smith, 1988, 108 S.Ct. 2136, 486 U.S. 1308, 100 L.Ed.2d 909.
- Use of public employees and facilities, see Webster v. Reproductive Health Services,

tution, is not a bar to consideration of a capital defendant's claim that the death penalty is disproportionate to his culpability under the facts of the case. People v Bean (1988) 46 Cal 3d 919, 251 Cal Rptr 467, 760 P2d 996.

§ 28. Victims' Bill of Rights

(a) The People of the State of California find and declare that the enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system to fully protect those rights, is a matter of grave statewide concern. The rights of victims pervade the criminal justice system, encompassing not only the right to restitution from the wrongdoers for financial losses suffered as a result of criminal acts, but also the more basic expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and sufficiently punished so that the public safety is protected and encouraged as a goal of highest importance.

Such public safety extends to public primary, elementary, junior high, and senior high school campuses, where students and staff have the right to be safe and secure in their persons.

To accomplish these goals, broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons are necessary and proper as deterrents to criminal behavior and to serious disruption of people's lives.

(b) Restitution. It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to restitution from the persons convicted of the crimes for losses they suffer.

Restitution shall be ordered from the convicted persons in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss, unless compelling and extraordinary reasons exist to the contrary. The Legislature shall adopt provisions to implement this section during the calendar year following adoption of this section.

(c) Right to Safe Schools. All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful.

(d) Right to Truth-in-Evidence. Except a[illegible] statute hereafter enacted by a two-thirds vote of the mem[illegible] each house of the Legislature, relevant evidence shall not be excl[illegible]ny criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.

(e) Public Safety Bail. A person may be released on bail by sufficient sureties, except for capital crimes when the facts are evident or the presumption great. Excessive bail may not be required. In setting, reducing or denying bail, the judge or magistrate shall take into consideration the protection of the public, the seriousness of the offense charged, the previous criminal record of the defendant, and the probability of his or her appearing at the trial or hearing of the case. Public safety shall be the primary consideration.

A person may be released on his or her own recognizance in the court's

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discretion, subject to the same factors considered in setting bail. However, no person charged with the commission of any serious felony shall be released on his or her own recognizance.

Before any person arrested for a serious felony may be released on bail, a hearing may be held before the magistrate or judge, and the prosecuting attorney shall be given notice and reasonable opportunity to be heard on the matter. When a judge or magistrate grants or denies bail or release on a person's own recognizance, the reasons for that decision shall be stated in the record and included in the court's minutes.

(f) Use of Prior Convictions. Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding. When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court.

(g) As used in this article, the term "serious felony" is any crime defined in Penal Code, Section 1192.7(c).

Adopted June 8, 1982.

Collateral References:

Witkin & Epstein, Criminal Law (2d ed) §§ 7, 8, 1253, 1325, 1453, 1474, 1487, 1492, 1497, 1509, 1526, 1527, 1777, 1997, 2241, 2521, 2557, 2833.

Witkin Evidence (3d ed) §§ 299, 1962, 8, 326, 624, 1313, 1791, 1911, 1968.

Cal Jur 3d (Rev) Constitutional Law § 10, Criminal Law §§ 51, 54, 2040, 2215, 2582, 3131, 3167, 3247, Delinquent and Dependent Children § 156.

Modern Cal Discovery (4th ed) §§ 18.8, 22.10.

Cal Trial Handbook 2d (BW, 1987) § 11:6, 14:14, 19:19, 28:13, 28:36.

Preservation of material evidence in California: does People v. Hitch survive California v. Trombetta. 13 Hast Const LQ 147.

The "Safe Schools" provision of the California Constitution: Can a nebulous constitutional right be a vehicle for change (right to safe schools under the "Victims' Bill of Rights")? 14 Hast Const LQ 789.

Admissibility of expert testimony in child sexual abuse cases in California: Retire *Kelly-Frye*and return to a traditional analysis. 22 Loyola U of LA LR 1103.

Warrant requirement for bugged informants under the California right to privacy. 14 Pacific LJ 1057.

Victims' rights symposium. 23 Pacific LJ 815.

Enhancing sentences with prior felony convictions: The limits of "without limitation." 23 Pacific LJ 1051.

Truth in evidence and the privilege clause — a compromised relationship. 23 Pacific LJ 1061.

Proposition 8 and the exclusionary rule: Towards a new balance of defendant and victim rights. 23 Pacific LJ 1101.

Proposition 8: California Law after In re Lance W. and People v Castro. 12 Pep L R 1059.

Proposition 8 (the "Victims' Bill of Rights") and the California Supreme Court: Interpretation run riot? 60 SCLR 539.

Restricting Gang Clothing in Public Schools: Does A Dress Code Violate A Student's Right of Free Expression? 64 SCLR 1321.

Proposition 8: It *may* go beyond the Fourth Amendment. 19 Southwestern U LR 57.

The wrongs of victim's rights. 37 Stan LR 937.

Dilution of Fourth Amendment rights on public high-school campuses. 21 USF LR 555.

Symposium: Proposition 8 comes of age. 13 Western St LR 1.

NOTES OF DECISIONS

The provisions of a statewide initiative measure, known as The Victims' Bill of Rights, were reasonably germane to each other and thus satisfied the requirement that initiative measures embrace a single subject (Cal. Const., art. II, § 8, subd. (d)). Each of the measure's several facets, which dealt with matters such as restitution, safe schools, bail, and prior convictions, shared the common concern of promoting the rights of actual or potential crime victims, and it was this goal that united all of the measure's provisions in advancing its common purpose. Brosnahan v Brown (1982) 32 Cal 3d 236, 186 Cal Rptr 30, 651 P2d 274.

An initiative measure known as The Victims' Bill of Rights did not constitute a revision of the state Constitution, rather than a mere amendment thereof, so as to require its adoption pursuant to a constitutional convention or legislative submission to the people. The measure's quantitative changes, which amounted to repealing one constitutional section and adding another, were not so extensive

Colorado

ARTICLE II

Bill of Rights

Section 16a. Rights of crime victims. Any person who is a victim of a criminal act, or such person's designee, legal guardian, or surviving immediate family members if such person is deceased, shall have the right to be heard when relevant, informed, and present at all critical stages of the criminal justice process. All terminology, including the term "critical stages", shall be defined by the general assembly.

As enacted November 3, 1992 -- Effective upon proclamation of the Governor. (See Laws 1991, p. 2031.)

Section 30b. No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

Enacted by the people November 3, 1992 — Effective upon proclamation of the Governor.

Editor's note: Although this section was numbered as section 30 as it appeared on the ballot, for ease of location it has been numbered as section 30b.

ARTICLE VII

Suffrage and Elections

Section 7. General election. The general election shall be held on such day as may be prescribed by law.

As amended November 3, 1992 — Effective upon proclamation of the Governor. (See Laws 1992, p. 2316.)

ARTICLE IX

Education

Section 1. Supervision of schools - board of education. (1) The general supervision of the public schools of the state shall be vested in a board of

Florida

SECTION 9. Due process.—No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

SECTION 10. Prohibited laws.—No bill of attainder, ex post facto law or law impairing the obligation of contracts shall be passed.

SECTION 11. Imprisonment for debt.—No person shall be imprisoned for debt, except in cases of fraud.

SECTION 12. Searches and seizures.—The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

History.—Am. H.J.R. 31-H, 1982; adopted 1982.

SECTION 13. Habeas corpus.—The writ of habeas corpus shall be grantable of right, freely and without cost. It shall be returnable without delay, and shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety.

SECTION 14. Pretrial release and detention.—Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. If no conditions of release can reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process, the accused may be detained.

History.—Am. H.J.R. 43-H, 1982; adopted 1982.

SECTION 15. Prosecution for crime; offenses committed by children.—

(a) No person shall be tried for capital crime without presentment or indictment by a grand jury, or for other felony without such presentment or indictment or an information under oath filed by the prosecuting officer of the court, except persons on active duty in the militia when tried by courts martial.

(b) When authorized by law, a child as therein defined may be charged with a violation of law as an act of delinquency instead of crime and tried without a jury or other requirements applicable to criminal cases. Any child so charged shall, upon demand made as provided by law before a trial in a juvenile proceeding, be tried in an appropriate court as an adult. A child found delinquent shall be disciplined as provided by law.

SECTION 16. Rights of accused and of victims.—

(a) In all criminal prosecutions the accused shall, upon demand, be informed of the nature and cause of the accusation against him, and shall be furnished a copy of the charges, and shall have the right to have compulsory process for witnesses, to confront at trial adverse witnesses, to be heard in person, by counsel or both, and to have a speedy and public trial by impartial jury in the county where the crime was committed. If the county is not known, the indictment or information may charge venue in two or more counties conjunctively and proof that the crime was committed in that area shall be sufficient; but before pleading the accused may elect in which of those counties he will be tried. Venue for prosecution of crimes committed beyond the boundaries of the state shall be fixed by law.

(b) Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused.

History.—Am. S.J.R. 135, 1987; adopted 1988.

SECTION 17. Excessive punishments.—Excessive fines, cruel or unusual punishment, attainder, forfeiture of estate, indefinite imprisonment, and unreasonable detention of witnesses are forbidden.

SECTION 18. Administrative penalties.—No administrative agency shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law.

SECTION 19. Costs.—No person charged with crime shall be compelled to pay costs before a judgment of conviction has become final.

SECTION 20. Treason.—Treason against the state shall consist only in levying war against it, adhering to its enemies, or giving them aid and comfort, and no person shall be convicted of treason except on the testimony of two witnesses to the same overt act or on confession in open court.

SECTION 21. Access to courts.—The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

SECTION 22. Trial by jury.—The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law.

SECTION 23. Right of privacy.—Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to

Illinois

§ 8.1. Crime Victim's Rights

(a) Crime victims, as defined by law, shall have the following rights as provided by law:

(1) The right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process.

(2) The right to notification of court proceedings.

(3) The right to communicate with the prosecution.

(4) The right to make a statement to the court at sentencing.

(5) The right to information about the conviction, sentence, imprisonment, and release of the accused.

(6) The right to timely disposition of the case following the arrest of the accused.

(7) The right to be reasonably protected from the accused throughout the criminal justice process.

(8) The right to be present at the trial and all other court proceedings on the same basis as the accused, unless the victim is to testify and the court determines that the victim's testimony would be materially affected if the victim hears other testimony at the trial.

(9) The right to have present at all court proceedings, subject to the rules of evidence, an advocate or other support person of the victim's choice.

(10) The right to restitution.

(b) The General Assembly may provide by law for the enforcement of this Section.

(c) The General Assembly may provide for an assessment against convicted defendants to pay for crime victims' rights.

(d) Nothing in this Section or in any law enacted under this Section shall be construed as creating a basis for vacating a conviction or a ground for appellate relief in any criminal case.

Adopted general election Nov. 3, 1992, eff. Nov. 3, 1992.

Historical Notes

Schedule:

The schedule contained in the 1992 amendment provides:

"This Amendment takes effect upon its approval by the electors of this State."

§ 9. Bail and Habeas Corpus

All persons shall be bailable by sufficient sureties, except for the following offenses where the proof is evident or the presumption great: capital offenses; offenses for which a sentence of life imprisonment may be imposed as a consequence of conviction; and felony offenses for which a sentence of imprisonment, without conditional and revocable release, shall be imposed by law as a consequence of conviction, when the court, after a hearing, determines that release of the offender would pose a real and present threat to the physical safety of any person. The privilege of the writ of habeas corpus shall not be suspended except in cases of rebellion or invasion when the public safety may require it.

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CASE ANNOTATIONS

1. Amendment to Art. 11, § 1 of Kansas Constitution as self-executing relative to assessment and taxation of property noted. Colorado Interstate Gas Co. v. Board of Morton County Comm'rs, 247 K. 654, 659, 802 P.2d 584 (1990).

§ 6.

CASE ANNOTATIONS

30. Spouse obligated to pay other spouse's necessities, including medical services. St. Francis Regional Med. Center, Inc. v. Bowles, 16 K.A.2d 374, 375, 376, 823 P.2d 226 (1992).

§ 9.

Law Review and Bar Journal References:

"Exemption Laws in Kansas: Recent Amendments and Bankruptcy Estate Planning," Mark A. Andersen, 38 K.L.R. 143, 149 (1989).

"Divorce Law: Lis Pendens, Judgment Liens, Homestead Exemptions, and Bankruptcy," John C. Peck, Shala M. Bannister and W. Thomas Gilman, 60 J.K.B.A. No. 2, 25, 30 (1991).

CASE ANNOTATIONS

186. Proceeds from involuntary transfer of homestead pursuant to divorce exempt where debtor intended to invest in another homestead. In re Daniels, 65 B.R. 703, 706 (1986).

187. Sales tax lien held as attaching to real property which is subject to constitutional claim of homestead exemption. Homestead Land Title Co. v. United States, 249 K. 569, 819 P.2d 660 (1991).

188. No forfeiture of homestead upon drug conviction unless consent of both husband and wife. City of Garden City v. Lot Nine, Block Three, 16 K.A.2d 174, 819 P.2d 1250 (1991).

189. Homestead, establishment, occupancy, intent; debtor claimed 160 acres. In re Snook, 134 B.R. 424 (1991).

§ 10.

Attorney General's Opinions:

City election to permit or prohibit sale of liquor by the drink; city's authority to prevent licensure thereof. 91-91.

CASE ANNOTATIONS

26. Amendment to Art. 11, § 1 of Kansas Constitution as self-executing relative to assessment and taxation of property noted. Colorado Interstate Gas Co. v. Board of Morton County Comm'rs, 247 K. 654, 659, 802 P.2d 584 (1990).

§ 12.

Attorney General's Opinions:

Membership or nonmembership in labor organizations. 88-121.

Membership or nonmembership in labor organizations; representation fee; employer and employee relations; rights of employees. 92-42.

§ 15. Victims' rights. (a) Victims of crime, as defined by law, shall be entitled to certain basic rights, including the right to be informed of and to be present at public hearings, as defined by law, of the criminal justice process, and to be heard at sentencing or at any other time deemed appropriate by the court, to the extent that these rights do not interfere with the constitutional or statutory rights of the accused.

(b) Nothing in this section shall be construed as creating a cause of action for money damages against the state, a county, a municipality, or any of the agencies, instrumentalities, or employees thereof. The legislature may provide for other remedies to ensure adequate enforcement of this section.

(c) Nothing in this section shall be construed to authorize a court to set aside or to void a finding of guilty or not guilty or an acceptance of a plea of guilty or to set aside any sentence imposed or any other final disposition in any criminal case.

History: L. 1992, ch. 343, § 1; Nov. 3, 1992.

List of Amendments and Proposed Amendments to the Kansas Constitution

YEAR	SUBJECT	ART.	SEC.
1990.	A proposition to revise article 6 of the constitution of the state of Kansas, relating to education. L. 1990, ch. 371; H.C.R. 5010; rejected Nov. 6, 1990: For 245,132; Against 377,625	6	1-7
1992.	A proposition to amend section 1 of article 11 of the constitution of the state of Kansas, relating to the taxation of property. L. 1992, ch. 342; H.C.R. 5007; adopted Nov. 3, 1992: For 473,415; Against 421,813 (Unofficial count)	11	1
1992.	A proposition to amend article 15 of the constitution of the state of Kansas by adding a new section thereto, prescribing certain rights for victims of crime. L. 1992, ch. 343; S.C.R. 1634; adopted Nov. 3, 1992: For 775,846; Against 145,374 (Unofficial count)	15	15

v. Crawford (1985) 383 N.W.2d 172, 147 pp. 244.

V. RIGHT TO APPEAL

Vaiver of right to appeal

sentencing issues not first presented to ourt are considered waived for appeal. v. Rodriguez (1991) 480 N.W.2d 287, 192 pp. 1.

ndants did not waive their right to appeal of suppression issue by pleading guilty, guilty pleas were accepted in understand- defendant's right to appeal suppression as not waived; defendants were entitled ppeal on the merits or to have their pleas e. People v. Reid (1984) 362 N.W.2d 655, h. 326.

esentencing, right to appeal

dant was entitled to appeal as of right sentencing where his first sentence was l on appeal and his resentence was based original conviction and resulted in less- nce than originally imposed; it was sen- ot court's decision to grant or deny de- s motion for resentencing, that was be- ealed. People v. Martinez (1992) 485 124, 193 Mich.App. 377.

uilty plea, right to appeal

trial court can accept plea of guilty ed upon defendant's waiver of right to ourt must determine if waiver is volun- owing, and intelligent; furthermore, ust determine whether agreement in- waiver of right to appeal defendant's as well as conviction and; if so, whether t understands and agrees; to determine waiver meets such requirements, court nsider all relevant facts and circum- surrounding waiver, including: nature s of agreement and age, experience, ground of defendant. People v. Rodri- 1) 480 N.W.2d 287, 192 Mich.App. 1.

se of pleading guilty, defendant waives review of all nonjurisdictional defects ction. People v. Rodriguez (1991) 480 87, 192 Mich.App. 1.

ant may voluntarily and knowingly stitutional right to appeal guilty plea and sentence while reserving right to leave to appeal and right to appointed counsel, when indigent, in exchange ng or sentencing concessions. People uez (1991) 480 N.W.2d 287, 192 Mich.

ant's waiver of his right to appeal in in does not preclude him from obtain- ate review of his sentence or conviction when warranted. People v. Rodri- 1) 480 N.W.2d 287, 192 Mich.App. 1.

Michigan

§ 24. Rights of crime victims; enforcement; assessment against convicted defendants

Sec. 24. (1) Crime victims, as defined by law, shall have the following rights, as provided by law:

The right to be treated with fairness and respect for their dignity and privacy throughout the criminal justice process.

The right to timely disposition of the case following arrest of the accused.

The right to be reasonably protected from the accused throughout the criminal justice process.

The right to notification of court proceedings.

The right to attend trial and all other court proceedings the accused has the right to attend.

The right to confer with the prosecution.

The right to make a statement to the court at sentencing.

The right to restitution.

The right to information about the conviction, sentence, imprisonment, and release of the accused.

(2) The legislature may provide by law for the enforcement of this section.

(3) The legislature may provide for an assessment against convicted defendants to pay for crime victims' rights.

Enactment ratified Nov. 8, 1988, Eff. Dec. 24, 1988.

Historical Notes

The 1988 enactment was proposed by 1988 House Joint Resolution P, and was submitted to and approved by the electors as Proposal B at the November 8, 1988, general election.

ARTICLE II

Elections

WESTLAW Computer Assisted Legal Research

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For more information on using WESTLAW to supplement your research, see the WESTLAW Electronic Research Guide, which follows the Preface.

§ 1. Qualifications of electors; residence

Notes of Decisions

Primary elections 18

18. Primary elections

Requirement that person declare party preference before voting in closed presidential primary did not violate State Constitution; closed primary system was not prohibited by constitutional requirement that all individuals who meet citizenship, residency, and age requirements be allowed to vote. Ferency v. Secretary of State (1991) 476 N.W.2d 417, 190 Mich.App. 398, appeal denied 482 N.W.2d 768, vacated in part on other grounds 486 N.W.2d 664.

Primaries are basically party functions so that there is legitimate state interest in restricting

Missouri

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>V.A.M.S. CONST. Art. 1, s 32

VERNON'S ANNOTATED MISSOURI STATUTES
CONSTITUTION OF 1945
ARTICLE I. BILL OF RIGHTS
COPR. (c) WEST 1993 No Claim to Orig. Govt. Works
Current through amendments approved 11-3-92

>s 32. (Crime VICTIMS' RIGHTS)

> < Section head was editorially supplied >

Section 32. 1. Crime victims, as defined by law, shall have the following rights, as defined by law:
(1) The right to be present at all criminal justice proceedings at which the defendant has such right, including juvenile proceedings where the offense would have been a felony if committed by an adult;
(2) Upon request of the victim, the right to be informed of and heard at guilty pleas, bail hearings, sentencings, probation revocation hearings, and parole hearings, unless in the determination of the court the interests of justice require otherwise;
(3) The right to be informed of trials and preliminary hearings;
(4) The right to restitution, which shall be enforceable in the same manner as any other civil cause of action, or as otherwise provided by law;
(5) The right to the speedy disposition and appellate review of their cases, provided that nothing in this subdivision shall prevent the defendant from having sufficient time to prepare his defense;
(6) The right to reasonable protection from the defendant or any person acting on behalf of the defendant;
(7) The right to information concerning the escape of an accused from custody or confinement, the defendant's release and scheduling of the defendant's release from incarceration; and
(8) The right to information about how the criminal justice system works, the rights and the availability of services, and upon request of the victim the right to information about the crime.

New Jersey

of pupils into area by bus, expense of such transportation could not be said to have resulted from state's taking of part of school property and was not item of damage to remaining land and building. State by State Highway Com'r v. Board of Ed. of City of Elizabeth, 116 N.J.Super. 305, 282 A.2d 71 (L.1971).

52.5. Burden of proof

Burden of demonstrating that a taking has occurred lies on the party alleging that state action is unconstitutional, and proof must be by clear and convincing evidence. Matter of Egg Harbor Associates (Bayshore Centre), 94 N.J. 358, 464 A.2d 1115 (1983).

54. —— Expert witnesses

A court will not permit an expert to testify to the value of vacant land, for condemnation purposes, based on projected income which could be earned from operation of building which might be erected thereon; such a valuation is too speculative. State by Com'r of Transp. v. F & J Partnership, 250 N.J.Super. 19, 593 A.2d 352 (A.D.1991).

58. Leasehold interests

Determination of just compensation allows all interests, including the leasehold, to be compensated, but New Jersey follows the unit rule which means that although a tenant may participate in the condemnation hearing, he is not entitled to have his tenancy separately and specifically evaluated in the condemnation award; actual apportionment of the condemnation award will take place at a separate and later proceeding. State v. Whitehead Bros. Co., Inc., 210 N.J.Super. 359, 509 A.2d 832 (L.1986).

59. Cable installation

Finding by Board of Public Utilities that damage from taking needed for installation of cable television service is nominal, thus warranting presumption that $1.00 satisfies just compensation requirements, was supported by expert's testimony at rule-making hearing that in cases he had examined cable had been installed without damage to property owners. NYT Cable TV v. Homestead At Mansfield, Inc., 214 N.J.Super. 148, 518 A.2d 748 (A.D.1986) affirmed 111 N.J. 21, 543 A.2d 10.

60. Private ownership, public use

Anticipated private ownership of shopping center to be built on land being condemned by Housing and Mortgage Finance Agency did not violate federal or state constitutional limits on power of eminent domain where condemnation was intended to serve public purpose of providing supplies and services for residents of publicly financed housing projects in the area. New Jersey Housing and Mortg. Finance Agency v. Moses, 215 N.J.Super. 318, 521 A.2d 1307 (A.D.1987) certification denied 107 N.J. 638, 527 A.2d 460.

61. Utility easements

Even though utility was granted general easement over private property without specification of course over which its lines were to be placed, once it placed lines and fixed easement's location, grant was essentially the same as if fixed in original grant, and general or specific nature of original grant was not dispositive of utility's claim against township alleging a "taking" by forced relocation of lines. Sussex Rural Elec. Co-op. v. Wantage Tp., 217 N.J.Super. 481, 526 A.2d 259 (A.D.1987).

Forced relocation of preexisting utility transmission facilities necessitated by township's road construction project amounted to a compensable taking, and utility was entitled to recover costs of relocation, since utility's interest antedated public's interest in roads in question, even though utility may have placed its lines specifically to accommodate subdivision development of which the roads were a critical part. Sussex Rural Elec. Co-op. v. Wantage Tp., 217 N.J.Super. 481, 526 A.2d 259 (A.D.1987).

21. Saving clause

Notes of Decisions

Elections 2

2. Elections

In view of fact that state has a legitimate interest in preventing "raiding" or crossover voting in a primary election N.J.S.A. 19:23–45 of primary elections law requiring that a voter who is not affiliated with a political party by virtue of a previous declaration or previous primary participation and who is not excused as a newly registered voter must file declaration for party on or before 50th day preceding primary election is not unconstitutional. Friedland v. State, 149 N.J.Super. 483, 374 A.2d 60 (L.1977).

22. Rights of victims of crimes

A victim of a crime shall be treated with fairness, compassion and respect by the criminal justice system. A victim of a crime shall not be denied the right to be present at public judicial proceedings except when, prior to completing testimony as a witness, the victim is properly sequestered in accordance with law or the Rules Governing the Courts of the State of New Jersey. A victim of a crime shall be entitled to those rights and remedies as may be provided by the Legislature. For the purposes of this paragraph, "victim of a crime" means: a) a person who has

Sec. 22. [Alien landownership.]

Until otherwise provided by law no alien, ineligible to citizenship under the laws of the United States, or corporation, copartnership or association, a majority of the stock or interest in which is owned or held by such aliens, shall acquire title, leasehold or other interest in or to real estate in New Mexico. (As amended September 20, 1921.)

Cross-references. — As to statutory authority for aliens to acquire or hold real estate by deed, will, inheritance or otherwise, see 45-2-112 NMSA 1978.

The 1921 amendment, which was proposed by J.R. No. 9 (Laws 1921) and adopted at the special election held on September 20, 1921, with a vote of 25,921 for and 18,342 against, amended this section, which formerly provided that no distinction should be made by law between resident aliens and citizens in regard to the ownership or descent of property.

Constitutionality of alien land laws is open to certain doubts. 1963-64 Op. Att'y Gen. No. 63-120.

Legislation enacted prior to amendment not "otherwise provided". — This section, as amended in 1921, is broad enough to prohibit the acquiring of any interest whatever in real estate by an alien ineligible to citizenship, and no legislation enacted prior to 1921 could be construed as a provision of law such as contemplated by the words "until otherwise provided by law." 1929-30 Op. Att'y Gen. 11.

Prohibition suspended. — Because 45-2-112 NMSA 1978 was enacted subsequent to the 1921 amendment to this section, it operates to suspend the prohibition against ownership of real property in New Mexico by persons other than United States citizens. 1931 Op. Att'y Gen. No. 81-6.

Phrase "eligible to citizenship" means a person belonging to a class which is eligible and who is capable of becoming a citizen upon due compliance with naturalization laws. 1963-64 Op. Att'y Gen. No. 63-120.

Law reviews. — For article, "The Perils of Intestate Succession in New Mexico and Related Will Problems," see 7 Nat. Resources J. 555 (1967).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 3A Am. Jur. 2d Aliens and Citizens §§ 2003, 2005.

Escheat for alienage of owner, or kindred of owner, who dies intestate, 23 A.L.R. 1237; 79 A.L.R. 1364.

Escheat of property of alien corporation, 23 A.L.R. 1247; 79 A.L.R. 1364.

Escheat as affecting contract for sale or lease to alien, 23 A.L.R. 1250; 79 A.L.R. 1366.

State regulation of landownership by alien corporation, 21 A.L.R.4th 1329.

3 C.J.S. Aliens §§ 16, 17.

Sec. 23. [Reserved rights.]

The enumeration in this constitution of certain rights shall not be construed to deny, impair or disparage others retained by the people.

Comparable provisions. — Idaho Const., art. I, § 21.
Iowa Const., art. I, § 25.
Montana Const., art. II, § 34.
Utah Const., art. I, § 25.
Wyoming Const., art. I, § 36.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 16 Am. Jur. 2d Constitutional Law §§ 7, 280.

16 C.J.S. Constitutional Law §§ 53, 58; 16A C.J.S. Constitutional Law § 445.

Sec. 24. (Proposed) [Victim's rights.]

A. A victim of arson resulting in bodily injury, aggravated arson, aggravated assault, aggravated battery, dangerous use of explosives, negligent use of a deadly weapon, murder, voluntary manslaughter, involuntary manslaughter, kidnapping, criminal sexual penetration, criminal sexual contact of a minor, homicide by vehicle, great bodily injury by vehicle or abandonment or abuse of a child or that victim's representative shall have the following rights as provided by law:

(1) the right to be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process;

(2) the right to timely disposition of the case;

(3) the right to be reasonably protected from the accused throughout the criminal justice process;

(4) the right to notification of court proceedings;

(5) the right to attend all public court proceedings the accused has the right to attend;

(6) the right to confer with the prosecution;

(7) the right to make a statement to the court at sentencing and at any post-sentencing hearings for the accused;

(8) the right to restitution from the person convicted of the criminal conduct that caused the victim's loss or injury;

(9) the right to information about the conviction, sentencing, imprisonment, escape or release of the accused;

(10) the right to have the prosecuting attorney notify the victim's employer, if requested by the victim, of the necessity of the victim's cooperation and testimony in a court proceeding that may necessitate the absence of the victim from work for good cause; and

(11) the right to promptly receive any property belonging to the victim that is being held for evidentiary purposes by a law enforcement agency or the prosecuting attorney, unless there are compelling evidentiary reasons for retention of the victim's property.

B. A person accused or convicted of a crime against a victim shall have no standing to object to any failure by any person to comply with the provisions of Subsection A of Section 24 of Article 2 of the constitution of New Mexico.

C. The provisions of this amendment shall not take effect until the legislature enacts laws to implement this amendment.

Compiler's notes. — Section 2 of S.J.R. No. 4 (Laws 1992) provides that this proposed amendment shall be submitted to the people for their approval or rejection at the next general election or at any special election prior to that date which may be called for that purpose.

ARTICLE III

Distribution of Powers

Sec.
1. Separation of departments; establishment of workers' compensation body.

Section 1. [Separation of departments; establishment of workers' compensation body.]

The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted. Nothing in this section, or elsewhere in this constitution, shall prevent the legislature from establishing, by statute, a body with statewide jurisdiction other than the courts of this state for the determination of rights and liabilities between persons when those rights and liabilities arise from transactions or occurrences involving personal injury sustained in the course of employment by an employee. The statute shall provide for the type and organization of the body, the mode of appointment or election of its members and such other matters as the legislature may deem necessary or proper. (As amended November 4, 1986.)

I. General Consideration.
II. Legislative Delegation of Power.
III. Legislation Affecting Judiciary.
A. Legislation Validly Affecting Courts.
B. Legislation Improperly Conferring Powers on Courts.
C. Improper Interference with Judiciary by Legislature.
IV. Judicial Review over Legislative Affairs.
V. Powers of Executive Department.

I. GENERAL CONSIDERATION.

Cross-references. — As to the workers' compensation division, see 52-5-1 NMSA 1978.

The 1986 amendment, which was proposed by H.J.R. No. 7 (Laws 1986) and adopted at the general election held on November 4, 1986, by a vote of 173,989 for and 92,419 against, added the last two sentences.

State constitutions are not grants of power to the legislative, executive or judiciary branches, but are limitations on the powers of each, and no branch of the state may add to, nor detract from, its clear mandate. State ex rel. Hovey Concrete Prods. Co. v. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957), overruled on other grounds, Wylie Corp. v. Mowrer, 104 N.M. 751, 726 P.2d 1381 (1986).

Each of three departments of government is

Rhode Island

Section 22. Right to bear arms. — The right of the people to keep and bear arms shall not be infringed.

Cross References. Federal guaranty of right to bear arms, U.S. Const., Amend. II.

Comparative Provisions. Bearing arms: Conn. 1965 Const., art. First, § 15. Mass. Const. [§ 18].

NOTES TO DECISIONS

1. Licensing Requirements.

Constitutional guarantee of the right to keep and bear arms is not infringed by state licensing requirements in § 11-47-8 which prohibit unlicensed carrying of a pistol or revolver on one's person except in his home, his place of business, or upon land possessed by him. State v. Storms, 112 R.I. 121, 308 A.2d 463 (1973).

Section 23. Rights of victims of crime. — A victim of crime shall, as a matter of right, be treated by agents of the state with dignity, respect and sensitivity during all phases of the criminal justice process. Such person shall be entitled to receive, from the perpetrator of the crime, financial compensation for any injury or loss caused by the perpetrator of the crime, and shall receive such other compensation as the state may provide. Before sentencing, a victim shall have the right to address the court regarding the impact which the perpetrator's conduct has had upon the victim.

Section 24. Rights not enumerated — State rights not dependent on federal rights. — The enumeration of the foregoing rights shall not be construed to impair or deny others retained by the people. The rights guaranteed by this Constitution are not dependent on those guaranteed by the Constitution of the United States.

Cross References. Federal guaranties as to rights retained by people, U.S. Const., Amend. 9, 10.

NOTES TO DECISIONS

Analysis

1. "Justifiable assault."
2. Right to resist arrest.
3. Unreasonable seizures.
4. Self-defense.
5. Law affecting particular city.
6. Local self-government.

1. "Justifiable Assault."

This section does not secure to husband the right to commit the "justifiable" assault upon the wife. Berberian v. Berberian, 109 R.I. 273, 284 A.2d 72 (1971).

2. Right to Resist Arrest.

Any rights reserved to an individual by the state constitution were subject to the general assembly's police power, and the abolition of the right to resist an unlawful arrest was a proper exercise of that power. State v. Ramsdell, 109 R.I. 320, 285 A.2d 399 (1971).

3. Unreasonable Seizures.

By constitutionally providing against unreasonable seizures, the people have inferentially recognized the necessity for reasonable regulations in this regard. Kavanagh v. Stenhouse, 93 R.I. 252, 174 A.2d 560 (1961), appeal dismissed, 368 U.S. 516, 82 S. Ct. 529, 7 L. Ed. 2d 521 (1962).

4. Self-Defense.

No right of self-defense is assured by the provision that the enumeration of rights in the declaration of rights shall not be construed to impair or deny others retained by the people. State v. Storms, 112 R.I. 121, 308 A.2d 463 (1973).

school district alleging deprivation of their constitutional statutory rights by school district in refusing to allow hearing before board of trustees in which they could complain of superintendent's denial of their employee grievances; school district and superintendent submitted detailed affidavit of superintendent's copies of relevant correspondence and board policies, including board's "open forum.". Corpus Christi Independent School Dist. v. Padilla (App. 13 Dist.1986) 709 S.W.2d 700.

§ 28. Suspension of laws

Notes of Decisions

5. **Administrative bodies**

Regulations under which State Parks and Wildlife Commission regulated sports and commercial activities involving redfish and speckled sea trout did not violate Const. Art. 1, § 28 providing that no power of suspending laws in the state could be exercised except by the legislature. Baggett v. State (App. 9 Dist.1984) 673 S.W.2d 908, appeal after remand 691 S.W.2d 777, 779 affirmed, reversed on other grounds 722 S.W.2d 700.

§ 29. Provisions of Bill of Rights excepted from powers of government; to forever remain inviolate

Notes of Decisions

5. **Remedies and procedure**

O'Hair v. Hill (C.A.1981) 641 F.2d 307 [Main Volume] rehearing granted 652 F.2d 423, on rehearing 675 F.2d 680.

§ 30. Rights of crime victims

Sec. 30. (a) A crime victim has the following rights:

(1) the right to be treated with fairness and with respect for the victim's dignity and privacy throughout the criminal justice process; and

(2) the right to be reasonably protected from the accused throughout the criminal justice process.

(b) On the request of a crime victim, the crime victim has the following rights:

(1) the right to notification of court proceedings;

(2) the right to be present at all public court proceedings related to the offense, unless the victim is to testify and the court determines that the victim's testimony would be materially affected if the victim hears other testimony at the trial;

(3) the right to confer with a representative of the prosecutor's office;

(4) the right to restitution; and

(5) the right to information about the conviction, sentence, imprisonment, and release of the accused.

(c) The legislature may enact laws to define the term "victim" and to enforce these and other rights of crime victims.

(d) The state, through its prosecuting attorney, has the right to enforce the rights of crime victims.

(e) The legislature may enact laws to provide that a judge, attorney for the state, peace officer, or law enforcement agency is not liable for a failure or inability to provide a right enumerated in this section. The failure or inability of any person to provide a right or service enumerated in this section may not be used by a defendant in a criminal case as a ground for appeal or post-conviction writ of habeas corpus. A victim or guardian or legal representative of a victim has standing to enforce the rights enumerated in this section but does not have standing to participate as a party in a criminal proceeding or to contest the disposition of any charge.

Adopted Nov. 7, 1989.

Historical Notes

This section was adopted at the Nov. 7, 1989 election, as proposed by Acts 1989, 71st Leg., H.J.R. 19, § 1.

ARTICLE II

THE POWERS OF GOVERNMENT

§ 1. Division of powers; three separate departments; exercise of power properly attached to other departments

Law Review Commentaries

Ad hoc rulemaking in Texas: The scope of judicial review. Ron Beal, 42 Baylor L.Rev. 459 (July/Aug. 1990).

Five commandments of Texas speedy trial: A post-*Meshell* analysis. Carl S. Lobitz, 54 Tex. B.J. 220 (1991).

Judicial review of agency law decisions on scope of agency authority. Hume Cofer, 42 Baylor L.Rev. 255 (1990).

Legal profession at stake: Why the sun should not set on the State Bar of Texas. Dan R. Price, 53 Tex.B.J. 1197 (1990).

Notes of Decisions

Bail bonds, scope of limitations of judicial powers 172.5
Parole 9

I. IN GENERAL

5. Dual office holding

School board trustee was not prohibited from simultaneously holding offices of justice of peace and school board trustee where nothing in functions as justice of peace interfered with or would interfere with functions as member of board. Turner v. Trinity Independent School Dist. Bd. of Trustees (App. 14 Dist.1983) 700 S.W.2d 1.

A county commissioner is not barred by this section or Art. 16, § 40, or by the common law doctrine of incompatibility from serving on the Texas Sesquicentennial Commission. Op.Atty. Gen.1984, No. JM-141.

One person is not prohibited from concurrently holding offices of constable and school trustee by article II, section 1 of the Texas Constitution, article XVI, section 40 of the Texas Constitution, or the common law doctrine of incompatibility. Op.Atty.Gen.1986, No. JM-519.

6. Infringement of powers

Separation of powers provision of State Constitution is violated when one branch of government assumes a power that is more "properly attached" to another branch or when one branch of government unduly interferes with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers. Armadillo Bail Bonds v. State (Cr.App.1990) 802 S.W.2d 237, rehearing on petition for discretionary review denied.

9. Parole

Instruction given pursuant to mandate in Code of Criminal Procedure regarding parole law and good conduct time did not violate defendant's right to due course of law or separation of powers doctrine. Marks v. State (App. 11 Dist. 1991) 815 S.W.2d 817, affirmed 830 S.W.2d 113.

II. LEGISLATIVE POWERS

67. Courts and judges, legislative powers

Valid, final judgment of court may not be modified by legislature; once actions have passed into judgment power of legislature to disturb rights created thereby ceases. Williams v. State (Cr.App.1986) 707 S.W.2d 40.

68. Fines and penalties, legislative powers

Anguiano v. Jim Walter Homes, Inc. (Civ.App. 1978) 561 S.W.2d 249 [Main Volume] ref. n.r.e.

Fixing of penalties for crime is legislative function; what constitutes adequate penalty is matter of legislative judgment and discretion, and courts will not interfere therewith unless penalty prescribed is outside of constitutional invitations. Muse v. State (App. 10 Dist.1991) 815 S.W.2d 769.

73. —— Necessity of standards and guidelines, delegation of legislative powers

State ex rel. Grimes County Taxpayers Ass'n v. Texas Municipal Power Agency (Civ.App.1978) 565 S.W.2d 258 [Main Volume] error dismissed.

78. —— Judiciary, delegation of legislative powers

Extent of legislature's power to confer upon district court authority to review administrative action is limited by separation-of-powers principle found in Constitution. Spring Independent

Washington

v. Neslund (1988) 50 Wash.App. 531, 749 P.2d 725.

7. Involuntary commitment

City's immediate revocation of concealed weapons permit pursuant to state firearms statute after learning of involuntary commitment order did not violate any liberty or property interest which holder may have had in permit. Morris v. Blaker (1992) 118 Wash.2d 133, 821 P.2d 482.

Compelling state interest in safety of public justified reasonable restrictions on right to concealed weapons permits to persons who had been involuntarily committed for treatment of mental disorder pursuant to statute. Morris v. Blaker (1992) 118 Wash.2d 133, 821 P.2d 482.

§ 30. Rights Reserved

Notes of Decisions

Executions 4

4. Executions

Journalist failed to establish right to attend execution absent proof that attendance at execution was "fundamental, inalienable right under the laws of God and nature" protected under State Constitution. Halquist v. Department of Corrections (1989) 113 Wash.2d 818, 783 P.2d 1065.

§ 35. [Rights of Crime Victims]

Effective law enforcement depends on cooperation from victims of crime. To ensure victims a meaningful role in the criminal justice system and to accord them due dignity and respect, victims of crime are hereby granted the following basic and fundamental rights.

Upon notifying the prosecuting attorney, a victim of a crime charged as a felony shall have the right to be informed of and, subject to the discretion of the individual presiding over the trial or court proceedings, attend trial and all other court proceedings the defendant has the right to attend, and to make a statement at sentencing and at any proceeding where the defendant's release is considered, subject to the same rules of procedure which govern the defendant's rights. In the event the victim is deceased, incompetent, a minor, or otherwise unavailable, the prosecuting attorney may identify a representative to appear to exercise the victim's rights. This provision shall not constitute a basis for error in favor of a defendant in a criminal proceeding nor a basis for providing a victim or the victim's representative with court appointed counsel.

Adopted by Amendment 84 (Laws 1989, S.J.R. No. 8200, approved Nov. 7, 1989), eff. Dec. 7, 1989.

ARTICLE II—LEGISLATIVE DEPARTMENT

§ 1. Legislative Powers, Where Vested

Notes of Decisions

V. INITIATIVE AND REFERENDUM

281. In general, initiative and referendum

Authority of judiciary over initiative or referendum process is limited to areas in which there is express statutory or constitutional law making question judicial. Schrempp v. Munro (1991) 116 Wash.2d 929, 809 P.2d 1381.

Legislation concerning initiative or referendum process may be enacted only to facilitate its operation. Schrempp v. Munro (1991) 116 Wash.2d 929, 809 P.2d 1381.

287. —— Declaration of emergency, exceptions, initiative and referendum

Legislation enacted on emergency basis goes into effect immediately and is exempt from People's constitutional power to reject legislation by referen-

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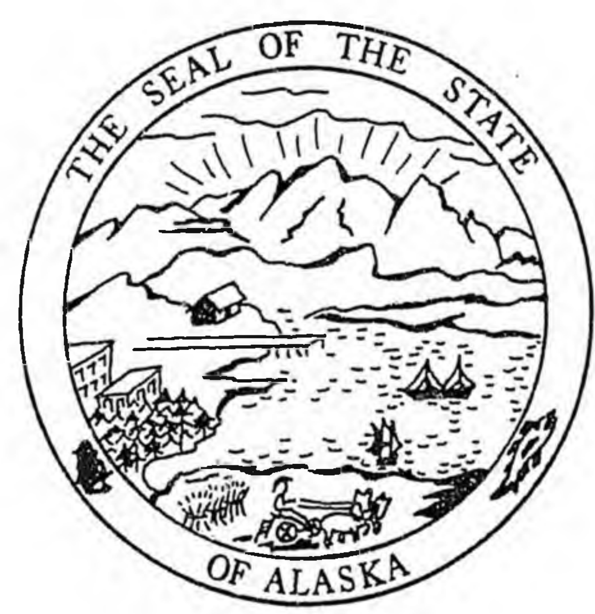

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ARTICLES

THE DEVELOPMENT OF APPELLATE SENTENCING LAW IN ALASKA*

SUSANNE D. DIPIETRO**

I. INTRODUCTION

Today, Alaska's appellate courts routinely review and modify criminal sentences under the authority of Alaska Statutes section 12.55.120(a), a statute that confers upon the appellate courts the power to modify sentences found to be overly severe.[1] Before passage of that legislation in 1969, however, there was no statutory mechanism by which a convicted defendant could have a severe but lawfully-imposed sentence reduced on appeal.[2] Prior to enactment of the sentence review statute, Alaska's then-three supreme court justices struggled with the basic question of whether the court had any common law or constitutional authority to review and modify overly severe or lenient criminal sentences that fall within statutory limits.[3] After the sentence review statute was passed, the supreme court, and later the Alaska Court of Appeals, struggled with the more complicated issue of the proper role for appellate courts in sentencing criminal defendants and in creating sentencing policy.

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1. ALASKA STAT. § 12.55.120(a) (1990).

2. Nor was there any statutory mechanism by which the state could appeal an overly lenient sentence.

3. It was generally accepted that appellate courts had jurisdiction to review and modify sentences that did not fall within the bounds established by statute for the offense in question. *See* Jefferson v. City of Anchorage, 374 P.2d 241 (Alaska 1962).

This article documents the development of sentence review case law in Alaska. It traces the evolution of appellate sentencing law and explains its relationship to presumptive sentencing and Alaska's ban on plea bargaining. The discussion concludes with a review of how Alaska's appellate courts, particularly the Alaska Court of Appeals, have supplemented Alaska's presumptive sentencing statutes.

II. Early Developments: 1966-1968

Three opinions published between 1966 and 1968 demonstrate how the justices differed in their approach to the issue: Justice Nesbett categorically opposed sentence review, Justice Rabinowitz favored it, and Justice Dimond vacillated between these two poles. The first of these cases was *State v. Pete*.[4] In *Pete*, the appellee had been found guilty of two counts of unlawful sale of intoxicating liquor, a misdemeanor punishable by a maximum of one year imprisonment.[5] The district court had sentenced the defendant to the maximum one year on each count, with the sentences to run consecutively.[6] On appeal, Pete argued that his sentence should be reduced because it was illegal or, in the alternative, that it was excessive.[7]

The supreme court rejected Pete's argument that his consecutive sentences were illegal.[8] Nevertheless, Chief Justice Nesbett and Justice Dimond voted to reduce his sentence to time served, stating that "the two offenses were really part of one general transaction involving the unlawful sale of liquor."[9] Justice Rabinowitz dissented from the majority's decision to reduce the sentence, arguing that "this important question relating to our appellate authority [to review sentences] has not been adequately briefed."[10]

Not until two years later was the court prepared to squarely address whether it had the authority to review and modify criminal sentences. In *Bear v. State*,[11] Justice Rabinowitz concluded that the supreme court had jurisdiction to review criminal sentences,[12] while Chief Justice Nesbett and Justice Dimond, distinguishing their earlier holding in *Pete*, concluded that the court did not have jurisdiction to review a criminal sentence for an abuse of discretion.[13]

4. 420 P.2d 338 (Alaska 1966).
5. *Id.* at 341.
6. *Id.*
7. *Id.* at 339.
8. *Id.* at 342.
9. *Id.*
10. *Id.* at 343 (Rabinowitz, J., concurring in part, dissenting in part).
11. 439 P.2d 432 (Alaska 1968).
12. *Id.* at 437-38.
13. *Id.* at 435.

The majority reasoned that without a statutory provision specifically conferring upon the appellate court authority to review criminal sentences, the determination of the period of time that a convicted defendant should serve was best left to the discretion of the trial judge and to the State Board of Parole.[14] Justice Rabinowitz, dissenting, pointed out that the court had already modified a sentence in *Pete*, and argued that a logical construction of the constitutional grant of final appellate jurisdiction to the supreme court permitted sentence review.[15]

In *Faulkner v. State*,[16] Justice Dimond, who earlier that year had refused to review Bear's sentence for an abuse of discretion, voted with Justice Rabinowitz to vacate Faulkner's sentence, even though it was within the limits of a valid statute. Faulkner had been sentenced to thirty-six years in prison on his plea of guilty to eight counts involving bad checks.[17] Both Justice Dimond and Justice Rabinowitz agreed that this sentence was too severe and should be vacated; however, they could not agree on a legal theory for their result.

Justice Dimond voted to vacate Faulkner's sentence on the grounds that it was "so 'disproportionate to the offense committed' " that it amounted to a violation of the constitutional ban against cruel and unusual punishment.[18] Justice Rabinowitz, reiterating the views he had expressed in his dissent in *Bear*, voted to vacate on the grounds that the trial court had abused its discretion and had imposed an excessive sentence; however, he did not share Justice Dimond's view that the sentence violated the constitutional ban against cruel and unusual punishment.[19] Chief Justice Nesbett disagreed with both of his colleagues, arguing in dissent that the cruel and unusual punishment prohibition could not be used to vacate a sentence within the limits of a valid statute, and that the court did not have jurisdiction to review a criminal sentence for abuse of discretion.[20]

Clearly, the issue was a difficult one for the court. When faced with an unusually harsh sentence, two of the three justices felt compelled to act; yet only one of the three was willing to open the door to wholesale sentence review.

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14. *Id.* at 436.
15. *Id.* at 439 (Rabinowitz, J., dissenting).
16. 445 P.2d 815 (Alaska 1968).
17. *Id.* at 817.
18. *Id.* at 818 (citations omitted).
19. *Id.* at 822, 830.
20. *Id.* at 825-26 (Nesbett, C.J., dissenting).

III. National Trends: The Rise of Appellate Sentence Review as a Goal of Sentence Reform

Alaska's appellate court was not alone in its reluctance to review criminal sentences. Nationwide, few appellate courts had accepted sentence review jurisdiction without specific statutory authorization.[21] There were several legal and policy arguments against sentence review. Some state courts, including the Alaska Supreme Court, held that reviewing sentences would improperly interfere, or seem to interfere, with the traditional power of the executive branch to modify sentences.[22] Other appellate courts felt that the trial judge was better able to fashion an appropriate sentence because the trial judge directly observes the behavior and demeanor of the offender.[23] Many judges simply feared that appellate sentence review would generate a flood of appeals that would render their caseloads unmanageable.[24]

Many sentencing laws in effect in the United States during the 1950s and the 1960s were indeterminate; they gave judges broad discretion to choose any sentence below the statutory maximum penalty for a given crime, and contained no articulated criteria for choosing the sentence or the release date.[25] For example, under former Alaska law, trial judges had discretion to choose both the type of sentence and, within extremely broad statutory minimums and maximums, the length of the sentence; but the statutes were silent as to what factors the judge should consider in pronouncing sentence.[26] The broad judicial discretion and lack of articulated sentencing criteria — typical of indeterminate statutes — were justified by rehabilitative purposes: "to enable judges and parole officials familiar with the case to choose a disposition tailored to the offender's need for treatment."[27]

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21. A. Campbell, Law of Sentencing § 126, at 386 (1978).

22. *Id.* at 387; *Bear*, 439 P.2d at 434. In England at common law, "the chief variations in punishments lay more in the methods by which an offender was to be executed than in any other respect; the role of the judiciary being to determine the question of guilt and to enter judgment." *Id.* After judgment had been entered, the "penalties of the law were exacted as a matter of course, unless a royal pardon was forthcoming." *Id.*

23. A. Campbell, *supra* note 21, at 386.

24. Ozanne, *Judicial Review: A Case for Sentencing Guidelines and Just Deserts*, in 17 Sentencing Reform: Experiments in Reducing Disparity 177, 179 (M. Forst ed. 1982).

25. Tonry, *Sentencing Guidelines and Their Effects*, in The Sentencing Commission and its Guidelines 16, 17 (1987).

26. *See* Alaska Stat. §§ 11.05.010-.060, 11.75.110 (1962) (repealed 1978).

27. Von Hirsch, *The Sentencing Commission's Functions*, in The Sentencing Commission and Its Guidelines, *supra* note 25, at 3. *See also* Forst, *Sentencing Disparity: An Overview of Research and Issues*, in Sentencing Reform: Experiments in Reducing Disparity, *supra* note 24, at 16.

By the mid-1970s, however, commentators were beginning to criticize unregulated sentencing discretion.[28] Critics objected to the fact that unregulated authority to sentence allows judges to decide similar cases differently.[29] Other commentators were skeptical about the value of rehabilitation as a primary goal of sentencing theory.[30] With the decline of the rehabilitative model in the United States came the rise of other sentencing models.[31]

The two most prominent of these models are the "just deserts" and the "incapacitation" models. The just deserts model of sentencing philosophy requires that the offender's sentence "comport with the gravity of his criminal conduct."[32] The incapacitation model emphasizes imprisoning offenders whose "early criminal records and social histories suggest they are likely to return to crime."[33] In contrast to the rehabilitative model, which is suited to a system of indeterminate sentencing, both of these models lend themselves to a system of explicit standards for sentencing.[34]

Both disenchantment with the rehabilitative model and concern over unjustified sentence disparity resulted in a growing consensus in the late 1970s that regulating judges' sentencing discretion would be a

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28. Von Hirsch, *supra* note 27, at 3.

29. *Id.* at 4. Deciding cases differently results in sentence disparity. Sentence disparity is generally defined as "differences in dispositions that cannot be explained by relevant characteristics of the offense or the offender." Hanrahan & Greer, *Criminal Code Revision and the Issue of Disparity*, in 17 SENTENCING REFORM: EXPERIMENTS IN REDUCING DISPARITY, *supra* note 24, at 36. Hanrahan and Greer explain that sentence parity, "the idea that offenders convicted of similar crimes should receive roughly the same punishment" is universally appealing because "even philosophically or politically diverse groups can agree that deviations from some sentencing norm are undesirable." *Id.* Disagreement arises because such groups have different views on how to define that norm. *Id.*

30. The rehabilitative model of punishment was criticized on two fronts. First, mounting evidence was beginning to show that rehabilitative programs did not have a measurable effect on recidivism. Some felt it was a waste of taxpayers' money to fund programs that did not reduce crime, and some thought it was unfair for prisoners to participate in intrusive therapeutic programs that had no practical effect. Second, people began to question the fairness of the rehabilitative model itself: is it fair to make the severity of the offender's penalty depend on the offender's perceived need for treatment, instead of on the seriousness of his offense? Von Hirsch, *supra* note 27, at 3-4; Forst, *supra* note 27, at 18-19.

31. Von Hirsch, *supra* note 27, at 4.

32. *Id.*

33. *Id.*

34. *Id.* Von Hirsch has explained that if criminal sanctions are to be based on the seriousness of the offender's conduct, then uniform guidelines are needed to help judges gauge the conduct's gravity and the appropriate, deserved penalty. If penalties are to be based, instead, on the statistical probability of re-offending, then such probabilities and the appropriate incapacitating measures should be set forth in explicit standards. *Id.*

necessary part of sentence reform.[35] Proponents of appellate review argued that appellate judges could regulate trial court discretion in two ways: they could review individual sentences, modifying those found to be excessive or too lenient, and they could in the process articulate standards and guidelines governing the imposition of criminal sanctions.[36]

IV. The Legislative Grant of Appellate Jurisdiction to Review Sentences: 1967-1969

In response to concerns about sentence reform, and to the Alaska Supreme Court's decision in *Bear*, the Alaska Judicial Council called in 1967 for the creation of a special statewide commission to study sentencing.[37] The Sentencing Commission, composed of Judicial Council members, lawyers, judges, civic leaders, legislators and others, convened in Sitka, Alaska in December 1968.[38]

At the Sitka conference, committees were appointed to study probation, the Alaska Bar Association's model sentencing act, and appellate review of sentences.[39] In February 1969, the Judicial Council recommended that the Alaska Legislature enact a statute giving the Alaska Supreme Court jurisdiction to review sentences in serious criminal cases.[40]

In April 1969, the Alaska Legislature enacted the recommended sentence review statute. House Bill 281, as amended, passed unanimously, apparently with little discussion, in both the House and the Senate.[41] The new law gave both the defendant and the state the right to appeal a sentence to the supreme court. If the state appealed, however, the court could not increase the sentence, but could only approve or disapprove it.[42]

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35. *Id.* at 3-4.

36. Ozanne, *supra* note 24, at 178 (citing American Bar Association, Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences 28-29 (1968)).

37. Alaska Judicial Council, Fifth Report: 1967-1968, at 33 (1969).

38. *Id.*

39. *Id.* at 35.

40. Alaska Judicial Council, Sixth Report: 1969-1970, at 4-5 (1971).

41. The vote was 33 "Yeas" and no "Nays" in the House, and 19 "Yeas" and no "Nays" in the Senate. H. Journal, Sixth Leg., 1st Sess. 752 (Apr. 12, 1969); S. Journal, Sixth Leg., 1st Sess. 930 (May 1, 1969). The statute was originally enacted as chapter 117, section 4 of the Alaska Session Laws of 1969. It was later codified at Alaska Statutes section 12.55.120.

42. Alaska Stat. § 12.55.120(b) (1990).

V. THE SUPREME COURT'S APPLICATION OF SENTENCING LEGISLATION: 1970-1975

A. Sentencing Goals and Standards

The court first exercised its statutory duty to review trial court sentences in *State v. Chaney*.[43] The court in *Chaney*, in an opinion written by Justice Rabinowitz, discussed the legislative intent of Alaska Statutes section 12.55.120, and concluded that the primary goal of the legislation was "to implement Alaska's constitutional mandate that '[p]enal administration shall be based on the principle of reformation and upon the need for protecting the public.' "[44]

The court then translated this principle into concrete standards to which the sentencing judge should refer when choosing a sanction. Those standards, known as the *Chaney* factors, are:

> rehabilitation of the offender into a noncriminal member of society, isolation of the offender from society to prevent criminal conduct during the period of confinement, deterrence of the offender himself after his release from confinement or other phenological treatment, as well as deterrence of other members of the community who might possess tendencies toward criminal conduct similar to that of the offender, and community condemnation of the individual offender, or in other words, reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves.[45]

The companion case of *Nicholas v. State*,[46] in an opinion by Justice Robert Erwin, is perhaps even more instructive than *Chaney* on the subject of the supreme court's philosophical approach to sentencing and appellate sentence review. Justice Erwin's opinion in *Nicholas* embraced the notion that the trial judge should have broad discretion to choose an appropriate sanction. The court explicitly placed primary responsibility for sentencing in the hands of the trial judge.[47] It also stressed that sentencing should remain flexible in order to take into account the facts of each crime, as well as the record and character of each offender.[48] The court refused to rank the *Chaney* goals in order of importance, preferring instead to let the trial court "determine the priority and relationship of these objectives in any particular case."[49]

Nicholas clearly indicated that the supreme court did not consider uniformity to be a significant goal of sentencing or of sentence review. As Justice Erwin wrote, "reasonable disparity is necessary to achieve

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43. 477 P.2d 441 (Alaska 1970).
44. *Id.* at 443 (quoting ALASKA CONST. art. I, § 12).
45. *Id.* at 444.
46. 477 P.2d 447 (Alaska 1970).
47. *Id.* at 449.
48. *Id.* at 448.
49. *Id.*

the purposes of sentencing . . . . [I]t is not the purpose of appellate review to enforce uniformity or to chill initiative on the part of the trial judge in attempting to arrive at a proper sentence."[50]

Consistent with Justice Erwin's mandate in *Nicholas,* the supreme court fashioned a deferential standard of review for evaluating sentences imposed by trial judges. In *McClain v. State*,[51] the court announced that it would conduct its own independent examination of the record, but that it would not modify a sentence unless "convinced that the sentencing court was clearly mistaken in imposing a particular sentence."[52] Over the next five years, the court used this "clearly mistaken" standard to correct only the most serious sentencing disparities on appeal.[53]

B. The First Five Years of Sentence Review

In 1975, Alaska Supreme Court Justice Robert Erwin surveyed all sentence appeals the court had decided in its first five years of sentence review. His survey confirmed that the supreme court had interfered very little in the sentencing function. Justice Erwin reported that the supreme court affirmed the trial court's decision in approximately sixty-eight percent of the sixty sentence appeals it reviewed between 1970 and July 1, 1975.[54]

In only twenty percent of the sixty cases did the court actually overturn the trial judge's sentencing decision.[55] Of this twenty percent, the court disapproved five percent (three sentences) as too lenient, but lacked the power to increase those sentences.[56] Thus, in only fifteen percent of the cases (nine cases) did the court actually modify the sentence or remand for resentencing.[57]

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50. *Id.* at 448-49.

51. 519 P.2d 811 (Alaska 1974).

52. *Id.* at 813 (citing *Chaney*, 477 P.2d at 443-44). Before deciding *McClain*, the court had also referred to its standard of review as the "zone of reasonableness" test. Under this test, the reviewing court was to "determine whether the lower court imposed a sentence within the range of alternatives which comport with the *Chaney* guidelines." *Id.* In *McClain*, the court concluded that the two tests were the same but abandoned the "zone of reasonableness" language in order to prevent future confusion. *Id.* at 813-14.

53. Stern, *Presumptive Sentencing in Alaska*, 2 ALASKA L. REV. 227, 257 n.150 (1985).

54. Erwin, *Five Years of Sentence Review in Alaska*, 5 UCLA-ALASKA L. REV. 1, 3 (1975).

55. *Id.* In an additional 12% of cases, the supreme court reversed the trial court's decision on grounds unrelated to the severity of the sentence. *Id.*

56. *Id.*

57. *Id.*

While unwilling to disturb many sentences, the supreme court did exercise its appellate review authority to develop and articulate sentencing criteria to guide trial judges. For example, in cases involving violent crimes against people (assault, rape and homicide), the court concluded that the nature of the offense should predominate over most mitigating circumstances, leaving judges free to put heavy emphasis on the *Chaney* goals of protecting society and reaffirming societal norms.[58] This was particularly true in the area of homicide, where the court affirmed substantial sentences for offenders with no prior criminal records.[59]

In cases involving drug offenders, the court developed four categories of offenses and explained that maximum terms of imprisonment ordinarily should be reserved for the worst offenders.[60] The court further suggested that factors such as the personal history and age of the offender should play a larger role in drug cases than in violent cases.[61]

For crimes against property, the court agreed with the American Bar Association that sentences in excess of five years should be restricted to particularly serious offenses, dangerous offenders and professional criminals.[62] However, the court did recognize that robbery involved somewhat different considerations than other crimes against property because it posed a high risk of injury to the victim.[63] Thus, for those property crimes not involving risk of physical injury to the victim, the court felt that age, background and previous criminal history were important.[64] However, for those property crimes involving the risk of injury or death, the court affirmed substantial sentences where violence occurred, where life was endangered or where prior convictions indicated that the offender had not been deterred by lesser sentences.[65]

VI. Impact of the Plea Bargaining Ban, the Court of Appeals, and Presumptive Sentencing on Appellate Sentence Review: 1975-1980

A. The Plea Bargaining Ban and Sentence Appeal Filings

By 1975, filings of sentence appeals were on the rise. Although the supreme court had decided only sixty sentence appeals during the entire period from 1970 through June of 1975, twenty-two sentence

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58. *Id.* at 5, 7.
59. *Id.* at 5.
60. *Id.* at 8-9.
61. *Id.* at 9.
62. Donlun v. State, 527 P.2d 472, 475 (Alaska 1974).
63. Erwin, *supra* note 54, at 13.
64. *Id.* at 12.
65. *Id.* at 13.

appeals were filed in 1975 alone.[66] Thirty-two sentence appeals were filed in 1976, a thirty-nine percent increase from the previous year.[67] In 1977, the number of sentence appeals jumped to sixty-three, a 103% increase from the previous year.[68]

This dramatic increase in sentence appeals can be largely explained by the effects of the 1975 ban on plea bargaining.[69] The ban greatly curtailed the frequency with which assistant district attorneys made specific sentence recommendations.[70] This documented decrease in sentence recommendations indicates that few post-ban defendants pled guilty or nolo contendere in exchange for specific sentence recommendations. Without specific sentence deals, post-ban defendants were free to appeal the sentences they did receive.[71] Thus,

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66. ALASKA COURT SYSTEM, 1979 ANNUAL REPORT, at 2, Table I (1980). It is important to recognize that the Court System's count of sentence appeals is underinclusive: a case is considered a sentence appeal only if it does not also include a merit appeal; cases that contain both a merit appeal and a sentence appeal are counted only as merit appeals.

67. *Id.*

68. *Id.*

69. On August 15, 1975, then-Attorney General Avrum Gross officially banned plea bargaining in Alaska. The Attorney General's policy prohibited all sentence recommendations by state prosecutors. Changing the charge or dismissing charges also was prohibited if done solely to obtain a plea of guilty. Exceptions to the policy were allowed in individual cases if approved by the Attorney General's office in advance. M. RUBINSTEIN, T. WHITE & S. CLARKE, THE EFFECT OF THE OFFICIAL PROHIBITION OF PLEA BARGAINING ON THE DISPOSITION OF FELONY CASES IN THE ALASKA CRIMINAL COURTS 17-22 (December 1978).

The Alaska Judicial Council's study of the immediate effects of the ban found that plea bargaining was substantially curtailed; although some "charge bargaining" persisted in rural areas, sentence recommendations were virtually eliminated. *Id.* at 28-31. Later data suggested that the ban, although still officially in effect, may not have been enforced quite as rigidly after mid-1978. *Id.* at 27-28; T. CARNS & J. KRUSE, A RE-EVALUATION OF ALASKA'S BAN ON PLEA BARGAINING (Draft I), ch. I ("Summary of Evidence Regarding the Existence of the Ban") (In Press).

The ban on plea bargaining was modified in 1980 by then-Attorney General Wilson Condon, and in 1986 it was significantly relaxed by then-Attorney General Harold Brown. The Council's latest study of the ban suggests that by mid to late 1986 the Attorney General's policy appeared to be "anemic at best in some attorneys' practices," although the prohibition did exist for many others. Evidence shows that the prohibition applied most strongly to sentence bargaining, but that prosecutors "regularly" engaged in charge bargaining. *Id.* at ch. I.

70. RUBINSTEIN, WHITE & CLARKE, *supra* note 69, at 111.

71. As a general rule, a defendant who pleads nolo contendere or guilty may appeal his sentence. *See* ALASKA STAT. § 12.55.120(a) (1990) ("[a] sentence of imprisonment lawfully imposed by the superior court for a term or for aggregate terms of one year or more may be appealed to the court of appeals . . . ."). However, it is unlikely that a defendant who had pled guilty in exchange for a specific sentence, and who in fact received the agreed-upon sentence, would be practically inclined to appeal his sentence.

the ban effectively increased the number of defendants able to file sentence appeals by decreasing the number of defendants who had agreed to their sentences in exchange for a plea.

The ban also changed the severity of sentences themselves. An analysis of post-ban sentences shows that sentencing became more severe for certain kinds of cases immediately after imposition of the ban.[72] Harsher sentences most certainly increased the proportion of defendants likely to appeal. Thus, imposition of the ban on plea bargaining is probably a primary cause of the sentence appeal increases noted in 1976 and 1977.

The Alaska Court System's 1979 Annual Report further shows that criminal merit appeals also increased substantially after 1975, although not as much as sentence appeals. From 1975 to 1976, there was a fifty-eight percent increase. From 1976 to 1977, there was an additional thirty percent increase.[73]

The 1975 to 1977 increase in criminal merit appeals might also be tied to the ban on plea bargaining. After the ban, the number of criminal trials increased, as did the number of trial convictions as a percentage of all convictions.[74] Of course, all defendants convicted at trial were legally entitled to file merit appeals.[75] Assuming that the proportion of defendants with the resources to file merit appeals remained roughly constant from 1974 to 1976, the observed increase in criminal

72. RUBINSTEIN, WHITE & CLARKE, *supra* note 69, at 111. Sentences became harsher in two ways. First, the percentage of defendants likely to receive a jail sentence increased significantly. This was true for all offenses taken as a group, and for drug offenses in particular. *Id.* at Table VII-2. Sentence lengths also increased significantly for "low-risk" property offenders, fraud offenders and drug offenders. Each of these increases can be attributed to the ban. Sentence lengths continued to increase substantially during the late 1970s for all offenses except drugs. The likelihood of a jail sentence increased across the board. These increases were probably due in part to the ban and in part to the nationwide emphasis on increased penalties for crime. Sentences began to drop slightly in 1978 and 1979. ALASKA JUDICIAL COUNCIL, ALASKA FELONY SENTENCES: 1976-1979, at 20, Table V (1980).

73. In contrast, civil appellate filings increased only slightly during this same time. For example, from 1975 to 1976, civil appeals increased by 42%, compared to a 58% increase in criminal merit appeals. From 1976 to 1977, civil appeals increased only 17%, compared to the 103% increase in sentence appeals and the 30% increase in criminal merit appeals. ALASKA COURT SYSTEM, 1979 ANNUAL REPORT, *supra* note 66, at 2.

74. Alaska first experienced an increase both in trial rates and in the absolute number of felony trials following adoption of the plea bargaining ban in 1975. Trial rates remained high over the next five years. Trial convictions as a percentage of all convictions also increased, from 8.5% before the ban to 15.3% in the year after the ban, peaking at 22.4% in 1977, and dropping only slightly, to 21.8%, in 1978 then to 21.2% in 1979. ALASKA JUDICIAL COUNCIL, ALASKA FELONY SENTENCES: 1984, at 64-65 (1987).

75. A defendant convicted at trial may appeal his conviction. ALASKA STAT. § 22.07.020(d) (1988). A defendant who pleads nolo contendere may also appeal his

merit appeals could be related at least in part to the increase in trials caused by the ban.[76]

B. Addition of the Court of Appeals

For the remainder of the decade, filings of criminal sentence and merit appeals remained above 1976 levels, although they decreased slightly from 1977 to 1978 and from 1978 to 1979.[77] In 1979, the Alaska Court System published a special report showing that while Alaska had the second highest number of appellate judges per 100,000 population in the nation, it also had in 1977 the third highest ratio of appellate filings to size of population.[78]

The Court System's report also showed that the supreme court's backlog was increasing. On December 31, 1975, the court had 258 cases pending; one year later the number had risen to 391. By December 31, 1978, 624 cases were pending.[79] Although in 1978 the court was publishing almost twice as many opinions as it had been in 1975, filings still exceeded dispositions every year.[80]

By the end of 1978, the supreme court had concluded that its workload had exceeded its ability to decide cases in a reasoned and timely manner.[81] To solve its workload problem, the court proposed establishing an intermediate court of appeals in Alaska.

The supreme court recommended that the intermediate court have limited subject matter jurisdiction, because projected filing trends indicated that there would not be enough work for two courts of general subject matter jurisdiction.[82] The court of appeals' jurisdiction

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conviction if his nolo plea was expressly conditioned upon the right to appeal one or more substantive issues. Cooksey v. State, 524 P.2d 1251, 1255-57 (Alaska 1974).

76. This analysis assumes that a defendant convicted at trial after the ban was not significantly more likely to challenge the conviction than a defendant convicted in 1974. However, it is not necessarily clear that the proportion of defendants possessing the resources to file merit appeals did remain constant during this time period. For example, the growth of prepaid legal insurance plans for labor unions could have increased some defendants' ability to afford merit appeals. These plans were relatively common and influential in Alaska during the mid-to-late 1970s, mainly due to construction of the TransAlaska Pipeline.

77. ALASKA COURT SYSTEM, 1979 ANNUAL REPORT, *supra* note 66, at Table I, at 2.

78. ALASKA COURT SYSTEM, 1978 ANNUAL REPORT, SUPREME COURT WORKLOAD: ANALYSIS OF PROPOSED SOLUTIONS 56, 97-99 (1979). During 1977, one appeal was filed in Alaska for every 589 residents. *Id.* at 99.

79. *Id.* at 60.

80. *Id.*

81. *Id.* at 56-57.

82. *Id.* at 104.

was limited to criminal appeals,[83] and the supreme court retained exclusive jurisdiction over all civil appeals, with discretionary appeals available from the court of appeals to the supreme court.[84]

There were three reasons to give the intermediate appellate court jurisdiction over all criminal appeals. First, the clear distinction between civil and criminal appeals would eliminate time-consuming jurisdictional disputes.[85] Second, Alaska's historical ratio of civil and criminal appellate filings suggested that the division of civil and criminal cases would give each court an equitable and reasonable workload.[86] Third, it was felt that "a criminal appeal is much more likely than a civil appeal to involve settled principles of law, with the only issue being whether the lower court misapplied the law to the facts of the case."[87] This third rationale suggests that the court of appeals' function originally was to be limited to simple correction of errors and implies that the supreme court, by the exercise of its discretionary review, would develop the substantive criminal law.

In 1980, the Alaska Legislature passed House Bill 104 as amended. Codified at Alaska Statutes section 22.07, the law established a three-judge court of appeals and gave it mandatory jurisdiction in criminal and quasi-criminal matters,[88] including sentence appeals.[89] The supreme court retained discretionary jurisdiction to review final decisions of the court of appeals.[90]

In July of 1980, Governor Jay Hammond appointed Alexander Bryner, Robert Coats and James Singleton to serve on the newly-created court. Alexander Bryner, the U.S. Attorney for Alaska, had also been a district court judge and an assistant public defender. Robert Coats, an assistant attorney general, had served as an assistant public defender. James Singleton, an Anchorage superior court judge, had

83. *Id.*

84. *Id.* at 94. Allowing appeals as of right from the court of appeals to the supreme court would only add to the supreme court's workload. *Id.*

85. Memorandum from Susan Burke, Alaska Court System Deputy Administrative Director, to Arthur Snowden, II, Administrative Director, at 3 (April 6, 1979).

86. *Id.* at 3-5. Ms. Burke based this conclusion on the observation that criminal merit appeals had maintained a fairly constant ratio to civil merit appeals from 1975 to 1978. *Id.* at 3. While she recognized that criminal sentence appeal filings had been increasing at a greater rate than merit appeals, she did not think that the high volume of sentence appeals would contribute significantly to the total caseload because "a sentence appeal takes an average of 25% less court time than a merit appeal." *Id.*

87. *Id.* at 6. It was recognized that "[i]f too many of the cases within the jurisdiction of the court of appeals involve areas of unsettled law, too many court of appeals decisions will require additional review by the supreme court . . . [resulting in] needless delay . . . and an extreme waste of judicial resources." *Id.* at 2.

88. ALASKA STAT. § 22.07.010-.020 (1988).

89. *Id.* § 22.07.020(b).

90. *Id.* § 22.07.030.

served on the Sentencing Guidelines Committee, which was established in 1978 to explore the use of guidelines in areas not covered by presumptive sentencing and to provide a substantive framework for development of a common law of sentencing. These three judges, who served together on the court of appeals for the next decade, had a profound effect on the development of appellate sentencing law in Alaska.[91]

C. Adoption of Presumptive Sentencing

Meanwhile, the Alaska Legislature in 1978 had substantially rewritten the Criminal Code, and for the first time adopted a system of presumptive sentencing.[92] Presumptive sentencing is a type of determinant sentencing based on the tenet that offenders who have similar prior criminal records and who are convicted of the same type of offense are presumed to deserve the same sanction.

The Legislature's stated purpose in adopting the presumptive sentencing scheme was to eliminate "unjustified disparity in sentences imposed on defendants convicted of similar offenses — disparity which is not related to legally relevant sentencing criteria."[93] The Alaska Legislature's concern over disparate sentences was prompted by studies published by the Alaska Judicial Council describing sentencing practices in Alaska from 1974 to 1976. One study found that for all classes of offenses, the identity of the sentencing judge was more important than any other factor (including harm to the victim except in cases of death, and the offender's prior record) in determining sentence length.[94] The Council also found racial disparities in sentences for

91. In May 1990, the U.S. Congress confirmed President George Bush's appointment of Judge James Singleton to the U.S. District Court for the District of Alaska. Judge Singleton left the Alaska Court of Appeals on August 1, 1990. On October 11, 1990, Governor Steve Cowper appointed David Mannheimer, the assistant attorney general in charge of the Office of Special Prosecutions and Appeals, to fill the vacancy created by Judge Singleton's departure.

92. Act of July 17, 1978, ch. 166, 1978 Alaska Sess. Laws 1, 120. The Criminal Code was passed by the Legislature in 1978, but did not take effect until January 1, 1980. *Id.*

93. Stern, *supra* note 53, at 228 (quoting ALASKA SENATE COMM. ON THE JUDICIARY, COMMENTARY ON THE ALASKA REVISED CRIMINAL CODE, S. JOURNAL SUPP. No. 47, at 148 (June 12, 1978)). This commentary was subsequently adopted by the Alaska House of Representatives. *See* ALASKA HOUSE COMM. ON THE JUDICIARY, COMMENTARY ON THE ALASKA REVISED CRIMINAL CODE, ALASKA HOUSE J. 1716 (June 16, 1978).

94. ALASKA JUDICIAL COUNCIL, ALASKA FELONY SENTENCING PATTERNS: A MULTIVARIATE STATISTICAL ANALYSIS (1974-1976), at iii, 40-41 (1977) [hereinafter ALASKA FELONY SENTENCES].

several types of offenses.[95] The fact that such unjustified disparities existed from 1974 to 1976 suggests that appellate sentence review, at least as it had been implemented by the Alaska Supreme Court, had not contributed significantly to the creation and enforcement of uniform sentencing practices.[96] Thus, the Legislature was required to take broader measures in pursuit of uniform sentencing.

The legislative decision to change Alaska's largely indeterminate sentencing scheme to one of presumptive sentencing also might have been influenced by a national policy shift away from rehabilitative sentencing philosophy to a "just deserts" philosophy, under which offenders who have committed similar offenses are sentenced similarly. The new statutory focus on uniformity, which had been completely absent from Alaska's former sentencing statutes and which had not played a significant role in the supreme court's previous sentencing decisions, was now elevated to primary importance.

VII. Application of Presumptive Sentencing: 1980-1990

The changes in the Alaska Criminal Code and the presumptive sentencing scheme went into effect on January 1, 1980, eight months before the Alaska Court of Appeals began deciding cases. Thus, although the court of appeals may originally have been created to decide cases under settled principles of law, the court was faced from its inception with interpreting a virtually new criminal code and sentencing scheme.[97] It soon became apparent that the judges on the newly-created court of appeals were willing to enforce the legislative emphasis on uniformity.

In the decade since its creation, the court of appeals' most straightforward sentence review function has been to interpret the language and intent of the presumptive sentencing statutes. However, Alaska's presumptive sentencing statutes do not specify presumptive terms for all offenses or combinations of offenses.[98] For cases in which

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95. The Council reported that for some classes of offenses, taking into account the independent contribution of all other factors in the study, defendants who were members of racial minorities were more likely than Caucasians to receive harsher sentences, both in terms of the length of imprisonment and the likelihood of receiving a probationary sentence. Alaska Felony Sentences, *supra* note 94, at v-vi, 43; Alaska Judicial Council, Sentencing in Alaska: A Description of the Process and Summary of Statistical Data for 1973, at 139, 175 (1975) (B. Cutler, Research Attorney).

96. This conclusion is not surprising, since the supreme court had made it clear from the outset that uniformity was not an important sentencing goal, and that it would not lightly substitute its sentencing judgment for that of the trial judge.

97. For an excellent overview of Alaska's presumptive sentencing laws, see Stern, *supra* note 53, at 230-39.

98. For example, presumptive sentencing does not apply to first felony offenders convicted of class B or class C felonies unless the felony was knowingly directed at

presumptive sentencing does not apply, the court of appeals has created a series of benchmark or typical sentences based primarily on the court's interpretation of the principles implicit in the presumptive sentencing scheme itself. For cases in which presumptive sentencing does apply, the court of appeals has developed an important body of case law prescribing the extent to which presumptive terms may be adjusted when statutory aggravators are found.[99] The court's most important decisions in these areas concern: (1) first felony offenders convicted of class B felonies, (2) first felony offenders convicted of aggravated class A felonies, (3) first felony offenders convicted of aggravated cases of sexual assault in the first degree and sexual abuse of a minor in the first degree, (4) offenders convicted of the unclassified felony of murder in the second degree, and (5) offenders convicted of two or more offenses before the judgment on either has been entered (offenders subject to consecutive sentencing). The remainder of this article focuses on the court of appeals' activity in these five areas.

A. First Felony Offenders and the *Austin* Guideline

When the Alaska Legislature first passed the new presumptive sentencing scheme in 1978, it excluded from the law virtually all first felony offenders. Although all first felony offenders convicted of class

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certain public officials or emergency responders engaged in the performance of their duties. ALASKA STAT. § 12.55.125(d)(3), (e)(3) (1990). Presumptive sentencing does not apply to the unclassified felonies of murder in the first and second degrees, attempted murder in the first degree, kidnapping, and misconduct involving a controlled substance in the first degree. *Id.* § 12.55.125(a)-(b). Those offenses have mandatory minimum sentences. Presumptive sentencing also does not specify total aggregate terms for offenders who are sentenced consecutively for multiple offenses, although it may specify a presumptive term for each separate offense. *See id.* § 12.55.125.

99. As the court of appeals has said:

> unless a measured and restrained approach is taken in the adjustment of presumptive sentences for both aggravating and mitigating factors, then the prospect of attaining the statutory goal of uniform treatment for similarly situated offenders would quickly be eroded, the potential for irrational disparity in sentencing would threaten to become reality, and the revised code's carefully fashioned system of escalating penalties for repeat offenders would be rendered utterly ineffective.

Juneby v. State, 641 P.2d 823, 833 (Alaska Ct. App. 1982).

Thus, the court of appeals has held that mere proof of an aggravating or mitigating factor cannot be deemed sufficient, in and of itself, to justify an adjustment of a presumptive term. *Id.* at 838. In deciding to what extent, if at all, the totality of the aggravating and mitigating factors justify deviation from the presumptive term, courts should apply the *Chaney* criteria and focus specifically on the aggravating or mitigating conduct in the particular case. *Id.* at 835 n.21.

A felonies are now subject to presumptive sentencing,[100] most class B and C first felony offenders still are not.

In 1981, the Alaska Court of Appeals extended presumptive sentencing principles to ensure that first felony offenders convicted of class B and C felonies would nevertheless be directly affected by the statutory scheme.[101] In *Austin v. State*,[102] the court of appeals observed: "Normally, a first offender should receive a more favorable sentence than the presumptive sentence for a second offender. It is clear that this rule should be violated only in an exceptional case."[103]

The court of appeals does not often violate the *Austin* guideline. To determine whether a first felony offender's conduct presents an "exceptional case" justifying an upward departure from the *Austin* guideline, the sentencing judge must find either aggravating factors or the kind of extraordinary circumstances which would justify referral of a presumptively-sentenced offender to the three-judge panel for sentencing.[104] More recently, the court has concluded that the *Austin* rule could be undermined unless a first felony offender is given advance notice of proposed aggravating factors, and announced that it

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100. In 1982, the Legislature amended the presumptive sentencing statutes to include all first felony offenders convicted of class A felonies. Act of May 20, 1982, ch. 45, 1982 Alaska Sess. Laws 52 (amending ALASKA STAT. § 12.55.125 (1980)).

101. Stern, *supra* note 53, at 259.

102. 627 P.2d 657 (Alaska Ct. App. 1981) (per curiam).

103. *Id.* at 657-58. This simple principle increased substantially the number of offenders affected by the presumptive sentencing scheme, since the majority of Alaska's convicted offenders are first felony offenders. In 1984, for example, 43.6% of all convicted offenders had no prior record, and 32.1% had only misdemeanor convictions, leaving only 10% with one or more prior felony convictions (14.5% of convicted offenders had unknown prior records). ALASKA JUDICIAL COUNCIL, ALASKA FELONY SENTENCES: 1984, at 22 (1987). Data collected in connection with the Judicial Council's most recent study of sentences from 1984 to 1987 indicate that of all convicted offenders, 70.3% (N=2754) were *not* subject to presumptive sentencing; persons without a prior felony record and those convicted of an unclassified offense except sexual abuse of a minor in the first degree are not subject to presumptive sentencing. The data is available from the Alaska Judicial Council library, 1029 W. Third Ave., Suite 201, Anchorage, Alaska 99501.

104. Neakok v. State, 653 P.2d 658, 662 (Alaska Ct. App. 1982) (citation omitted); *see also* Sears v. State, 653 P.2d 349, 350 (Alaska Ct. App. 1982). To justify referral to a three-judge panel, the sentencing judge must find by clear and convincing evidence that manifest injustice would result from imposing the term required by the presumptive sentencing statute. ALASKA STAT. § 12.55.165 (1990). Manifest injustice might result where the trial judge finds the existence of relevant non-statutory aggravating or mitigating factors. *Id.*; Dancer v. State, 715 P.2d 1174, 1177 (Alaska Ct. App. 1986). Manifest injustice also might be found if the term required by the presumptive sentencing statutes, whether or not adjusted for statutory aggravating or mitigating factors, is clearly inappropriate considering the totality of the circumstances. ALASKA STAT. § 12.55.165 (1990); *Dancer*, 715 P.2d at 1177.

will henceforth require prior notice to the defendant before approving deviations from *Austin*.[105]

B. Benchmarks

Another device that the court of appeals uses to guide sentencing in non-presumptive cases is the benchmark. A benchmark is a judicially-created presumptive term; it is a sentencing range representing terms imposed on similar offenders convicted of similar offenses. The purpose of the benchmark is to "focus the attention of the trial court and the parties on individual cases and ensure that typical cases would receive a typical sentence and that those defendants receiving atypical sentences would be sentenced on the basis of objective aggravating factors, not factors idiosyncratic to a specific judge."[106] The Alaska Court of Appeals has articulated benchmarks for first felony offenders sentenced for class B felonies, aggravated class A felonies, serious sexual offenses, second degree murder and for consecutively-imposed sentences.

1. *First Offenders Convicted of Class B Felonies.* First offenders convicted of class B felonies are not subject to presumptive sentencing. Second offenders face a four year presumptive term.[107] Under the presumptive statute as limited by *Austin*, then, a first time offender convicted of a class B felony faces a sentence falling anywhere between zero and four years.

In *State v. Jackson*,[108] the court of appeals divided this four-year span for first offenders convicted of class B felonies into four distinct subcategories defined by the seriousness of the offense and the rehabilitative potential of the offender. *Jackson* prescribes the following benchmarks:

> a. less than ninety days is the benchmark sentence for a case involving significantly mitigated conduct AND an offender whose prospects for rehabilitation are significantly better than that of the typical first offender;
> b. between ninety days and one year is the benchmark for a case involving mitigated conduct OR an offender whose background indicates particularly favorable prospects for rehabilitation;
> c. one to four years to serve is the benchmark for a typical offender committing a typical or moderately aggravated offense (four years is the presumptive term for a second felony offender); and

105. Wylie v. State, No. 1063, slip op. at 20 (Alaska Ct. App. Aug. 10, 1990).

106. Page v. State, 657 P.2d 850, 855 (Alaska Ct. App. 1983).

107. ALASKA STAT. § 12.55.125(d)(1) (1990). The maximum term is ten years. *Id.* § 12.55.125(d).

108. 776 P.2d 320 (Alaska Ct. App. 1989).

d. up to six years is the benchmark for an offense that is exceptionally aggravated, that is, an offense that involves significant statutory aggravators or other extraordinarily aggravated circumstances.[109]

In articulating these four benchmarks, the court made explicit the sentencing ranges that had been implicit in prior cases involving first felony offenders convicted of class B felonies.[110] Although the court has said that these benchmarks are flexible,[111] sentences outside these ranges are likely to be scrutinized carefully.

2. *First Offenders Convicted of Class C Felonies.* The potential range of sentences for first offenders convicted of class C felonies is narrower than the range for those convicted of class B felonies. Since there is no presumptive term, and since *Austin* would ordinarily restrict the upper limit to two years (the presumptive term for a second class C felony offender[112]), the potential range is only from zero to two years. Perhaps because the potential for disparity is not as significant with such a small sentencing range, the court of appeals has not set explicit benchmarks for sentencing class C felons, although it has elaborated on guidelines created by the supreme court.

On the low end, the Alaska Supreme Court has suggested that, in the absence of a substantial misdemeanor record or other aggravating factors, a first felony offender convicted of a class C felony involving a crime against property should receive a sentence of probation, coupled with restitution, without incarceration.[113] The court of appeals, however, has cautioned that a probationary sentence "will be appropriate only if mitigating circumstances exist and the offender is a promising candidate for rehabilitation through probationary supervision."[114]

At the upper end, the court of appeals has permitted a sentence as high as four years with three years suspended where the conduct constituting the offense was particularly serious, where, for example, the conduct actually amounted to a class B felony.[115] It has also permitted a sentence equal to the presumptive term for a second felony offender (coupled with an additional one year suspended sentence)

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109. *Id.* at 326-27.

110. *Id.* at 326.

111. *Id.* at 327.

112. ALASKA STAT. § 12.55.125(e)(1) (1990).

113. Leuch v. State, 633 P.2d 1006, 1013-14 & n.22 (Alaska 1981). A probationary sentence is one of less than sixty days imprisonment. Sentences of less than sixty days are often referred to as "shock probation," since the defendant is incarcerated long enough to know what prison is like, but not long enough to be adversely affected by it. Langton v. State, 662 P.2d 954, 959 (Alaska Ct. App. 1983).

114. State v. Coats, 669 P.2d 1329, 1334 (Alaska Ct. App. 1983).

115. Long v. State, 772 P.2d 1099 (Alaska Ct. App. 1989).

where the trial court found aggravating factors that would have warranted referral to a three judge sentencing panel.[116] The Alaska Supreme Court has permitted a sentence of ten years with five years suspended where the magnitude and manner of the crime (embezzlement) were exceptional, and the crime had a "devastating effect" on the victim, the defendant's employer.[117]

3. *First Offenders Convicted of Aggravated Class A Felonies.* First felony offenders convicted of class A felonies are subject to a five year presumptive term.[118] First offenders who commit the most aggravated class A offenses face terms ranging from the five year presumptive term to the twenty year maximum term.[119] Within this framework, the court of appeals has set a benchmark upper limit of ten years on the extent to which sentences for first offenders convicted of aggravated class A felonies may be increased.[120] Offenses may be aggravated by the offender's prior history, the circumstances of the offense, or by simultaneous convictions for more than one offense.[121] In establishing this benchmark, the court analyzed past sentencing practices and looked to the standards of the American Bar Association, which recommended against periods of incarceration for more than ten years, except in exceptional cases.[122]

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116. Hads v. State, 727 P.2d 11, 12-13 (Alaska Ct. App. 1986).

117. Karr v. State, 686 P.2d 1192, 1195-96 (Alaska 1984).

118. ALASKA STAT. § 12.55.125(c)(1) (1990). If the offense is other than manslaughter and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the offense, or knowingly directed the conduct constituting the offense at a uniformed officer or emergency responder engaged in the performance of official duties, the presumptive term is seven years. *Id.* § 12.55.125(c)(2).

119. *Id.* § 12.55.125(c).

120. DeGross v. State, 768 P.2d 134, 139-40 (Alaska Ct. App. 1989); Lawrence v. State, 764 P.2d 318, 321 (Alaska Ct. App. 1988); Townsel v. State, 763 P.2d 1353, 1356 (Alaska Ct. App. 1988); Williams v. State, 759 P.2d 575, 577-78 (Alaska Ct. App. 1988); Pruett v. State, 742 P.2d 257, 264-65 (Alaska Ct. App. 1987).

121. Increasing the presumptive sentence requires two determinations. First, the trial judge must determine whether the aggravating factor has been established by clear and convincing evidence; second, the trial court must exercise its discretion to determine whether the factor justifies an increase in the presumptive term. Jones v. State, 771 P.2d 462, 467 (Alaska Ct. App. 1989); Juneby v. State, 665 P.2d 30, 32 (Alaska Ct. App. 1982) (modified opinion).

122. Townsel v. State, 763 P.2d 1353, 1356 (Alaska Ct. App. 1988). The ABA Standards state that for most offenses, the maximum authorized prison term ought not to exceed ten years except in unusual cases, and normally should not exceed five years. ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES, Part II, § 2.1(d) (approved draft 1968). The ABA Standards suggest that confinement for the maximum period is appropriate when the court finds that such confinement is necessary to protect the public from further criminal conduct, and that the defendant

The court of appeals has acknowledged that lengthy terms of imprisonment should not be imposed for purposes of rehabilitating an offender and that they will seldom be necessary for deterrence or community condemnation.[123] The court of appeals is thus reluctant to approve sentences in excess of ten years even in cases involving convictions for multiple counts of robbery.[124] This ten year benchmark limit for first-time class A felons is also consistent with *Austin*, because the presumptive term for a second offender convicted of a class A felony is ten years.[125]

4. *Sexual Assault I and Sexual Abuse of a Minor I.* Since 1982, all offenders convicted of sexual assault in the first degree[126] or sexual abuse of a minor in the first degree[127] have been subject to presumptive sentencing.[128] The presumptive term for a first felony offender is eight years[129]; a second felony offender faces fifteen years; and a third felony offender faces twenty-five years.[130]

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previously has been convicted of two felonies committed on different occasions. *Id.* § 3.3(b), (b)(i).

The court of appeals' ten year benchmark is being challenged in a case now on appeal to the Alaska Supreme Court, Wentz v. State, 777 P.2d 213 (Alaska Ct. App. 1989), *petition for hearing granted*, No. S-3498 (Alaska Oct. 9, 1989). In this appeal, the state has argued in part that the Alaska Legislature implicitly rejected the ABA Standard when it enacted some presumptive terms greater than 10 years. Petitioner's Brief at 16.

123. DeGross v. State, 768 P.2d 134, 140 (Alaska Ct. App. 1989) (discussing Pears v. State, 698 P.2d 1198 (Alaska 1985)).

124. *Id.* (discussing Hale v. State, 764 P.2d 313 (Alaska Ct. App. 1988); *Townsel*, 763 P.2d 1353; Williams v. State, 759 P.2d 757 (Alaska Ct. App. 1988)). One exception to the 10 year benchmark applies to cases involving premeditated attempts to kill or seriously injure. Pruett v. State, 742 P.2d 257, 264 (Alaska Ct. App. 1987). *See, e.g.*, Marzak v. State, No. 1068, slip. op. at 6 (Alaska Ct. App. Aug. 24, 1990); Burleson v. State, 543 P.2d 1195 (Alaska 1975).

125. ALASKA STAT. § 12.55.125(c)(3) (1990).

126. *See id.* § 11.41.410 (Supp. 1989) (defining sexual assault in the first degree).

127. *See id.* § 11.41.434 (Supp. 1989) (defining sexual abuse of a minor in the first degree).

128. *Id.* § 12.55.125(i) (1990).

129. The eight year term became effective on October 1, 1982; before then, the presumptive term was the five to seven years applicable to the other class A felonies. Act effective Oct. 1, 1982, ch. 143, § 30, 1982 Alaska Sess. Laws 451, 475 (amending ALASKA STAT. § 12.55.125 (1980)).

130. ALASKA STAT. § 12.55.125(i)(1)-(4) (1990). 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 offense, the presumptive term is ten years. *Id.* § 12.55.125(i)(2).

The term of a first offender who has established a statutory mitigator could be reduced by as many as four years.[131] If the state establishes an aggravator, however, the statute permits a sentence ranging from the presumptive term to the maximum thirty years.[132]

Many cases involving sexual assault or sexual abuse of a minor in the first degree are aggravated in the sense that they involve either multiple assaults on the same victim occurring over a protracted period of time, or multiple victims or both. This is especially true in cases of sexual abuse of a minor, which almost invariably involve many separate incidents of penetration of one or more victims, whether or not there is actually a plea to multiple counts.[133]

The court of appeals has expressed concern that an offender who has engaged in a continuous course of sexual abuse but who is charged with and pleads to a single count of first degree sexual assault theoretically could be sentenced differently than an offender who has engaged in a similar course of conduct but who is convicted of multiple counts.[134] To ensure that offenders who have engaged in similar conduct are sentenced similarly, regardless of the prosecutor's decision of how many counts to charge, the court of appeals has instructed the sentencing judge to consider the totality of the defendant's conduct to the extent that it is verified in the record.[135]

In addition, the court of appeals has articulated a benchmark upper limit of ten to fifteen years for first offenders convicted in aggravated cases of sexual assault and sexual abuse of a minor.[136] The court defines aggravated cases as those that involve multiple victims, multiple assaults on a single victim or serious injuries to one or more victims; such cases usually will be considered aggravated whether or not there is actually a plea to multiple counts.[137] Other factors that can aggravate cases of sexual assault or sexual abuse of a minor include the

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131. *Id.* § 12.55.155(a)(2). Where the presumptive term is greater than four years, factors in mitigation can reduce the sentence by as much as one half. *Id.*

132. *Id.* §§ 12.55.155(a)(2), 12.55.125(i).

133. State v. Andrews, 707 P.2d 900, 912-13 (Alaska Ct. App. 1985), *aff'd*, 723 P.2d 85 (Alaska 1986).

134. *Id.* The offender who is convicted of multiple counts is subject to consecutive sentencing. For further explanation of the circumstances under which sentences may be imposed consecutively, see *infra* section VI and accompanying notes.

135. *Andrews*, 707 P.2d at 912-13.

136. Boggess v. State, 783 P.2d 1173 (Alaska Ct. App. 1989); Covington v. State, 747 P.2d 550 (Alaska Ct. App. 1987); Mosier v. State, 747 P.2d 548 (Alaska Ct. App. 1987); Hancock v. State, 741 P.2d 1210 (Alaska Ct. App. 1987); Soper v. State, 731 P.2d 587 (Alaska Ct. App. 1987); State v. Andrews, 707 P.2d 900 (Alaska Ct. App. 1985), *aff'd*, 723 P.2d 85 (Alaska 1986).

137. *Andrews*, 707 P.2d at 913.

age of the victim[138] and conduct that continues for a long period of time.[139]

First offender sentences in excess of the ten to fifteen year benchmark are appropriate only in exceptional circumstances.[140] In order to exceed the benchmark, the trial judge must make an express finding that the defendant cannot be rehabilitated or deterred within a lesser period of time.[141] In this context, the court of appeals has occasionally approved sentences totalling as many as twenty-five years with five years suspended; but these have been exceptionally aggravated cases.[142] The court also once held that a "particularly serious offender" could receive as many as forty years.[143]

5. *Unclassified Felonies*. The unclassified felonies which are non-presumptive are murder in the first and second degrees, attempted murder in the first degree, kidnapping, and misconduct involving a controlled substance in the first degree. The statutory sentencing range for first degree murder is between twenty and ninety-nine years; the statutory range for the rest of these offenses is between five and ninety-nine years.[144]

Within the extremely broad statutory ranges for these serious offenses, the court of appeals has clearly articulated a benchmark for second degree murder: twenty to thirty years.[145] The court arrived at

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138. *See* Zackar v. State, 761 P.2d 1015, 1017 (Alaska Ct. App. 1988).

139. *See* Lewis v. State, 706 P.2d 715, 717 (Alaska Ct. App. 1985).

140. Boggess v. State, 783 P.2d 1173, 1182 (Alaska Ct. App. 1989); Hancock v. State, 741 P.2d 1210, 1214-15 (Alaska Ct. App. 1987).

141. *Hancock*, 741 P.2d at 1213-14.

142. *See, e.g.*, Howell v. State, 758 P.2d 103, 108 (Alaska Ct. App. 1988); *Lewis*, 706 P.2d at 717.

143. *Hancock*, 741 P.2d at 1214-15.

144. ALASKA STAT. § 12.55.125(a)-(b) (1990).

145. State v. Krieger, 731 P.2d 592, 595 (Alaska Ct. App. 1987); Page v. State, 657 P.2d 850, 855 (Alaska Ct. App. 1983). This 20 to 30 year benchmark is internally consistent with the court's 10 to 15 year benchmark for aggravated class A felonies and its 15 year benchmark for aggravated sexual assaults: the court regards crimes involving loss of life as the most serious offenses.

In 1988, Judge Singleton suggested that the court also adopt a 10 to 15 year benchmark for composite sentences imposed in cases involving convictions for kidnapping combined with other serious offenses. Garrison v. State, 762 P.2d 465, 471-74 (Alaska Ct. App. 1988) (Singleton, J., concurring). Judge Singleton further suggested that for policy reasons composite sentences in excess of 20 years be limited to cases involving obscured murder (cases in which the kidnapping obscured the circumstances of the killing), kidnapping for ransom, terrorist kidnapping for political or social advantage, and enslavement. *Id.* at 472. Judge Singleton reconciled these two suggested benchmarks with terms imposed in previous cases by explaining that offenders "convicted of offenses involving both rape and kidnapping who received sentences in excess of the ten- to fifteen-year benchmark for aggravated rape have usually been felony recidivists." *Id.* at 473 (citation omitted).

this range by surveying second-degree murder cases decided since 1970.[146] In approving such a significant term of imprisonment, the court acknowledges that deterrence of others and affirmation of community norms remain the primary sentencing criteria for intentional killings.[147]

Although the court has warned that any sentence substantially exceeding the second degree murder benchmark "would appear at least provisionally suspect,"[148] the court further explained in *State v. Krieger*[149] that a person who commits second degree murder under circumstances approximating first degree murder may receive an aggravated sentence, while one who commits second degree murder under circumstances approximating manslaughter may receive a mitigated sentence.[150] In typical cases, however, the twenty to thirty year benchmark still applies.[151]

The court of appeals has not significantly limited sentencing discretion for the other unclassified felonies. Like the supreme court, the court of appeals seems unwilling to interfere unduly with sentences for serious offenses characterized by extreme physical violence. For example, the court of appeals will approve the maximum penalty of ninety-nine years for first degree murder contract killings, even where the offender has no substantial prior record.[152] Moreover, the court has held that consecutive ninety-nine year sentences for first degree murder are not necessarily excessive.[153] In first degree murder cases, the "inherent seriousness of the offense will almost invariably require that the goals of isolation of the offender, general deterrence, and community condemnation be given a prominent role in sentencing."[154]

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146. *Page*, 657 P.2d at 855.

147. *Krieger*, 731 P.2d at 595.

148. *Page*, 657 P.2d at 855.

149. 731 P.2d 592 (Alaska Ct. App. 1987).

150. *Id.* at 596. *See also* Abruska v. State, 705 P.2d 1261, 1273-74 (Alaska Ct. App. 1985) (court upheld a 99 year sentence for second degree murder where defendant was a worst offender and exhibited a "pattern of cruel and violent behavior to others").

151. *Krieger*, 731 P.2d at 596.

152. Mathis v. State, 778 P.2d 1161, 1169 (Alaska Ct. App. 1989); Ridgely v. State, 739 P.2d 1299, 1302 (Alaska Ct. App. 1987); Lewis v. State, 731 P.2d 68, 72-73 (Alaska Ct. App. 1987); Riley v. State, 720 P.2d 951, 953 (Alaska Ct. App. 1986); Hoover v. State, 641 P.2d 1263, 1264 (Alaska Ct. App. 1982).

153. Nukapigak v. State, 663 P.2d 943, 946 (Alaska 1983) (consecutive 99 year terms permissible in exceptional cases as long as sentence is otherwise in accordance with sentencing criteria), *questioned in* Collins v. State, 778 P.2d 1171, 1177 (Alaska Ct. App. 1989) (Singleton, J., concurring).

154. Riley v. State, 720 P.2d 951, 952-53 (Alaska Ct. App. 1986).

C. Consecutive and Concurrent Sentencing

1. *Statutory Framework*. Before enactment of the Revised Criminal Code in 1980, Alaska's consecutive sentencing statute, Alaska Statutes section 11.05.050, gave judges unlimited discretion to impose consecutive sentences on defendants convicted of two or more crimes before judgment on either had been entered.[155] Case law interpreting this statute permitted consecutive sentences for distinct crimes.[156] However, neither the Alaska Legislature nor the Alaska Supreme Court established any guidelines concerning the imposition of consecutive rather than concurrent sentences.

In 1980, the Legislature replaced Alaska Statutes section 11.05.050 with a similar statute.[157] The new statute provided in part that before judgment was entered a defendant convicted of two or more crimes could be sentenced either consecutively or concurrently, as the court provided.[158] The court of appeals, noting the general similarity between the old and the new statute, concluded that the new law did not change the situations in which a sentencing court was permitted to impose consecutive sentences.[159]

The current versions of Alaska Statutes section 12.55.025(e) and (g) were adopted in 1982.[160] Under section 12.55.025(e), an offender who is convicted of two or more crimes before the judgment on either has been entered "shall" be sentenced consecutively, subject to the six exceptions listed in section 12.55.025(g).[161]

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155. ALASKA STAT. § 11.05.050 (1962) (repealed 1978).

156. Lacquement v. State, 644 P.2d 856, 859 (Alaska Ct. App. 1982) (dictum), *modified*, Jones v. State, 744 P.2d 410, 411-12 (Alaska Ct. App. 1987). For further discussion of *Jones*, see *infra* section VI and accompanying notes.

157. ALASKA STAT. § 12.55.025 (1980).

158. *Id.*

159. *Lacquement*, 644 P.2d at 859.

160. Act of July 3, 1982, ch. 143, §§ 24-25, 42, 1982 Alaska Sess. Laws 23, 30.

161. ALASKA STAT. § 12.55.025(g), (e) (1990). The first three subparagraphs in section 12.55.025(g) concern situations in which multiple offenses grow out of the same or a connected transaction or are closely related in time. Thus, the trial judge may sentence concurrently if the crimes violate similar societal interests, the crimes are part of a single, continuous criminal episode, or there was not a substantial change in the objective of the criminal episode, including a change in the parties to the crime, the property or type of property right offended, or the persons offended. *Id.* § 12.55.025(g)(1)-(3). The last three subparagraphs in (g) provide that concurrent sentences may be given as long as the crimes were not committed while the defendant was trying to escape, or as long as the sentences are not for the crimes of homicide, assault, kidnapping, and sexual offenses, or are not for the crimes of robbery or extortion resulting in physical injury. *Id.* § 12.55.025(g)(4)-(6).

The court of appeals first interpreted these 1982 changes in *State v. Andrews*,[162] concluding that section 12.55.025(e) expresses a legislative preference for consecutive sentences, subject to the exceptions listed in section 12.55.025(g). While the *Andrews* court recognized the legislative preference for consecutive sentences, it nevertheless interpreted the exceptions to that preference to permit imposition of concurrent sentences in almost every case.[163] The court decided that the trial judge could reject the legislative preference and impose concurrent sentences if the conduct satisfied any one of the six subparagraphs in section 12.55.025(g).[164] In other words, each subparagraph is an independent basis for permitting concurrent sentences.[165]

Of course, a defendant who qualifies for concurrent sentences under section 12.55.025(g) is not necessarily entitled to them. In the court of appeals' interpretation of that section, the sentencing judge will seldom be required to impose sentences consecutively, but retains a certain amount of discretion to do so. The court of appeals has chosen to restrict the judge's consecutive sentencing discretion by formulating benchmarks that control the *extent* to which sentences may be imposed consecutively.[166]

2. *Judicially-Imposed Limits on Consecutive Sentences*. One important test for evaluating the appropriateness of all consecutively-imposed sentences focuses not on the length of the individual consecutive increments, but on the total aggregate term. The court of appeals requires that the total consecutive term be justified under the *Chaney* standards.[167]

In addition to the *Chaney* standards, the court uses benchmarks to evaluate the appropriateness of a defendant's total sentence. One important benchmark that limits the extent to which sentences may be

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162. 707 P.2d 900, 902 (Alaska Ct. App. 1985), *aff'd per curiam* 723 P.2d 85 (Alaska 1986).

163. 707 P.2d at 906.

164. *Id.* at 908.

165. *Id.* at 905. Thus, a defendant convicted of multiple sexual assaults against different victims during an eight month period cannot benefit from the subparagraph that makes concurrent sentences available to those who are not convicted of such offenses (subparagraph (g)(5)), but he can qualify for concurrent sentences because his crimes involved similar societal interests (subparagraph (g)(1)), were not committed while escaping (subparagraph (g)(4)), and did not involve the circumstances set forth in subparagraph (g)(6). *Id.* at 908.

166. The court of appeals has criticized the 1980 version of section 12.55.025(e) as being a "major loophole in the presumptive sentencing scheme," because the unfettered discretion to impose concurrent or consecutive sentences severely undercuts the sentencing goals of uniformity and freedom from unwarranted disparity. Clifton v. State, 758 P.2d 1279, 1286 (Alaska Ct. App. 1988).

167. Contreras v. State, 767 P.2d 1169, 1174 (Alaska Ct. App. 1989). For discussion of the *Chaney* standards, see *supra* note 43 and accompanying text.

imposed consecutively is whether the total sentence, including consecutive increments, exceeds the presumptive term for the single most serious offense.

In 1982, in *Lacquement v. State*,[168] the court of appeals announced that where the trial judge imposes consecutive presumptive terms, but the aggregate of the consecutive terms exceeds the presumptive term for the most serious single offense, the trial judge must make an affirmative finding that confining the defendant for the aggregate period of the consecutive term is necessary to protect the public.[169] Noting that the decision to impose consecutive rather than concurrent sentences clearly affects the total sentence imposed, the court required that such a consecutive term be justified by the *Chaney* goal of isolation.[170]

The court of appeals has recently developed an important exception to the *Lacquement* requirements of a special finding of public danger and the need for isolation. In cases where the total of the consecutive terms imposed does not exceed *ten years*, a total term exceeding the presumptive term for the most serious single offense can be based on sentencing goals other than isolation.[171]

The court of appeals introduced this exception in *Jones v. State*,[172] and reiterated it in *Farmer v. State*.[173] In *Jones*, the defendant was convicted of two counts of vehicular manslaughter and received consecutive presumptive sentences totalling twice the presumptive term for the single most serious count.[174] The trial judge had found that the harsh sentence was necessary to reflect the crime's seriousness and deter others.[175] Judge Coats believed that the sentencing goals cited by the trial judge were sufficient to justify a sentence exceeding the five year presumptive term, even where there was no finding of public danger.[176]

In *Farmer*, Judge Bryner, this time writing for the court, cited *Jones* and explained that the court would no longer read *Lacquement*

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168. 644 P.2d 856 (Alaska Ct. App. 1982).

169. *Id.* at 862. As Judge Coats noted in *Clifton v. State, Lacquement* essentially applied the reasoning of an earlier Alaska Supreme Court case, Mutschler v. State, 560 P.2d 377 (Alaska 1977), to the presumptive sentencing statutes. *Clifton*, 758 P.2d 1279, 1286 (Alaska Ct. App. 1988).

170. Bolhouse v. State, 687 P.2d 1166, 1175 (Alaska Ct. App. 1984).

171. *See* DeGross v. State, 768 P.2d 134, 140 n.1 (Alaska Ct. App. 1989).

172. 744 P.2d 410 (Alaska Ct. App. 1987).

173. 746 P.2d 1300 (Alaska Ct. App. 1987).

174. *Jones*, 744 P.2d at 411.

175. *Id.* at 412.

176. *Id.* Although Judge Coats agreed with the trial judge's reasoning, he voted to reduce Jones' sentence by two years, from 10 years to 10 years with two years suspended. Judge Coats' opinion suggested that the 1982 amendments to section

inflexibly.[177] Judge Bryner announced that "the appropriate focus is no longer on the narrow issue of public danger, but rather on whether a composite sentence exceeding the presumptive term is warranted under the totality of the circumstances."[178] Farmer had argued that his sentence, which exceeded the two year presumptive term by eleven months of unsuspended time, should have been based on an express finding of necessity. The court of appeals disagreed, holding that the sentence was justified by the seriousness of the offenses.[179]

In *Clifton v. State*,[180] the court further clarified the rule of *Jones* and *Farmer*, explaining that because the Legislature in 1982 had amended section 12.55.025(e) to express a preference for consecutive sentences, the court would henceforth require only "substantial reasons" to justify consecutive terms exceeding the presumptive term for the single most serious offense.[181] In *Clifton*, the court affirmed a composite sentence of twelve years with two years suspended, where the presumptive sentence for the most serious count, sexual abuse of a minor in the first degree, was eight years and the maximum was thirty years.[182]

Where the consecutive terms *exceed* ten years, however, the court of appeals will apparently continue to apply *Lacquement* apparently more rigidly. Thus, where the composite term exceeds the presumptive for the single most serious count, or exceeds ten years of unsuspended time, the court continues to require a specific finding that there

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12.55.025(e) (substituting a preference for consecutive sentences) legislatively superseded *Lacquement*'s requirement that the decision to sentence consecutively be based on the goal of isolation. *Id.* at 411.

Judge Singleton's concurring opinion resisted this suggestion, insisting that the questions of what total sentence is appropriate and whether that sentence should consist of consecutive increments or concurrent segments are independent of each other, and that "a sentence that would be inappropriate when viewed as a sentence for the most serious offense, does not automatically become appropriate simply because it is comprised of multiple sentences that were imposed consecutively." *Id.* at 415 (Singleton, J., concurring). Judge Singleton agreed with Judge Coats, however, that Jones' sentence should be reduced to 10 years with two years suspended. *Id.* at 414 (Singleton, J., concurring).

Judge Bryner objected in dissent to his colleagues' apparent conclusion that a first felony offender convicted of drunk driving and multiple manslaughter counts enjoys a sentence ceiling of eight years. *Id.* at 415 (Bryner, J., dissenting).

177. *Farmer*, 746 P.2d at 1301. Apparently, the court had resolved the initial disagreement reflected in *Jones*.

178. *Id.* at 1301-02.

179. *Id.* at 1302 (Farmer's convictions arose from a car crash in which one person was killed and two others were injured).

180. 758 P.2d 1279 (Alaska Ct. App. 1988).

181. *Id.* at 1286.

182. *Id.* at 1285-86.

is an actual need to isolate the defendant for the protection of the community for the full period in question.[183]

A second benchmark limiting consecutive sentences is related to the supreme court's general rule that the maximum sentence generally should not be imposed unless the court determines that the offender is a "worst offender" for that class of crime.[184] The court of appeals has held that offenders who are characterized as "worst offenders" and "dangerous offenders" require sentences emphasizing the goals of deterrence, reaffirmation of societal norms, and isolation for the protection of the public.[185] A finding that a defendant is a "worst offender" can justify imposition of consecutive sentences equal to the maximum term for the single most serious count.[186]

To arrive at a finding of worst offender status, the trial court must look to the manner in which the crime was committed and to the character and background of the defendant.[187] Factors considered in the determination of the offender's character and background include the defendant's prior convictions, age, military records, employment history, substance addiction, presentence report, dangerous propensities and the possibility that the defendant has an antisocial personality.[188]

"Worst offender" status, however, does not automatically permit imposition of consecutive sentences exceeding the maximum for the single most serious crime.[189] The court of appeals has repeatedly held that in order to impose such a term, the trial court must specifically

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183. *See, e.g.*, Castle v. State, 767 P.2d 219, 222 (Alaska Ct. App. 1989).

184. *See* State v. Wortham, 537 P.2d 1117, 1120 (Alaska 1975); Galaktionoff v. State, 486 P.2d 919, 924 (Alaska 1971).

185. Bumpus v. State, 776 P.2d 329, 333 (Alaska Ct. App. 1989), *petition for hearing granted*, No. S-3463 (Alaska Oct. 9, 1989).

186. *Id.* at 334-35; DeGross v. State, 768 P.2d 134, 140 (Alaska Ct. App. 1989); Heacock v. State, 762 P.2d 503, 505 (Alaska Ct. App. 1988).

187. Hintz v. State, 627 P.2d 207, 210 (Alaska 1981).

188. State v. Wortham, 537 P.2d 1117, 1120 (Alaska 1975). Care must be taken to distinguish between the notion of "worst offender" and the statutory aggravator contained in section 12.55.155(c)(10). *See* ALASKA STAT. § 12.55.155(c)(10) (1990) ("the conduct constituting the offense was among the most serious conduct included in the definition of the offense"). "Worst offender" status can be established by the personal characteristics of the offender, or by the particular conduct involved in the offense, or by both. *Wortham*, 537 P.2d at 1120. This is distinct from the statutory aggravator, which is established only by the seriousness of the offender's conduct. The Legislature's enactment of statutory aggravators did not replace the concept of "worst offender."

189. *Bumpus*, 776 P.2d at 335; *DeGross*, 768 P.2d at 140.

find, in addition to the "worst offender" designation, that the defendant will continue to pose a danger to the community during the extended term and that his continued isolation is actually necessary.[190] Such sentences "cannot be justified by considerations of rehabilitation, deterrence of self or others, or reaffirmation of community norms."[191] Thus, a first offender convicted of multiple class A felonies should not be given sentences exceeding the twenty year maximum unless the trial judge first determines that such a term is actually necessary for the protection of the community and that "the [defendant] can neither be rehabilitated nor deterred" by a shorter sentence.[192]

Finally, the court of appeals has formulated specific benchmark terms which the trial judge should not exceed when sentencing offenders convicted of multiple counts of certain types of serious crimes. For example, a thirty year benchmark applies if the offender has a nonviolent record and is convicted of multiple counts of serious felonies involving substantial violence.[193] There is a forty year benchmark for persons with felony records involving crimes of violence who commit multiple serious felonies involving substantial violence.[194] The court of appeals also has applied the forty year benchmark to the case of a violent sexual offender who had a substantial nonviolent criminal record but also had a history of violent behavior.[195] The upper limit for criminal conduct short of murder is probably a composite sentence similar to the fifty three years given in *Wortham v. State*.[196]

3. *1988 Amendment to Alaska Statutes Section 12.55.025.* In 1988, the Legislature added subparagraph (h) to Alaska Statutes section 12.55.025.[197] That section requires judges to impose some consecutive period of incarceration for each sexual or physical assault against a child.[198] While it was not the Legislature's intent to restrict the court's discretion in determining the length of the consecutive terms,

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190. *Bumpus*, 776 P.2d at 335; *DeGross*, 768 P.2d at 140; *Heacock*, 762 P.2d at 505; Hancock v. State, 741 P.2d 1210, 1214 n.2 (Alaska Ct. App. 1987). *See also* Mutschler v. State, 560 P.2d 377 (Alaska 1977) (Erwin, J., dissenting).

191. Newell v. State, 771 P.2d 873, 878 n.3 (Alaska Ct. App. 1989) (Singleton, J., dissenting on other grounds). *See also DeGross*, 768 P.2d at 140-41 n.1 (noting that composite sentences exceeding 10 years must be based on the need for isolation).

192. *DeGross*, 768 P.2d at 141.

193. *See* Hancock v. State, 741 P.2d 1210, 1212 (Alaska Ct. App. 1987); Tookak v. State, 648 P.2d 1018, 1023-24 (Alaska Ct. App. 1982).

194. *See Hancock*, 741 P.2d at 1212; Wortham v. State, 689 P.2d 1133, 1145 n.7 (Alaska Ct. App. 1984); Larson v. State, 688 P.2d 595, 600 (Alaska Ct. App. 1984).

195. *Hancock*, 741 P.2d at 1215.

196. 689 P.2d 1133 (Alaska Ct. App. 1984); *see also* Murray v. State, 770 P.2d 1131, 1140-41 (Alaska Ct. App. 1989) (discussing limits upon composite sentences).

197. Act effective May 28, 1988, ch. 66, §§ 5, 6, 1988 Alaska Sess. Laws 4.

198. ALASKA STAT. § 12.55.025(h) (1990).

the Legislature did wish to express its preference for "judges to impose some consecutive period of time so as to reflect the community's abhorrence of these types of offenses, and to bring home to the offender that some additional penalty must be paid for each and every proven offense."[199]

It is not clear what effect, if any, the 1988 amendment has had or will have on sentencing practices. Since at least 1985 the court of appeals has endorsed the principle that a person who commits multiple sexual assaults should receive a more severe sentence than a person convicted of a single assault.[200]

Moreover, even assuming that the 1988 amendment would cause the trial court judges to impose consecutive sentences more frequently for sexual assaults against minors, the total term imposed, including consecutive increments, would continue to be limited by the court of appeals' benchmarks and by the requirement that total terms be justified under the *Chaney* standards. Thus it is not clear that the 1988 amendment has caused, or will cause total sentences to become appreciably longer.

VIII. Conclusion

The court of appeals, which has decided well over 1,100 sentence appeals since its creation in 1980,[201] has adopted the role envisioned by the original proponents of appellate review. It routinely reduces excessive sentences to bring them in line with sentences given in comparable cases, and has created an extensive body of case law articulating appropriate sentencing principles, establishing benchmark terms for many classes of offenses, and establishing standards for the extent to which sentences can be increased in aggravated cases. In addition, the court of appeals has moved to close a major loophole in the presumptive sentencing scheme by regulating the total aggregate terms that may be imposed for offenders who are sentenced consecutively. By virtue of the volume and completeness of the sentencing law that it has created, the Alaska Court of Appeals is one of the most active sentence review courts in the nation.[202]

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199. House Letter of Intent, 1988 H. JOURNAL 2331 (February 24, 1988).

200. *See* State v. Andrews, 707 P.2d 900, 910 (Alaska Ct. App. 1985), *aff'd per curiam*, 723 P.2d 85 (Alaska 1986).

201. *See* ALASKA COURT SYSTEM, 1989 ANNUAL REPORT, at 5-9; *id.*, 1987 ANNUAL REPORT, at 5-9; *id.*, 1984 ANNUAL REPORT, at 5-9; *id.*, 1982 ANNUAL REPORT, at 5-9.

202. By way of comparison, Minnesota's appellate courts decided less than half as many sentence appeals during their first seven years of reviewing presumptive sentences than the Alaska Court of Appeals decided in its first seven years. Commenting in 1987 upon the number of sentence appeals decided by Minnesota's courts,

There are drawbacks, however, to relying too heavily on appellate review to articulate sentencing principles and to fine-tune sentences. Appellate review by its very nature is backward-looking. It is the proper role of the appellate court to examine what has occurred in a specific case, and to pass on the propriety of the result in that case only. It is generally accepted that an appellate court is effective only when it decides cases based on the factual record before it and only after the record in that case has been completely developed. As a rule, it cannot and should not anticipate what other factual situations might arise in the future, nor should it fashion rules prospectively.

We have seen in the course of the previous analysis that the court of appeals, while willing to take its sentence reviewing function quite seriously, creates target benchmarks by looking back and reviewing sentences previously approved in similar cases. It then synthesizes all the cases in that area, often publishing a decision making explicit the reasoning implicit in its previous decisions. While this is entirely appropriate behavior for an appellate court, it means that the court of appeals cannot shape sentencing law prospectively, because it cannot choose the cases that come before it, and it cannot decide cases with an eye to what might happen in the future. In addition, the court's process of deciding numerous cases in an area and then publishing a decision distilling the general principle is often confusing to the practitioner, who is sometimes left with dozens of cases and no concrete rule.

It is the function of a legislature to shape law prospectively. Besides being able to look forward, a legislature can establish sentencing policy in the context of other considerations, such as the overall allocation of the state's resources. This legislative function complements the appellate courts' review of individual cases and synthesis of the individual decisions into a comprehensive set of interpretations of the statutes and constitution.

However, legislatures face at least two difficulties when called upon to write specific punishments for crimes. First, legislatures seldom have the time needed to create the original law, nor do they have the time necessary to review the law and make appropriate changes once it has gone into effect.[203] Second, it has been said that "legislators have considerable incentives to adopt posturing stances of 'toughness' and few incentives for giving thought to the justice of proposed penalties . . . ."[204] One solution is to have legislatures delegate some of

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Michael Tonry predicted that Minnesota would become "the first American jurisdiction to have a meaningful system of appellate sentence review." Tonry, *supra* note 25, at 42.

203. Von Hirsch, *supra* note 27, at 6.

204. *Id.*

their rule-making ability to a sentencing commission that has both the time and the representation from a variety of interest groups necessary to generate responsible sentencing policies. Like the legislature, the sentencing commission's mission is prospective: to decide the future direction of sentencing policy.

A sentencing commission was established in Alaska during the 1989-90 legislative term.[205] Alaska's Sentencing Commission is composed of fourteen representatives from many different interest groups. Its purpose is to evaluate the effect of sentencing laws and practices on the criminal justice system, and to make recommendations for improving criminal sentencing practices.

As Andrew von Hirsch has explained, a useful first step in any sentencing commission's work is the study of past sentencing practices,[206] like those conducted by the Alaska Court of Appeals. However, the task should not end there. The commission also should make a normative evaluation of those past practices. A normative evaluation is not limited to a decision about whether the existing presumptive terms are fair, although certainly that should be a part of the process. Alaska's Sentencing Commission must ask whether past sentencing practices hav been based on coherent and articulated sentencing goals and philosophies, and if they have, it must clearly define the goals and rank them in order of importance. It also must decide what effects past practices have had on the criminal justice system in terms of prison overcrowding, and to what extent, if at all, prison overcrowding should be taken into account when formulating presumptive terms. Alaska's Sentencing Commission, and Alaska's Legislature, should resist the impulse to limit sentence reform to tinkering with presumptive terms or making surface changes in the existing statutes, such as bringing class B and C first felony offenders under presumptive sentencing.[207]

Appellate review of sentencing has profoundly changed sentencing policy in Alaska during the two decades since its inception. The *Chaney* guidelines set by the Alaska Supreme Court in the first decade are not only applied to every sentencing decision, but were incorporated by the Legislature into its statement of sentencing policy during the revision of the criminal code. In the second decade of sentence

205. H.B. 491 (Judiciary), 16th Leg., 2d Sess. (1990). The Alaska Sentencing Commission had its first meeting in August of 1990. It is scheduled to make its recommendations to the Legislature over the next three years.

206. Von Hirsch, *supra* note 27, at 7.

207. In his 1985 article, Professor Barry Stern argues that excluding first-time B and C felony offenders from the presumptive sentencing scheme results in disparate amounts of time to serve, because offenders sentenced non-presumptively can be paroled, while offenders sentenced presumptively cannot. Stern, *supra* note 53, at 259-64.

review, the appellate courts' decision to determine the justice of non-presumptive sentences by referring to the presumptive sentencing structure has had far-reaching effects on the entire criminal justice system.[208] The third decade of appellate review of sentencing should see the interaction of the decisions made over the past twenty years with new policies recommended by the Sentencing Commission to the Legislature and the courts. The past experience suggests that the appellate courts will continue to use their authority to participate actively in the shaping of Alaska's sentencing practices.

208. The Alaska Judicial Council's most recent analysis of sentences imposed in Alaska between 1984 and 1987 indicates that the variable of judge identity no longer makes a significant contribution to the mean active sentence length. CARNS & KRUSE, *supra* note 69, ch. III. The lack of importance of this variable probably reflects the combined contributions of presumptive sentencing and the appellate courts' guidelines and benchmarks. *Id.*

CRIMESTRIKE

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December 7, 1993

Ms. Janice Lienhart
Victims for Justice
619 E. Fifth Avenue
Anchorage, Alaska 99501

Re: Alaska Victims' Rights Constitutional Amendment

Dear Janice:

I did not want the year to end without formally thanking you for your courtesy and hospitality during my recent visit in Alaska.

In the time intervening since my visit, I have continued to seek out information that may be helpful as we approach the legislative session early next year. I spoke today with Senator William Van Regenmorter in Michigan. He wrote and sponsored both the Michigan victims' rights statute and subsequently the Michigan victims' rights constitutional amendment. The Senator is sending me a booklet prepared after the passage of their law to explain victims' rights to citizens in Michigan. He also had some suggestions about how to approach certain sensitive issues.

Senator Van Regenmorter indicated that states opting for what he calls the "philosophical approach" (broad statements preserving and protecting the rights of victims to due process and fair treatment without specifying those rights) have found that they left too much discretion in the courts without sufficient direction regarding what those rights should be. He told me that in Michigan a victim's right to be present in the courtroom after he or she had testified was not adequately assured until a constitutional amendment was passed. Judicial power to control the courtroom preempted the victim's right to be present without reliance on any right of the defendant. It is therefore not simply a matter of defendants' rights defeating victims' rights.

I specifically asked about any legislative implementation language in their constitutional amendment. He said that his staff had researched the issue and felt that it was necessary. Without it, the Senator opined that the legislature would not be able to fully implement the victims' rights to provide for such things as enforcement, limitations, and means of implementation.

As for opposition to the proposed constitutional amendment, a Michigan taxpayer organization initially opposed the proposed constitutional amendment because they feared that prosecutors (and hence the state) could be liable to victims for violation of their rights. The resulting monetary damages would be paid out of the public coffers and place an additional burden on the taxpayer, hence their opposition. Senator Van Regenmorter indicated that as a result of this concern language was added restricting suits for monetary damages.

Finally, the Michigan victims' rights amendment was drafted to provide that an assessment against defendants could be ordered by the court to pay for the preservation and implementation of victims' rights. This provision was added to allow the state to shift the cost of implementation to the defendants. He cautioned however that the state needs to be prepared to meet this cost initially and not depend on revenues from defendants who frequently are indigent. Senator Van Regenmorter indicated that the it has cost the State of Michigan approximately $1 1/2 million dollars to implement their constitutional amendment state wide, but in his opinion it is well worth the cost.

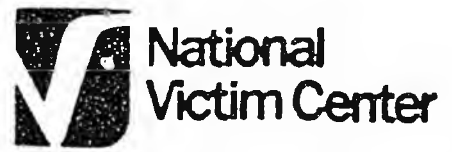
The Senator would be happy to answer any questions that we may have, or talk to any legislator that has questions. He is deeply committed to victims and victims rights and may be a valuable ally. His opinion as a Senator (and elected official) may be more persuasive to other Legislators since he understands the political implications of support for victims' rights.

Please keep me informed of the progress of your legislation. I am prepared to return to Alaska as needed to ensure our goal of passing a victims' rights constitutional amendment. Best regards to you and your sister, Sharon, for a safe and happy holiday season!

Sincerely,

Linda

Linda A. Akers
Deputy Director
CrimeStrike



An advocacy and resource center founded in honor of Sunny von Bulow

OVERVIEW OF CRIME AND VICTIMIZATION IN AMERICA

GENERAL DATA

- About 34.7 million Americans age 12 or older were victims of crime in 1987. This is a 1.8% increase in overall crimes from 1986, the lowest level of crime since 1971. (Bureau of Justice Statistics, *Criminal Victimization in 1987*, NCJ-113587, October 1988)

- One violent crime occurred every 21 seconds in 1987. (Federal Bureau of Investigation, Uniform Crime Reports, *Crime in the United States*. JUS-432, Release date July 10, 1988)

- Almost 6,000,000 of the crimes committed in 1987 were classified as violent. (Bureau of Justice Statistics, *Criminal Victimization 1987*. NCJ-113587, October 1988)

- One in four American households were touched by a crime of violence or theft in 1987, the same proportion as in the previous two years. (Bureau of Justice Statistics, *Households Touched by Crime, 1987*, NCJ-111240 May 1988)

- The *National Crime Survey* determined that an estimated 34.1 million crimes, including both completed and attempted offenses, were committed against individuals or households across the United States in 1986. (Bureau of Justice Statistics, *Criminal Victimization in the United States, 1986*, NCJ-111456, August 1988)

- Almost 5% of the nation's households had a member who was the victim of a violent crime in 1987. (Bureau of Justice Statistics, *Households Touched by Crime, 1987*, NCJ-111240, May 1988)

- Males were more often victimized by strangers than were females: 67% of violent crimes committed against males and 45% of violent crimes committed against females were committed by strangers. (Bureau of Justice Statistics, *Criminal Victimization in the United States, 1986*., NCJ-111456, August, 1988

- Approximately a third of violent crimes involved the presence or use of a weapon. (Bureau of Justice Statistics, *Criminal Victimization in the United States, 1986*, NCJ-111456, August 1988)

- At current crime rates, an estimated five-sixths of U.S. citizens will be victims of attempted or completed violent crimes during their lifetimes. The risk is greater for males than females and for blacks than whites. (Bureau of Justice Statistics, *Report to the Nation on Crime and Justice. Second Edition*, NCJ-105506, March 1988)

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DOMESTIC VIOLENCE

- Conservative estimates predict domestic violence affects more than 2.1 million women, four million children and one million older people each year. (Family Violence Project, San Francisco, California, *Safe At Home: Domestic Violence is Everyone's Business)*

- The most likely classification for incidents of domestic violence is simple assault, which is a misdeameanor in most jurisdictions. (American Bar Association *Journal. Violence in the Home*, May 1, 1987)

- In 1986, at least half of the domestic "simple assaults" actually involved bodily injury as serious or more serious than 90% of all rapes, robberies and aggravated assaults. (Bureau of Justice Statistics, *Preventing Domestic Violence Against Women*, NCJ-102037, August, 1986)

- Twenty to fifty percent of American couples have suffered violence regularly in their marriage. (National Institute of Mental Health, *Plain Talk About Wife Abuse*, July 29, 1987)

- In the *National Crime Survey*, seven out of ten incidents of domestic violence were committed by the woman's spouse, ex-spouse, boyfriend or ex-boyfriend. An estimated 52% of all incidents of domestic violence were reported to police. (Bureau of Justics Statistics, *BJS Data Report. 1987*. NCJ-110643, April 1988).

DRUNK DRIVING

- Every 22 minutes, one person dies in an alcohol-related auto crash. (National Highway Traffic Safety Administration, *Preliminary Estimates of 1987 Highway Safety Statistics. 1988)*

- Estimates of the economic costs of drunk driving range from $11 billion (NHTSA, 1985) to $24 billion (Allstate, 1982) each year. (Mothers Against Drunk Driving, *A Summary of Statistics Related to the National Drunk Driving Problem*, October 1988)

- In 1987, nearly nine 15- to 19-year-olds died each day in alcohol-related traffic crashes. (National Highway Traffic Safety Administration, *Preliminary Estimates of 1987 Highway Statistics. 1988)*

- Between 1970 and 1986 arrests for DWI increased nearly 223%, while the number of licensed drivers increased by 42%. (Bureau of Justice Statistics, *Drunk Driving*, NCJ-109945, February 1988)

- Nearly half of those in jail for DWI had previously been sentenced to probation, jail, or prison for DWI. (Bureau of Justice Statistics, *Drunk Driving*, NCJ-109945, February 1988)

HATE/VIOLENCE CRIMES (cont'd)

- The incidents of anti-gay violence rose 42% in 1987. A record 7,008 incidents, ranging from verbal abuse to slayings, were reported to the *National Gay and Lesbian Task Force*. Fifteen percent of all incidents reported in 1987 and five percent of the physical assaults involved verbal references to AIDS. (National Gay and Lesbian Task Force, *Anti-Gay Violence, Victimization & Defamation in 1987)*

- In January of 1988, five states required police to record and report incidents of racial, religious and ethnic violence. Three states had established procedures to collect data, although there was no data collection legislation. (National Institute Against Prejudice and Violence, *Forum* newsletter, Vol 3, No. 1, January 1988)

HOMICIDE

- In 1987, there was one murder every 26 seconds. (Federal Bureau of Investigation, Uniform Crime Reports, *Crime in the United States*, JUS-432, Release date July 10, 1988)

- Criminal homicide is one of the 15 most frequent causes of death, and for the 15- to 34-year age group, it is second only to accidents as a cause of death. (Washington Criminal Justice Reports, *Crime Victims Digest*, Vol 5, No. 11, November 1988)

- At the current homicide rates, about one out of every 133 Americans will become a murder victim. For black males, the proportion is estimated to be one in 30. (Bureau of Justice Statistics, *Lifetime Likelihood of Victimization*, NCJ-104274, March 1987)

- In 1986, 95% of the black murder victims were slain by black offenders; 88% of the white murder victims were killed by white offenders; males were most often slain by males (83%); however, 9 out of every 10 female victims were murdered by males. (Federal Bureau of Investigation, *Uniform Crime Reports 1986*, JUS-432, Release date July 25, 1987)

SEXUAL ASSAULT

- Every six minutes during 1987, one American was forcibly raped. (Federal Bureau of Investigation, Uniform Crime Reports, *Crime in the United States*, JUS-432, Release date July 10, 1988)

- Of the almost 125,000 rapes reported to the *Bureau of Justice Statistics* in 1987, 36.4% happened between 6:00 a.m. and 6:00 p.m. and 35.9% occurred between 6:00 p.m. and midnight. (Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics. 1987*, NCJ-111612)

LEGISLATION (cont'd)

- Forty-eight states now allow the use of victim impact statements.
- Seventeen states mandate court appearance for victims.
- Twenty-four states have plea bargain/consultation legislation.
- Forty-four states have victim/witness information statutes.
- Thirty-four states have notification of final disposition.
- Thirty-nine states have notification of the release of prisoners in felony cases.
- Forty-six states have victim compensation programs.
- Every state, including the District of Columbia, have some sort of restitution legislation, and 23 states have mandatory restitution legislation.

Source: *National Organization for Victim Assistance*, January 1988.

FOR FURTHER INFORMATION CONTACT:

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(817) 877-3355

U.S. Department of Justice
633 Indiana Avenue, N.W.
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Bureau of Justice Statistics: (202) 724-7782
National Institute of Justice: (202) 724-2949
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10th and Pennsylvania Avenue
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"The Spark of Justice":

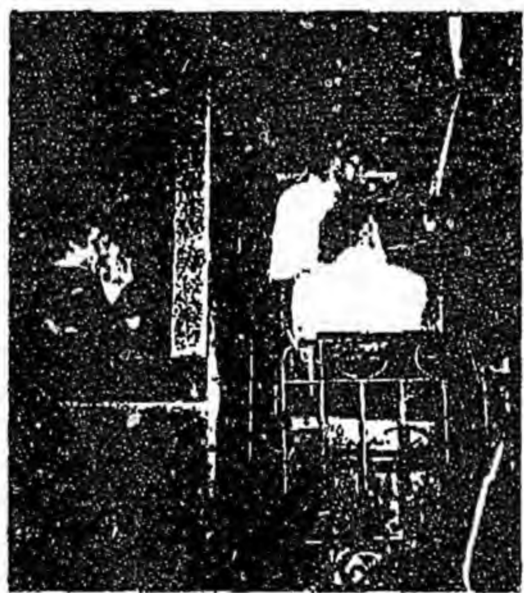
A Call for Enacting A Constitutional Amendment

By Steve Twist

The welcoming ceremonies at the Fourteenth Annual Conference followed traditional form, with a warm greeting from Pima County Attorney Stephen Neely and a thoughtful address by NOVA President Daniel Rosenblatt, among others. Greetings from Attorney General Robert Corbin, delivered by his Chief Assistant, were expected to lean more towards a friendly welcome than towards the thought-provoking. If that is what the participants wanted of Steve Twist, they were disappointed. Judging from their reactions, however, they were anything but disappointed.

As a service to the many conference-goers who asked for a copy of Steven Twist's stemwinder on victim rights, we are reprinting it here:

Steve comes by his impatience the hard way. As a principal supporter of a victim rights amendment to the Arizona constitution, he lead the fight that found that proposal just one vote short of ratification in the Arizona legislature last session. He and other victim advocates in the state are determined to get their proposal on the ballot through a petition drive. It seems likely that they will succeed. Steve's speech follows.



Steve Twist speaks at the opening ceremonies. The platform is a made-for-movies train, at the sound stage at Old Tucson. Other whistle-stoppers are (l. to r.) Dan Rosenblatt, Marlene Young, and Stuart Gelman.

Good evening. It is my great privilege to join Steve Neely in welcoming you to Tucson and to the warm hospitality of Southern Arizona.

It is highly appropriate to have selected Tucson as the host site for this meeting. Steve Neely has been one of the pioneers of victim/witness programs among prosecutors in America and his program, run by Viki Sharp, Sharon Hechman, Stuart Gellman and the many fine and dedicated staff and volunteers, is consistently regarded as among the best in the nation.

It has brought new sensitivity to the business of prosecution by recognizing the plight of victims as they suffer not only the ordeal of the crime, but also the ordeal of the criminal justice system. Pima County's program helps victims cope with both ordeals. We are proud to have them in Arizona.

But the strength of their program has also taught us that new frontiers must be explored, that new answers must be found. Here in Tucson, as elsewhere in Arizona and America, the most caring and effective victim/witness program cannot protect victims from a criminal justice system which is itself abusive, destructive, and deaf to the cry for victims' rights.

The best counseling programs are strained to breaking when the system itself causes the emotional pain which needs treatment.

The most caring prosecutor, who regularly consults with victims about their cases, cannot overcome the trauma caused by the incessant delays he must report, or the procedural setbacks, the suppression of evidence, the repeated releases of defendants, or sentences that neither deter nor punish nor protect future victims.

The strongest victims' rights statutes will never protect victims if they are always second to the constitutional rights of defendants . . . or for that matter, to the interests or convenience of the judges or the lawyers.

The best-funded compensation and assistance programs, even if they had badly-needed additional revenues, will never compensate for the injustice or the indignity of our systems' treatment of victims.

Many of us in the victims' movement believe that we must seek more fundamental reforms in the justice system if we are to make our dreams of justice a reality.

In 1988 in Arizona, over 200,000 of our neighbors will be victims of either murder, rape, robbery, aggravated assault, or serious theft. As they begin to cope with the crime and the justice system, in many ways we force them to face it legally alone. In my state, victims have not one constitutional right or remedy to protect them.

They have no right to a speedy trial.

They have no right to privacy.

They have no right to a lawyer.

They have no right to refuse a pre-trial interview.

They have no right to be informed or consulted.

They have no right to be in the courtroom.

They have no right to finality to their ordeal.

They have no right to be heard until the trial is over.

They have no right to access to the entire court record.

They have no right to due process.

In short, they are treated as a hard piece of evidence in our system.

Having failed victims in our duty to protect them from crime, we then subject them to a system which affords them no constitutional rights and they are brutalized by it.

Many of us believe the answer lies in constitutional reform. Unless victims' rights are made a part of our basic law — our constitutional law — victims will always be second-class citizens. It is time for this atrocity to stop.

As those of us in Arizona know, our

challenge is great and our opposition is strong. Not all the venom in my state is found in the creatures of the Arizona desert.

Of course none of our opponents are against "victims' rights". The strength of the movement you have forged has captured the agenda and they are afraid to oppose us.

They are for "victims rights *but*..." — but they don't believe those rights should be in the Constitution.

They are for victim rights *but*

. . . they are not for the right of the victim to be in the courtroom throughout the trial;

. . . they are not for the victims right to a speedy trial;

. . . or reasonable finality;

. . . or to refuse pre-trial interviews;

. . . or to have all relevant evidence introduced so the truth of what happened can fully be heard.

They are not for the child victims right to testify outside the threatening presence of the defendant.

They are not for the victims' right to prison sentences which will protect future victims.

Those who say they are for "victim rights *but*..." are deceitful, fraudulent, and they have no right to associate with you or carry the banner which you have raised.

". . . you've seen it in the eyes of caring police and dedicated prosecutors; you've seen it in the mirror."

Our movement is the most important civil rights movement of the Eighties and Nineties. Our success will depend on courage and spirit and perseverance.

Napoleon said there are only two powers in the world, the sword and the spirit. In the end, he said, the sword will always be conquered by the spirit.

For now, it seems, the sword is in the hands of the criminal and we have lost the spirit to overcome him.

But in all the injustice we see, in all the victims' pain, there is a spark. You know that spark. You have seen it in the eyes of those you counsel and comfort; you've seen it in the eyes of citizens who can no longer stomach the repeated horror stories which daily come from our system; you've seen it in the eyes of caring police and dedicated prosecutors; you've seen it in the mirror.

It is the spark of justice. Remember when you first felt that spark, when your hearts were touched and filled by it. Inspire yourself again for this cause and you will inspire others. Use this conference to re-ignite the spark, or feed it with the oxygen that is here. Share your ideas, share your vision of our new frontier, and we will see justice for victims in our day.

Thank you. □

News from the States:

California Updates "Miranda" Warnings

For years, victim advocates have spoken of a "Reverse Miranda" warning or card — one that would routinely be used to read to the victim that person's rights.

Due to an initiative of the California Youth Authority and the California Corrections Department — supported by the state's major law enforcement associations — victims there may soon receive such a recital of their rights as a standard part of filing a crime report.

The following is an announcement describing the new program.

"You have a right to remain silent..." That's a phrase that has become well known to law enforcement and criminal suspects with whom they deal. If police agencies, the California Youth Authority (CYA), the California Department of Corrections (CDC) and victim rights advocates have their way, crime victims will have their rights explained at the scene of crimes too.

That is why the CYA, CDC and major law enforcement organizations are distributing cards to law enforcement officers throughout the state that can be used not only to advise suspects of their rights, but the victims of their rights as well.

The cards will be accompanied by a letter signed by Cal Terhune, Director, CYA; Jim Rowland, Director, CDC; Glen Craig, President, California Peace Officers Association (CPOA); Craig Meacham, President, California Police Chiefs' Association; and Sherman Block, President, California State Sheriffs' Association.

Although victims of crime in California have had these rights for years, only the suspects have had their rights read to them at the time of arrest. This card will inform the victims of their rights under the law and provide them with information for assistance.

The local law enforcement agencies are being encouraged to use the same information with local assistance phone numbers for distribution to victims, who may not remember the information given to them by the officers at the scene of the crime.

The implementation of the project is the accomplishment of a cooperative effort between law enforcement associations, CYA, CDC, and the office of Governor George Deukmejian, who has fully supported the project.

If all those involved have their way, "As a victim of a crime, you may..." will become as well known as the Miranda warning given to criminal suspects.

For more information, write:

Sharon English
California Youth Authority
4241 Williamsgorough Drive
Sacramento, CA 95823 □