DEPT. LAW UPDATE: STATE V. AULIYE

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

STATE OF ALASKA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Court of Appeals No. A-8084
	)	
CANDICE AULIYE,	)	
	)	
Respondent.	)	
	)	

Superior Court No. 2NO-01-00427 Cr.

ON PETITION FOR REVIEW FROM THE SUPERIOR COURT
SECOND JUDICIAL DISTRICT AT NOME
BEN ESCH, JUDGE

OPENING BRIEF OF PETITIONER

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APPELLATE COURTS

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Deputy Clerk

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Rights of Accused

In all criminal prosecutions, the accused shall have the right to a speedy and public trial. by an impartial jury of twelve, except that the legislature may provide for a jury of not more than twelve nor less than six in courts not of record. The accused is entitled to be informed of the nature and caused of the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption great; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor. and to have the assistance of counsel for his defense.

Alaska Rule of Appellate Procedure 402 provides:

Petitions for review of non-appealable orders or decisions

(a) When Available.

(1) An aggrieved party, including the state of Alaska, may petition the appellate court as provided in Rule 403 to review any order or decision of the trial court, not appealable under Rule 202. and not subject to a petition for hearing under Rule 302, in any action or proceeding, civil or criminal. In addition. a party may petition the supreme court as provided in Rule 403(h) to review an unsuspended sentence of imprisonment which is not appealable under Appellate Rule 215(a)(1).

(2) A petition for review shall be directed to the appellate court which would have jurisdiction over an appeal from the final judgment of the trial court in the action or proceeding in which it arises.

(b) When Granted. Review is not a matter of right, but will be granted only where the sound policy behind the rule requiring appeals to be taken only from final judgments is outweighed because:

(1) Postponement of review until appeal may be taken from a final judgment will result in injustice because of impairment of a legal right, or because of unnecessary delay, expense, hardship or other related factors; or

(2) The order or decision involves an important question of law on which there is substantial ground for difference of opinion, and an immediate review of the order or decision may materially advance the ultimate termination of the litigation, or may advance an important public interest which might be compromised if the petition is not granted; or

(3) The trial court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative tribunal, as to call for the appellate court's power of supervision and review; or

(4) The issue is one which might otherwise evade review, and an immediate decision by the appellate court is needed for the guidance of the lower courts or is otherwise in the public interest.

Alaska Statute 04.16.050(a) provides:

Possession, control, or consumption by persons under the age of 21

(a) A person under the age of 21 years may not knowingly consume, possess, or control alcoholic beverages except those furnished persons under AS 04.16.051(b).

Alaska Statute 04.16.050(b)-(k) provides:

See attached appendix.

Alaska Statute 12.55.055(c) provides:

Community work

. . .

(c) The court may offer a defendant convicted of an offense the option of performing community work in lieu of a fine, surcharge, or portion of a fine or surcharge if the court finds the defendant is unable to pay the fine. The value of community work in lieu of a fine is $3 per hour.

Alaska Statute 47.12.400(c)(3) provides:

Youth courts

. . .

(c) A nonprofit corporation may obtain recognition from the commissioner to serve as a youth court. The corporation may exercise only the powers that are delegated to a youth court by the commissioner, and shall exercise those powers as authorized by the corporation's articles of incorporation and bylaws. The bylaws of the corporation must set out standards and procedures by which the corporation, in its capacity as a youth court,

. . .

(3) may secure jurisdiction over a minor; the youth court may secure jurisdiction over the minor only with the consent of the minor and the agreement of the minor's legal custodian.

STATEMENT OF JURISDICTION

On August 3. 2001. Superior Court Judge Ben Esch entered an order which provided that a first offender charged with minor consuming alcohol (MCA) under AS 04.16.050(a) is entitled to a jury trial and court-appointed counsel. The state filed a petition for review on August 20, 2001.[1] This court granted the state's petition for review on October 12, 2001, and ordered formal briefing. This court has jurisdiction pursuant to AS 22.07.020 and Appellate Rule 402.

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[1] This court granted the state's motion for a ten-day extension of time to file the petition for review; thus, the petition was timely filed. [*See* Order For Extension, dated August 24, 2001]

ISSUES PRESENTED FOR REVIEW

Is a first offender charged with minor consuming alcohol (MCA) under AS 04.16.050(a) entitled to a jury trial and court-appointed counsel?

In the order granting the state's petition for review, this court directed the parties to address the following issues:

1. As a condition of probation or SIS probation, can a defendant charged with first-offense minor consuming be ordered to undertake in-patient treatment and, if so, does this in-patient treatment constitute the equivalent of imprisonment, thus presumptively triggering the right to a jury trial?

2. If a defendant is ordered to complete work service as a condition of probation or SIS probation, does this constitute a criminal penalty that triggers the right to a jury trial?

3. Sections (b)(2) and (e) of AS 04.16.050 appear to require the sentencing court to impose probation whether or not any portion of the fine is suspended. In other words, this probation apparently is not imposed in exchange for some other portion of the sentence being suspended; rather, the probation and all its specified conditions stand alone.

(a) What is the nature of this kind of probation?

(b) Might this "probation" be viewed as a device for allowing the sentencing court to impose a sentence that can repeatedly be modified for up to one year, or until the defendant reaches the age of 21, whichever is longer?

(c) What penalty does a defendant face for violating the terms of this probation?

STATEMENT OF THE CASE

A. Introduction

In the last decade lawmakers in the state have struggled to find solutions to the problems associated with abuse of alcohol in Alaska. One of the serious problems that has drawn significant legislative attention has been drinking among minors, and the disproportionate number of teenage deaths related to drinking and driving. While concerned about the dangers of teen drinking, lawmakers have also tried to avoid burdening young adults with criminal records for youthful offenses.

B. History of Minor Consuming Laws in Alaska

AS 04.16.050 was enacted in 1980 to prohibit a person under 19 years of age from possessing, consuming, or controlling alcohol, with some exceptions not important here. *See* Ch. 131, § 3, SLA 1980. When the minor consuming alcohol statute (MCA) was first enacted, the penalty was a class A misdemeanor. *Id.* The drinking age was raised from 19 to 21 in 1983. *See* Ch. 109, § 8, SLA 1983. Under this law, although juveniles under 18 years of age came under the juvenile justice system, persons 18 through 20 years old were charged in district court and could obtain a conviction of record for a crime. *Id.*

In 1994 the legislature enacted additional laws to address the high rate of alcohol-related automobile fatalities among young people in Alaska. As the supreme court noted in *State v. Niedermeyer*, 14 P.3d 264, 271 (Alaska 2000), there was evidence that minors who consume alcohol tend to be less careful drivers. The legislature responded to this concern by adopting AS 28.15.183 - AS 28.15.184, which provided for the administrative revocation of the privilege to drive for minors who consumed alcohol – commonly known as the "Use It/Lose It" law. *See* Ch. 71, SLA 1994. The legislature's purpose was to keep youthful drivers who drink alcohol off the road, and to provide an incentive for youths not to drink alcohol at all, so as not to lose their driving privileges. *See* Minutes, House Health, Education and Social Services Standing Committee (February 17, 1994).

Having enacted administrative sanctions for minor consuming in 1994, the next year the legislature felt it could reduce the penalty for MCA from a class A misdemeanor to a violation in order to achieve more consistent enforcement. *See* Ch. 81, § 1, SLA 1995. The sponsor of the legislation stated that the changes were made in response to the concern of many parents about the lack of juvenile court action for MCA. *See* Minutes, Senate Finance Standing Committee (March 22, 1995). The juvenile justice system was overburdened, and it was felt that drinking minors needed more than a scolding letter from "the system" which usually arrived several months after

the offense. *Id.* For those minors 18 to 20 years old, it was felt that there was a reluctance on the part of some law enforcement officers to cite a youth for a misdemeanor that would be on the person's permanent record and possibly prejudice future opportunities to join the military or obtain employment. *Id.*; *see also* Minutes, House Finance Standing Committee (May 5, 1995).

The advantages of the new lower penalty for MCA were described as allowing a judge to (1) intervene early to help a young person avoid a serious alcohol problem and (2) address minors with drinking problems who were falling through the cracks in the enforcement scheme. *See* Minutes, House Judiciary Standing Committee (April 21, 1995). By doing so, the new statute was seen more as a preventive approach to alcohol abuse by teens, rather than as a punitive approach. *See* Minutes, Senate Judiciary Committee (March 1, 1995). There were also practical advantages mentioned in support of the change: attorneys for the state would not have to appear for trial of MCA violations; jury trials would be avoided; and there was no need for counsel to be appointed on behalf of the youth. *See* Minutes, House Judiciary Standing Committee (April 21, 1995).

Although the 1995 legislation reduced the possible level of punishment from one year in jail to a $300 fine, the legislature was apparently willing to make that change in order to obtain more consistent

enforcement, and because the 1994 "Use It/Lose It" law provided what was then thought to be substantial deterrent against minors consuming alcohol.[2]

Beginning in 1996, however, the legislature's efforts to deal effectively yet fairly with minors consuming alcohol had to start taking into account court decisions that reversed these legislative judgments. In *State v. District Court,* 927 P.2d 1295 (Alaska App. 1996), this court held that the revocation of driving privileges under AS 28.15.185 required that the minor be afforded a jury trial and court-appointed counsel. In response to this decision, the legislature amended AS 28.15.185 to exclude MCA as a basis for court revocation of a minor's privilege to drive. *See* Ch. 93, § 6, SLA 1998. That left the administrative license revocation provisions in the "Use It/Lose It" law as the most meaningful deterrent to juvenile drinking.[3]

Subsequently, in *State v. Niedermeyer,* 14 P.3d 264 (Alaska 2000), the supreme court held that the administrative revocation of a minor's driving privileges for conviction of MCA was a criminal sanction that entitled

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[2] In 1996 lawmakers enacted other laws creating violations for minors driving after drinking any amount of alcohol, commonly known as the "Zero Tolerance" law. *See* AS 28.35.280 - 28.35.290; Ch. 143, SLA 1996.

[3] In 1999 lawmakers amended the administrative revocation of driving privileges to significantly reduce the period of revocation (*e.g.*, from 90 days to 30 days for a first revocation) and to provide that multiple revocations run concurrently, rather than consecutively. *See* Ch. 88, SLA 1999; Minutes, House Judiciary Standing Committee (April 9, 1999).

minors to a jury trial and court-appointed counsel. After this opinion was issued. the Department of Law urged the supreme court to adopt a rule appointing counsel and providing jury trials for MCA violations. Letter from Attorney General Bruce M. Botelho to Chief Justice Dana Fabe (December 20, 2000). However, the supreme court declined to adopt such a rule and suggested that the Department of Law address its concerns to the Criminal Rules Committee. Letter from Chief Justice Dana Fabe to Attorney General Bruce M. Botelho (January 2, 2001).

The *Neidermeyer* opinion removed the last effective deterrent to minors consuming alcohol. Because the court system was refusing to appoint counsel or grant jury trials in MCA cases, that meant that no driver licenses could be revoked. The legislature was thus forced to take action, and it is against this backdrop that the legislature enacted the current MCA law, Ch. 65, SLA 2001. The underlying purpose was the same as in 1995: to address the serious problem of underage drinking, the disproportionately high rate of teenage alcohol-related highway fatalities, and at the same time to avoid unfairly burdening youth with a criminal record for youthful misconduct. In addition, however, the legislature also decided to re-criminalize MCA for

repeat offenders, thus partially returning the law to its status prior to 1995. *See* AS 04.16.050(c) and (d); Ch. 65, § 2, SLA 2001.[4]

C. The Current Offense

On July 14, 2001, 18-year-old Candice Auliye was issued a citation for minor consuming alcohol (MCA), in violation of AS 04.16.050(a). [Exc. 1] The public defender was appointed to represent Auliye at her arraignment. [Exc. 3, Log Notes of Arraignment, August 2, 2001] It appears from the log notes of the arraignment that Auliye had a prior conviction for MCA under the former version of the statute. [Exc. 3] Nevertheless, she was still a first offender for purposes of the current statute.[5]

On August 3, 2001, Judge Esch issued a written order, sua sponte, in which he ruled that Auliye was entitled a jury trial. [Exc. 5-9] In his ruling, Judge Esch concluded that the penalty provisions in AS 04.16.050(b) for first offenders convicted of MCA – including a fine of up to

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[4] The current version of the MCA statute took effect on July 4, 2001. *See* Ch. 65, § 21, SLA 2001 (the effective date provided in the session law was July 1, 2001, but Governor Knowles did not actually sign the bill until July 4, 2001).

[5] The current version of the statute "wipes the slate clean" and only applies to minor consuming offenses that occur after the effective date of the statute. Offenders convicted under prior versions of the statute, while still "first offenders" for purposes of the current statute, are not eligible for the SIS/community diversion sentencing option available for "true first offenders". *See* Ch. 65, § 1, SLA 2001; AS 04.16.050(b)(1) and (2).

$600. mandatory probation for one year or until the offender is 21 years of age (whichever is longer), and the possibility of in-patient alcohol treatment and community work service as conditions of probation – amounted to criminal sanctions which entitled first offenders to the constitutional protections of court-appointed counsel and a jury trial. [*Id.*]

The state asked this court to review Judge Esch's order. As noted above, this court granted the state's petition for review and ordered formal briefing. Auliye's case was stayed pending resolution of the state's petition for review. [Exc. 10]

ARGUMENT

FIRST OFFENDERS CHARGED WITH MINOR CONSUMING ALCOHOL UNDER AS 04.16.050 ARE NOT ENTITLED TO COURT-APPOINTED COUNSEL AND JURY TRIALS BECAUSE FIRST OFFENSES UNDER THE CURRENT STATUTE ARE NOT "CRIMINAL PROSECUTIONS" WHICH SUBJECT FIRST OFFENDERS TO CRIMINAL PENALTIES

A. Standard of Review

This court applies its independent judgment in interpreting a statute, "adopting the rule of law that is most persuasive in light of precedent, reason, and policy." *Sosa v. State*, 4 P.3d 951, 953 (Alaska 2000); *see also Wurthmann v. State*, 27 P.3d 762, 764 n.5 (Alaska App. 2001) (citing *Conner v. State*, 696 P.2d 680, 682 (Alaska App. 1985)).

B. The Right To Court-Appointed Counsel And A Jury Trial

Article I, section 11, of the Alaska Constitution guarantees that:

> In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve; except that the legislature may provide for a jury of not more than twelve nor less than six in courts not of record. The accused is entitled ... to have the assistance of counsel for his defense.

The concomitant rights to a jury trial and to counsel under the state constitution apply to all criminal prosecutions. *See Baker v. City of Fairbanks*, 471 P.2d 386, 401-02 (Alaska 1970); *Alexander v. City of Anchorage*, 490 P.2d 910, 913 (Alaska 1971).

In *Baker*, the supreme court defined the categories of cases that qualify as "criminal prosecutions" for purposes of applying the right to a jury trial under the Alaska Constitution:

> In extending the right to jury trial, we define the category of "criminal" prosecutions as including any offense a direct penalty for which may be incarceration in a jail or penal institution. It also includes offenses which may result in the loss of a valuable license, such as a driver's license or a license to pursue a common calling, occupation, or business. It must also include offenses which, even if incarceration is not a possible punishment, still connote criminal conduct in the traditional sense of the term.

Baker, 471 P.2d at 402 (footnote omitted).

Subsequently, in *Alexander*, the supreme court held that the right to counsel under the state constitution applied to "criminal prosecutions" as defined in *Baker*:

> [I]n any criminal prosecution, as we have defined the term in *Baker*, the accused shall have the right to be represented by counsel. This means that he has the right to the assistance of counsel for his defense if he is prosecuted for a misdemeanor, as well as for a felony, when the penalty upon conviction of the misdemeanor may result in incarceration in a jail or a penal institution, the loss of a valuable license, or a fine so heavy so as to indicate criminality.

Alexander, 490 P.2d at 913.

In *State v. District Court*, 927 P.2d 1295 (Alaska App. 1996), this court relied on *Baker* and concluded that persons charged with MCA under the former version of the statute were entitled to a jury trial and to court-

appointed counsel: this conclusion was based on the requirement that the sentencing court revoke a minor's driver's license (or the privilege to obtain a license if one had not yet been obtained) as part of the sentence. More recently, in *State v. Niedermeyer*, 14 P.3d 264 (Alaska 2000), the supreme court concluded that the administrative revocation of a minor's driver's license upon conviction for MCA was also a criminal sanction that entitled persons charged under the former statute to the procedural protections of a jury trial and appointed counsel.

C. AS 04.16.050 And The Statutory Penalty Scheme

The offense of minor consuming alcohol (MCA) is defined in AS 04.16.050(a):

> A person under the age of 21 years may not knowingly consume, possess, or control alcoholic beverages except those furnished persons under AS 04.16.051(b).

The penalties for first-time offenders are set forth in AS 04.16.050(b). [6] Judicial officers have two options in sentencing first-time

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[6] A copy of Ch. 65, §§ 1-2, SLA 2001, encompassing the amendments to AS 04.16.050(b) and the new subsections added to the statute, is attached as Appendix A to the state's brief.

AS 04.16.050(b)(1) and (2) provides:

> A person who violates (a) of this section and who has not been previously convicted or received a suspended imposition of sentence under (1) of this subsection is guilty

(footnote continued . . .)

offenders: (1) suspended imposition of sentence (SIS) and referral to a community diversion panel. or (2) imposition of fines. along with alcohol screening and education. For persons who have never been convicted of minor consuming (*i.e* :rue first offenders), the court may grant a suspended imposition of sentence and place the person on probation for one year or until he or she is 21 years of age (whichever is longer). Among the conditions of

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(. . . footnote continued)

> of minor consuming or in possession or control. Upon conviction in the district court, the court
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> (1) may grant a suspended imposition of sentence under AS 12.55.085 and place the person on probation for one year or until the person is 21 years of age, whichever is later. if the person has not been convicted of a violation of this section previously; among the conditions of probation. the court shall, with the consent of a community diversion panel, refer the person to the panel. and require the person to comply with conditions set by the panel. including counseling, education. treatment. community work. and payment of fees: in this paragraph. "community diversion panel" means a youth court or other group selected by the court to serve as a sentencing option for a person convicted under this section: or
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> 2) shall impose a fine of at least $200 but not more than $600. shall require the person to attend alcohol information school if the school is available, and shall place the person on probation under (e) of this section: the court may suspend a portion of the fine imposed under this paragraph that exceeds $200 if the person is required to pay for education or treatment required under (e) of this section.

probation. the court is required to refer the person to a community diversion panel that deals with underage drinkers. if one exists in the community. If the community diversion panel accepts the referral. the panel (not the sentencing court) may impose conditions of probation "including counseling, education, treatment, community work, and payment of fees." The offender must comply with any probation conditions imposed by the court and the community diversion panel. *See* AS 04.16.050(b)(1).

For first-time offenders who have been convicted of minor consuming in the past under former MCA provisions. or for those persons convicted under the current statute who do not receive a suspended imposition of sentence as provided in section (b)(1), the court must impose a fine of at least $200 but not more than $600; the portion of the fine above $200 can be suspended if the person is ordered to pay for alcohol education or treatment as part of the sentence. In addition. the person is required to attend alcohol information school. if available. and is placed on probation as provided in (e) of the statute. The probation required under (e) is mandatory and cannot be refused, and the person is also required to enroll in a juvenile alcohol safety action program, if such a program is available. *See* AS 04.16.050(b)(2) and (e).

Under section (e), which applies to first-time and repeat offenders, the court is required to impose three conditions of probation: (1)

that the person pay for and successfully complete any alcohol education or treatment recommended: (2) that the person not possess or consume alcoholic beverages or controlled substances; and (3) that the person complete any community work service ordered by the court (or in the case of first offenders, recommended by the community diversion panel). *See* AS 04.16.050(e).

D. Discussion

Judge Esch concluded that first offenders charged under the current MCA statute are entitled to jury trials and court-appointed counsel because the penalties for a first offense – specifically, a fine of up to $600, mandatory probation, and the possibility that community work service and in-patient alcohol treatment may be required as conditions of probation – are sanctions that connote "criminality" under *Baker* and its progeny. Judge Esch is mistaken. His analysis overlooks the sentencing alternatives provided for first offenders under the current version of the statute and the unique nature of the "probation" that may be imposed in these cases.

"Probation" Under AS 04.16.050(b) and (e). Generally, in granting probation to an offender, a sentencing court is offering the offender a more lenient alternative to imposition of the statutory penalty if the offender is willing to abide by the conditions of probation established by the court. *State v. Staael*, 807 P.2d 513, 517 (Alaska App. 1991). The sanction

for violation of a condition of probation is usually imposition of the suspended portion of the sentence. But a person always has the alternative of refusing to accept probation and receiving the suspended sentence if he or she thinks that the conditions of probation are more onerous than the sentence which might be imposed. *See Bland v. State*, 846 P.2d 815, 818 (Alaska App. 1993) (citing *Brown v. State*, 559 P.2d 107, 111 n.13 (Alaska 1977); *Alfred v. State*, 758 P.2d 130, 131 (Alaska App. 1988)).

The probation required under the MCA statute is somewhat different. Under sections (b)(1) and (b)(2) of the statute, the sentencing court is required to place all first-offenders convicted of MCA on probation or SIS probation for one year or until the person is 21 years of age, whichever is longer; moreover, section (e) expressly provides that "[t]he person may not refuse probation." But there are no sanctions for violations other than paying the suspended portion of the fine imposed for the first offense and being treated as a second offender based on the violation.[7] In other words, the probation is mandatory for first offenders to the extent that the minor cannot refuse probation so as to defeat the graduated sanctions for repeat and

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[7] The current MCA statute is structured so that a second offense is based on a violation of probation (*i.e.*, consuming alcohol again before turning 21), rather than committing an offense after having been previously convicted of the same offense. *See State v. Peel*, 843 P.2d 1249 (Alaska App. 1992); *Pananen v. State*, 711 P.2d 528 (Alaska App. 1985).

habitual offenders. But the minor can still elect to simply pay the fine and not comply with the other probation conditions that may be imposed by the court or the community diversion panel, including alcohol treatment and community work service, if he or she thinks the conditions are too onerous. *Alfred*, 758 P.2d at 131 (citing *Brown*, 559 P.2d at 111 n.13).

In some respects, the violation of probation under the statute is similar to violating a court-imposed protective order (*i.e.*, a domestic violence restraining order). Just as a defendant cannot elect not to be subject to the protective order, a minor cannot refuse "probation" under the statute. *See* AS 04.16.050(e). Just as the legislature can make it a crime to violate a restraining order, the legislature can properly enhance the penalties for second MCA offenses based on the probation violation, without affording the minor the right to a jury trial or court-appointed counsel in connection with the first violation.

Does the "probation" required by the statute allow the sentencing court to impose a sentence that can repeatedly be modified until the minor is 21? Theoretically yes; realistically, no. Once the minor violates his or her probation for a first-MCA violation, he or she is subject to the enhanced penalties for second offenders (which entitles the minor to a jury trial and court-appointed counsel under *Baker* and *Alexander* because conviction for a second offense can result in suspension of the minor's driver's license). *See*

AS 04.16.050(c). The court is not required to extend the probation indefinitely for repeat violations by suspending and reimposing ever-smaller portions of the fine until the minor turns 21, and it would not make sense for the court to do so. Rather the court would simply revoke the probation imposed for the first offense and impose the entire suspended portion of the fine; the enhanced penalties for second and repeat violations under the statute do not depend on the continuation of probation.

In-Patient Alcohol Treatment. Judge Esch was concerned that first offenders may be required as a condition of probation to complete a program of alcohol counseling and treatment that includes in-patient treatment. *See* AS 04.16.050(g) (treatment recommended by a juvenile alcohol safety action program "may include a period of inpatient treatment if the judgment specifies the maximum period of inpatient treatment authorized"). Since a defendant may be entitled to credit for time served in some inpatient treatment programs. Judge Esch reasoned that the possibility of inpatient treatment entitled first offenders to the procedural safeguards of a jury trial and appointed counsel. *See Booth v. State*, 903 P.2d 1079. 1088 (Alaska App. 1995) (citing *Baker* and *Alexander*: "[I]t is the potential penalty for a crime that determines whether the accused is entitled to a jury trial and the assistance of a court-appointed attorney.")

Sentencing judges have authority to grant a defendant credit for time served in a residential drug or alcohol treatment program pursuant to a court order making participation in the program a condition of bail release or probation. *See Lock v. State*, 609 P.2d 539 (Alaska 1980); *Nygren v. State*, 658 P.2d 141, 146 (Alaska App. 1983). In order for participation in such a program to qualify for *Nygren* credit, the court's order must subject the defendant to substantial restraints on his liberty amounting to "the functional equivalent of imprisonment." *Lock*, 609 P.2d at 546; *Nygren*, 658 P.2d at 145-46; *see also Hester v. State*, 777 P.2d 217, 218 (Alaska App. 1989). The analysis in *Nygren* discusses some of these jail-like features:

> [T]heir residents are invariably sent there by court order; the facilities require residency, and residency requirements are sufficiently stringent to involve a definite element of confinement; residents of the facilities are subject to twenty-four hour physical custody or supervision; any periods during which residents may be permitted to leave the facility are expressly limited, both as to time and purpose; while in the facility, residents are under a continuing duty to conform their conduct to institutional rules and to obey orders of persons who have immediate custody over them; and residents are subject to sanctions if they violate institutional rules or orders and to arrest if they leave the facility without permission.

Nygren, 658 P.2d at 146.

As a condition of probation or SIS probation, the minor is referred to either a community diversion panel (*i.e.*, a youth court or similar community program) in the case of true first offenders, or to alcohol

information school in the case of first offenders with a prior minor consuming conviction. *See* AS 04.16.050(b)(1) and (2). For both classes of first offenders, the court may also require the minor to pay for and enroll in a juvenile alcohol safety action program approved by the Department of Health and Social Services, if one is available, or by the court if a department-approved program is not available. *See* AS 04.16.050(e) and (k). But in either case, any alcohol education or treatment requirements placed on the minor, including in-patient treatment that may be recommended under section (g), are imposed by the program itself, not by the sentencing court.

Moreover, as discussed above, the minor always has the option of not participating in the recommended treatment program (in-patient or otherwise) and simply paying the suspended portion of the fine. [8] *Alfred*, 758 P.2d at 131 (citing *Brown*, 559 P.2d at 111 n.13). The fact that the minor may ultimately agree to participate in an in-patient treatment program – a decision that likely would be made by the minor and his family with the minor's best interests in mind – does not trigger the right to a jury trial and appointed counsel. *Cf.* AS 47.12.400(c)(3) ("[T]he youth court may secure jurisdiction over the minor only with the consent of the minor and the

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[8] A minor who has been recommended for in-patient treatment also has the option of asking the sentencing court to review the referral. AS 04.16.050(g).

agreement of the minor's legal guardian").

Judge Esch's reasoning assumes that all in-patient treatment programs are the same; they are not. It is clear that not all in-patient programs place the same restrictions on their participants, and that not all restrictions that may be required of the participants in a particular program amount to the "functional equivalent of imprisonment" for *Nygren* purposes. The fact that participation in some programs may entitle a person to *Nygren* credit does not turn a non-criminal matter into a criminal one in every case, with all its attendant rights, any more than a minor's election to participate in such a program would. Judge Esch was simply wrong when he concluded that the mere possibility of in-patient treatment was sufficient to entitle a minor charged with first-offense minor consuming to a jury trial and court-appointed counsel.

Community Work Service. First-offenders convicted of minor consuming can be ordered to perform community work service as a condition of probation and SIS probation. In *Booth*, this court held that "community labor" is a criminal penalty and concluded that it is the potential penalty that may be imposed by the sentencing court that determines whether a person is entitled to a jury trial and the assistance of court-appointed counsel under *Baker* and *Alexander*. *Booth*, 903 P.2d at 1087-88. But *Booth* does not mandate the conclusion that first-offenders charged under the MCA statute

are entitled to these protections for two reasons: (1) it is the community diversion panel, not the sentencing court, that orders true first offenders to perform work service, and (2) all first offenders can refuse to perform the work service, opting instead to pay the unsuspended portion of the fine.

Under section (b)(1) of the statute, the sentencing court is required to refer a true first offender to a community diversion panel (*i.e.*, a youth court) and it is the diversion panel that can require the minor to perform community work service, not the court. Under section (b)(2), the sentencing court is required to place all other first offenders on probation under section (e), which provides that the minor shall "complete any community work ordered." But there is no requirement of community work service for first offenders sentenced under (b)(2); in fact, it appears that the work service provision mentioned in section (e) is directed at repeat and habitual MCA offenders, since the court is specifically required to impose work service as a condition of probation for repeat and habitual offenders. *See* AS 04.16.050(c)(1) (requiring repeat offenders to perform at least 48 hours of community work), and AS 04.16.050(d)(1) (requiring habitual offenders to perform at least 96 hours of community work).

Moreover, as with the requirement of alcohol treatment that may be imposed as a condition of probation, the first offender sentenced under sections (b)(1) or (b)(2) always has the option of refusing to perform the work

service and simply paying the unsuspended portion of the fine (the only sanction that can be imposed for failing to comply with any work service or alcohol treatment requirement imposed by the court or the community diversion panel). The fact that a first offender has the option of performing community work service in lieu of paying a fine does not transform an MCA violation into a "criminal prosecution" under *Baker*. If it did, jury trials would seemingly be required in all traffic cases and minor fish and game cases because a sentencing court has the option of allowing a defendant to perform community work in lieu of paying a fine. *See* AS 12.55.055(c). The fact that this option exists does not and should not trigger the right to a jury trial and court-appointed counsel for first offenders charged with MCA.

Fines. A defendant has the right to a jury trial and to the assistance of court-appointed counsel in a "criminal prosecution" when the possible direct punishment is incarceration, loss of a valuable license, or the imposition of a fine "so heavy as to indicate criminality"; as the supreme court explained in *Baker*, "[a] heavy enough fine might also indicate criminality because it can be taken as a gauge of the ethical and social judgments of the community." *Baker*, 471 P.2d at 402 n.29; *see also Alexander*, 490 P.2d at 913. A first offender sentenced under section (b)(2) is subject to a fine of at least $200 but not more than $600; the court may suspend the portion of the fine that exceeds $200 if the person is required to

pay for alcohol education or treatment that may be imposed under section (e) as a condition of probation. *See* AS 04.16.050(b)(2).

As to the size of the fine itself. a maximum fine of $600 for first-MCA offenders, even without the provision for the suspension of the amount of the fine over $200 to be applied to the costs of alcohol education and treatment, does not in itself connote criminality. In making that determination, the supreme court and this court look to the circumstances surrounding the offense as an indicator of society's attitude toward the conduct in question. *See e.g., State v. Dutch Harbor Seafoods, LTD.*. 965 P.2d 738, 742 (Alaska 1998) (maximum fine of $3000 for first offenders convicted of strict liability commercial fishing violations does not connote criminality in context of highly regulated fishing industry); *State v. O'Neil Investigations, Inc.*, 609 P.2d 520, 537-38 (Alaska 1980) (plurality opinion) ($5000 civil fine for unfair or deceptive bill collection practices does not render proceedings "criminal prosecutions"); *Alaska Public Defender Agency v. Superior Court*, 584 P.2d 1106, 1110 (Alaska 1978) ($100 fine for offense of harassment under municipal ordinance not indicative of criminality "in this modern day of constantly rising inflation and devaluation of the dollar"); *see also Booth*, 903

P.2d at 1087 (assuming that fines of no more that $360 "are not the sort of severe sanction that denotes criminality").[9]

In concluding that first MCA offenders are entitled to jury trials, Judge Esch relied upon the supreme court's statement in *Niedermeyer*, 14 P.3d at 271, that "[u]nderage drinking has traditionally been regarded as criminal misconduct." [Exc. 8] But Judge Esch mistakenly applied this language in the context of a very different statutory scheme than the one considered by the supreme court in *Niedermeyer*, in which the sentencing court was required to revoke a minor's driver's license as part of the sentence for a MCA violation. The same "social and moral approbation" the supreme court attached to convictions resulting in license suspensions for underage drinking in *Niedermeyer*, 14 P.3d at 271, does not apply to first offenders convicted under the current statute who face no more than the possibility of a modest fine, two-thirds of which can be suspended if the minor is required as a condition of probation to pay the costs of alcohol education and treatment

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[9] As noted above, the supreme court in *Alaska Public Defender Agency* concluded that a fine of $100 was not indicative of criminality viewed in the light of constantly rising inflation and devaluation of the dollar at that time (1978). 584 P.2d at 1110. The same $100 fine in 2001, adjusted for inflation, would be $273.47; a $200 fine in 1978 (the minimum fine for first-MCA offenses under the current statute), similarly adjusted for inflation, would be $546.93 in 2001; a fine of $600 in 1978 (the maximum fine for first-MCA offenses under the current statute) would be $1640.80 in 2001. *See* Bureau of Labor and Statistics, Inflation Calculator, at www.bls.gov.cpi.

that may be required as a condition of probation. Notably, it is apparent from the legislative discussions of House Bill 179 (the proposed MCA statute) that the legislature viewed the fines that could be imposed for first offenses as a method of giving the sentencing court the much needed flexibility to deal with the alcohol education and treatment needs of first offenders by making the possible fines high enough to serve as an incentive for first offenders to seek treatment rather than simply paying a fine. *See* House Judiciary Committee Minutes. March 30 and April 10. 2001.

The current MCA statute represents a determination by the legislature that minors who consume alcohol. particularly first offenders, do not have the judgment or capacity to responsibly consume alcohol. By enacting the current statutory scheme, the legislature was attempting to address the problem of underage drinking before it results in true criminal behavior. The focus of the penalties for first-time MCA offenders under the current statute is alcohol education. screening, and treatment. not punishment.

First-offense MCA violations under the current statute are not "criminal prosecutions" under *Baker* and *Alexander* and, therefore, first-offenders charged under the statute are not entitled to a jury trial or to court-appointed counsel.

CONCLUSION

For these reasons. Judge Esch's order granting Auliye a jury trial should be reversed. The order appointing the Public Defender to represent her should also be reversed.

Dated November 20th, 2001, at Anchorage, Alaska.

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: _____
John A. Scukanec
Assistant Attorney General

LAWS OF ALASKA

2001

Source
CSHB 179(FIN)

Chapter No.
65

AN ACT

Relating to underage drinking and drug offenses; and providing for an effective date.

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

THE ACT FOLLOWS ON PAGE 1

Approved by the Governor: July 3, 2001
Actual Effective Date: July 4, 2001

THE
FOLLOWING
DOCUMENT(S)
ARE
POOR
ORIGINAL
COPIES

AN ACT

1 Relating to underage drinking and drug offenses; and providing for an effective date.

2

3

4 * **Section 1.** AS 04.16.050(b) is amended to read:

5 (b) A person who violates (a) of this section <u>and who has not been</u>
6 <u>previously convicted or received a suspended imposition of sentence under (1) of</u>
7 <u>this subsection</u> is guilty of <u>minor consuming or in possession or control</u> [A
8 VIOLATION]. Upon conviction in the district court, the court

9 <u>(1)</u> may <u>grant a suspended imposition of sentence under</u>
10 <u>AS 12.55.085 and place the person on probation for one year or until the person</u>
11 <u>is 21 years of age, whichever is later, if the person has not been convicted of a</u>
12 <u>violation of this section previously; among the conditions of probation, the court</u>
13 <u>shall, with the consent of a community diversion panel, refer the person to the</u>
14 <u>panel, and require the person to comply with conditions set by the panel,</u>

1 including counseling, education, treatment, community work, and payment of
2 fees; in this paragraph, "community diversion panel" means a youth court or
3 other group selected by the court to serve as a sentencing option for a person
4 convicted under this section; or
5 (2) shall impose a fine of at least $200 but not more than $600, shall
6 require the person to attend alcohol information school if the school is available,
7 and shall place the person on probation under (e) of this section; the court may
8 suspend a portion of the fine imposed under this paragraph that exceeds $200 if
9 the person is required to pay for education or treatment required under (e) of
10 this section [NOT LESS THAN $100].
11 * Sec. 2. AS 04.16.050 is amended by adding new subsections to read:
12 (c) A person is guilty of repeat minor consuming or in possession or control if
13 the person was placed on probation under (b) of this section or has been previously
14 convicted, and the person violates (a) of this section. Upon conviction in the district
15 court, the court shall
16 (1) impose a fine of $1,000 and require at least 48 hours of community
17 work;
18 (2) revoke the person's driver's license for three months;
19 (3) take possession of the person's driver's license; and
20 (4) suspend up to $500 of the fine and place the person on probation
21 under (e) of this section.
22 (d) A person is guilty of habitual minor consuming or in possession or control
23 if the person was placed on probation under (c) of this section, or has been previously
24 convicted twice, and the person violates (a) of this section. Habitual minor consuming
25 or in possession or control is a class B misdemeanor. Upon conviction, the court may
26 impose an appropriate period of imprisonment and fine and place the person on
27 probation under (e) of this section and shall
28 (1) impose at least 96 hours of community work;
29 (2) revoke the person's driver's license for six months;
30 (3) within five working days, notify the agency responsible for the
31 administration of motor vehicle laws of the revocation; and

(4) take possession of the person's driver's license.

(e) The court shall place a person sentenced under (b), (c), or (d) of this section on probation for one year, or until the person is 21 years of age, whichever is later. The person may not refuse probation. The court may require the person to pay for and enroll in a juvenile alcohol safety action program, if one is available. The court shall impose the following conditions of probation:

(1) the person shall pay for and successfully complete any education or treatment recommended;

(2) the person may not consume inhalants or possess or consume controlled substances or alcoholic beverages, except as provided in AS 04.16.051(b);

(3) the person shall timely complete any community work ordered, as provided in (f) of this section; and

(4) other conditions the court considers appropriate.

(f) A person ordered to perform community work under this section shall perform the work within 120 days of the entry of judgment for a conviction. The court may expand the time period for up to 30 days upon a showing of good cause. The person shall submit verification of completion of community work to the clerk of court on a form provided by the court. If the verification is not provided within the time period required by this subsection, the court shall, within 30 days, schedule further proceedings in the case to determine whether a violation of probation has occurred.

(g) The treatment recommended by a juvenile alcohol safety action program for a person placed on probation under (e) of this section may include a period of inpatient treatment if the judgment specifies the maximum period of inpatient treatment authorized. A person who has been recommended for inpatient treatment may make a written request to the sentencing court for review of the referral. A person shall make a request for review within seven days after the recommendation and shall specifically set out the grounds upon which the request for review is based. The court may order a hearing on the request for review.

(h) The juvenile alcohol safety action program to which a person is referred under this section shall inform the court or a minor's juvenile probation officer if the person fails to submit to evaluation or fails to complete successfully any education or

treatment recommended. If the court finds that the person has failed to perform community work as ordered, to submit to evaluation, or to complete successfully the education or treatment recommended, the court may impose the suspended fine, and may impose any period of suspended incarceration. If the person was convicted under (c) or (d) of this section, the court shall revoke the person's driver's license for an additional six months beyond the revocation imposed under (c) or (d) of this section. A court revoking a person's driver's license under this subsection shall notify the agency responsible for the administration of motor vehicle laws of the revocation within five working days.

(i) When considering the financial resources of a minor for purposes of determining eligibility for court-appointed counsel under this section, the court shall consider the resources of both the defendant and the defendant's parent or guardian, unless the court finds good cause to treat the defendant's or the defendant's parent's or guardian's resources as being unavailable to the defendant.

(j) A driver's license revocation under this section is consecutive to a revocation imposed under another provision of law, but is concurrent with a revocation under another provision of law based on a prior conviction, adjudication of delinquency, or informal adjustment under AS 47.12.060.

(k) In this section,

(1) "driver's license" has the meaning given in AS 28.40.100;

(2) "juvenile alcohol safety action program" means

(A) a juvenile alcohol safety action program developed and implemented or approved by the Department of Health and Social Services under AS 47.37;

(B) any other alcohol education or treatment program approved by the Department of Health and Social Services under AS 47.37 if a program described in (A) of this paragraph is not available in the community in which the person resides; or

(C) a program or counseling approved by the court if a program or treatment described in (A) of this paragraph is not available in the community where the person resides;

(3) "previously convicted" means a conviction or an adjudication as a delinquent for a violation of AS 11.71, AS 28.35.030, 28.35.032, 28.35.280 - 28.35.290, or a law or ordinance in another jurisdiction with substantially similar elements.

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

STATE OF ALASKA, Petitioner, vs. CANDICE AULIYE, Respondent.	Court of Appeals No. A- 08084

(Trial Court No. 2NO-S01- 00427 CR)

APPEAL FROM THE SUPERIOR COURT
SECOND JUDICIAL DISTRICT AT NOME
HONORABLE BEN ESCH, JUDGE

RESPONDENT'S BRIEF

RECEIVED
DEPARTMENT OF LAW
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OFFICE OF SPECIAL PROSECUTIONS
AND APPEALS
ANCHORAGE, ALASKA

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Filed in the Court of Appeals
Of the State of Alaska
_____, 2002

MARILYN MAY, CLERK
Appellate Courts

_____
Deputy Clerk

VRA CERTIFICATION AND APP. R. 513.5 CERTIFICATION

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court. I further certify, pursuant to App. R. 513.5, that the font used in this document is Univers 12.5 point.

rvd by: DHK → JAS
to: _____
_____
✓ _____

STATEMENT OF THE CASE

A. Introduction

Candice Auliye was cited, as a first-time offender, for minor consuming in violation of A.S. 04.16.050. Because the statute subjected Ms. Auliye to criminal penalties, Judge Esch ordered that she was entitled to court-appointed counsel and to a jury trial. The state petitioned this court for review of Judge Esch's order. This court granted review to determine whether A.S. 04.16.050 subjects first-time offenders to criminal penalties, thereby entitling them to court-appointed counsel and to a jury trial.

The state argues that A.S. 04.16.050 does not subject first time offenders to criminal penalties. The state is wrong. The statute subjects first time offenders to mandatory probation that can be repeatedly modified for up to ten years. Conditions of probation include potential residential substance abuse treatment, community work service and heavy fines. A minor who fails to comply with probation may receive a permanent criminal conviction of record.

B. The Minor Consuming Statute—A.S. 04.16.050 and the Statutory Penalty Scheme

In 2001, at the request of the Department of Law, the Alaska Legislature proposed House Bill 179, "offenses related to underage drinking." The intent of the bill was to enact a system of graduated punishment whereby the penalty for minors possessing or consuming alcohol would increase in severity with the number of prior convictions. See House Judiciary Minutes, March 31, 2001. For first offenders, the initial intent of the Legislature was to reduce the costs associated

with prosecution by eliminating the minor's right to court-appointed counsel and right to trial by jury. Id. Towards that end, the initial draft of the bill proposed a $600 fine, with the entire amount suspended, as a penalty for first-time offenders so that the amount at stake would not trigger the right to court-appointed counsel and a jury trial. Id. In commenting on the proposed draft, Assistant Attorney General Dean Guaneli specifically noted that: "no license revocation or community work service is available, which the courts have held would trigger a right to a jury trial and a right to counsel, which drives up costs for first offenders." Id.

Some of the members of the judiciary committee voiced concerns that the proposed penalty for first time offenders was not serious enough to "get the attention of the youth of the state" and lobbied for the inclusion of tougher penalties. Id. As a direct result, the final version of the bill, A.S. 04.16.050, runs directly afoul of the very concerns voiced by Assistant Attorney General Guaneli. The statute provides that first offenders convicted of minor possessing or consuming alcohol may be placed in residential substance abuse treatment, be ordered to perform community work service, pay up to a $600 fine, and be placed on probation for one year, or until the person is 21 years of age, whichever is later.[1] A.S. 04.16.050(b), (e)-(g).

The statute further provides that probation is mandatory for first-time offenders. A.S. 04.16.050(e). If an offender violates probation, the court can revoke

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1 Thus, a first offender convicted of minor consuming can be placed on probation for up to 10 years. A.S. 12.55.090 limits probation for criminal offenses to 10 years.

the suspended imposition of sentence and impose a permanent criminal conviction of record. A.S. 04.16.050(b)(1); A.S. 12.55.085(a)-(c). As a condition of probation, the court can also order that the offender not operate a motor vehicle unless it is equipped with an ignition interlock device. A defendant is then required to surrender his driver's license and bear all the costs associated with installing and maintaining the device. A.S. 12.55.102(a)-(e).

ARGUMENT

I. A MINOR PROSECUTED UNDER A.S. 04.16.050 IS ENTITLED TO COURT-APPOINTED COUNSEL AND TO A JURY TRIAL

A. Introduction—Legal Background

In any criminal prosecution, the accused is entitled, in addition to a jury trial, to the assistance of counsel at public expense if the accused is indigent. Sixth and Fourteenth Amendments, United States Constitution; Article I, section 11, Alaska Constitution; Alexander v. City of Anchorage, 490 P.2d 910, 915 (Alaska 1971). A "criminal prosecution" includes prosecution for any offense that may result in incarceration in a jail or penal institution or the loss of a valuable license, such as a driver's license. Baker v. City of Fairbanks, 471 P.2d 386, 401-02 (Alaska 1970); Alexander v. City of Anchorage, 490 P.2d at 913. "Criminal prosecution" also includes "offenses which, even if incarceration is not a possible punishment, still connote criminal conduct in the traditional sense of the term." Baker v. City of Fairbanks, 471 P.2d at 402. Prosecution for an offense that results in the imposition of a fine alone, if the fine is heavy enough to indicate criminality, may also qualify as a "criminal prosecution." Id. at 403, n.29.

B. Analysis

1. The potential for residential treatment triggers a minor's constitutional right to court-appointed counsel and trial by jury

Alaska courts have previously held that time spent in certain residential treatment programs pursuant to court order, while on probation, is the equivalent of time spent in a jail or penal institution. Lock v. State, 609 P.2d 539, 545 (Alaska 1980); Nygren v. State, 658 P.2d 141, 146 (Alaska App. 1983). Thus, Alaska courts

have given defendants credit against their jail sentences for time spent in residential treatment programs pursuant to court order while on probation. Lock v. State, 609 P.2d at 545-46; Nygren v. State, 658 P.2d at 146.

In so doing, courts have held that persons in residential treatment programs, like inmates in jails and penal institutions, can suffer substantial restraints on their freedom of movement and behavior. Id. An individual in residential treatment as a condition of probation is there by court order. Id. An individual in residential treatment can be required to maintain residence at the treatment facility, can be subjected to twenty-four (24) hour physical custody or supervision, and, if allowed to leave, only permitted to do so for limited purposes and duration. Nygren v. State, 658 P.2d at 146. Residents of treatment programs have a duty to conform their conduct to the rules of the program and to obey the orders of those supervising them. Id. Finally, residents of treatment programs are subject to sanctions if they violate the rules of the program. Id.

A first-time offender found in violation of A.S. 04.16.050 faces the potential of residential substance abuse treatment that, depending upon the requirements of the residential program, can impose the same restraints on the individual's behavior and freedom of movement as a jail or penal institution. Prosecution for an offense that subjects an accused to the potential of jail time is a criminal prosecution. Baker v. City of Fairbanks, 471 P.2d at 401-402; State v. Browder, 486 P.2d 925, 937 (Alaska 1971). It logically follows that prosecution for an offense that subjects the accused to the potential equivalent of jail time is also a criminal prosecution.

The state admits that a defendant charged with a first violation of the minor consuming statute can be ordered to undertake residential treatment. (Pet. Br. at p.20-21) However, the state argues that the potential for residential treatment is not the equivalent of jail time because the treatment is imposed by a referral agency and not by the court itself. (Pet. Br. at p.21)

The state's argument lacks merit. The argument overlooks the fact that the minor consuming statute *requires* the sentencing court to refer the defendant to a substance-abuse treatment referral agency and to *order* the defendant to comply with the conditions set by the agency. A.S. 04.16.050(b)(1), (2), (e), (g). Thus, a first-time offender convicted under the minor consuming statutes is court-ordered to complete residential treatment if residential treatment is recommended by either a community diversion panel (for true first offenders) or by the juvenile alcohol safety action program. It is precisely because the residential treatment is court-ordered that the court has the power to revoke the minor's probation if the minor fails to participate in a referral agency's recommendation to complete residential treatment.

Additionally, the state's argument overlooks the fact that the sentencing court maintains veto authority over the referral agency's recommendation that the minor undergo residential treatment. Pursuant to A.S. 04.16.050(g), a minor who is recommended for inpatient treatment can request the sentencing court to review the referral. The court can order a hearing on the request for review. Id. By inference, the court has the authority to nullify the referral if it deems it inappropriate. Thus, referral to residential treatment is made only with the approval and authority of the court.

The state further argues that the potential for residential treatment does not trigger a minor's right to counsel and trial because the minor has the option of ignoring the court's order to participate in recommended treatment. (Pet. Br. at p.21) According to the state, the only penalty the minor suffers from ignoring the court's order is the imposition of the suspended portion of the fine. Id.

The state is wrong. First, it is the *potential* penalty for a crime that determines whether the accused is entitled to a jury trial and to the assistance of court-appointed counsel, not the penalty that actually occurs. Booth v. State, 903 P.2d 1079, 1088 (Alaska App. 1995). Thus, a minor's ability to reject court-ordered residential treatment *post* conviction is irrelevant to the issue of whether the minor is entitled to assistance of counsel and trial by jury *prior to* conviction.

Second, a minor who chooses to ignore the order of the court to comply with treatment recommendations can suffer much more than the mere imposition of a fine. The penalties imposed by the minor consuming statute are expressly governed by title 12, the Code of Criminal Procedure. A minor who is granted a suspended imposition of sentence and refuses to comply with conditions of probation may receive a permanent criminal conviction of record. A.S. 12.55.085(c).

Third, a minor who violates conditions of probation will be brought repeatedly before the court until the minor complies with treatment recommendations. Probation under A.S. 04.16.050(b)(1) and (2) is mandatory: the minor cannot refuse probation. A.S. 04.16.050(e). Normally, a criminal defendant has the right to refuse probation and receive the suspended portion of a sentence if

the defendant thinks the conditions of probation are too onerous. See Brown v. State, 559 P.2d 107, 111 n. 13 (Alaska 1977); Bland v. State, 846 P.2d 815, 818 (Alaska App. 1993). The benefit to a defendant of terminating probation is that the court no longer maintains supervisory authority over the defendant. Unlike any other defendant, a minor convicted under A.S. 04.16.050 cannot unilaterally terminate the court's authority over him prior to the termination of the probation period.

Additionally, the minor can be subject to the court's supervisory authority for as long as ten years.[2] As the state concedes, the sentencing court can repeatedly modify the sentence imposed during the entire probationary period. (Pet. Br. at p.18) The clear purpose of the statute is to provide minors with substance abuse treatment while they are on probation to prevent them from committing future alcohol-related offenses. It is realistic to expect that the court will maintain supervisory authority over the minor until the minor complies with conditions of probation. Should the minor violate probation by failing to comply with residential treatment, it is extremely unlikely, as the state suggests, that the court will simply impose the suspended fine without taking steps to require the minor to obtain and complete treatment. It is far more likely that the court will impose a portion of the suspended fine and order the minor to comply with treatment recommendations, which the court can do repeatedly during the probationary term.

Mandatory probation under A.S. 04.16.050 is a tool for the court to

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[2] A minor convicted under the statute shall be placed on probation for one year, or until the minor is twenty-one, whichever is later. A.S. 04.16.050(e). Probation may not exceed ten years. A.S. 12.55.090(c).

enforce compliance with the conditions of probation for a lengthy period of time. The state's argument that probation is mandatory so that the minor cannot refuse probation and defeat the graduated sanctions for repeat offenders is meritless. (Pet. Br. p.17-18) A minor cannot defeat the graduated sanctions for repeat offenders by refusing probation. If the minor refuses SIS probation, the minor receives a criminal conviction of record and is subject to treatment as a repeat offender if he/she re-offends. A.S. 04.16.050(c); A.S. 12.55.085(c). A minor on non-SIS probation is treated as a repeat offender if he/she re-offends regardless of whether the minor refuses probation. Id.

Should the sentencing court wish to provide the minor with additional incentive to comply with treatment recommendations, the court may also invoke its authority to hold the minor in criminal contempt for refusing to comply with the court's order. A.S. 12.80.010; 09.50.010(5). While the usual penalty for a probation violation is revocation of probation, the court can find a defendant in criminal contempt for a probation violation if the court gives the defendant advance notice of its intent to do so. Alfred v. State, 758 P.2d 130, 131 (Alaska App. 1988). This is particularly true when the court orders the defendant to contact an alcohol rehabilitation agency and the defendant refuses to do so. Id. Where the minor is able to comply with treatment but continually refuses to do so, the court can imprison the minor until the minor complies with the court's order. A.S. 09.50.050.

2. The potential for community work service triggers a minor's constitutional right to court-appointed counsel and trial by jury

Court-ordered community work service constitutes a "criminal penalty." Booth v. State, 903 P.2d 1079 (Alaska App. 1995). Indeed, the Thirteenth Amendment to the United States Constitution prohibits "involuntary servitude, except as a punishment for a crime whereof the party shall have been duly convicted." Id. at 1088. The mere potential for a sentence of community work service is a criminal penalty, subjecting a defendant to a criminal prosecution, even though the defendant may not be sentenced to perform any labor. Id. at 1087-88.

The state concedes that a minor found in violation of A.S. 04.16.050 and placed on probation under either (b)(1) or (b)(2) faces the potential penalty of community work service. (Pet. Br. at p.22) However, the state makes the same arguments in addressing the community work service penalty as it made in addressing the residential treatment penalty. The state argues that the potential for community work service does not trigger the right to counsel and right to a jury trial because work service is imposed by a referral agency and not by the court itself. (Pet. Br. at p.23) The state further argues that the minor can avoid performing community work service and opt to pay the suspended portion of the fine.

The state's arguments regarding community work service fail for the same reasons they fail in regards to residential treatment. Although community work service may be set by a referral agency, the defendant is court-ordered to comply with the referral agency's recommendation. A.S. 04.16.050(b)(1), (b)(2), (e) and (f). Furthermore, the potential of community work service is a criminal penalty

regardless of whether the defendant is actually ordered to perform any labor. Booth v. State, 903 P.2d at 1088. Lastly, a minor who refuses to perform community work service as ordered by the court can suffer much more than the mere imposition of a fine. A minor can receive a permanent criminal conviction of record, can be brought repeatedly before the sentencing court for modification of probationary conditions for as long as ten years, and can be subject to the court's power to hold the minor in criminal contempt of court.

3. The potential for a $600 fine connotes criminality and triggers the minors' constitutional right to court appointed counsel and to trial by jury

An offense that may result in a fine alone, if heavy enough to indicate criminality, may also qualify as a "criminal prosecution." Baker v. City of Fairbanks, 471 P.2d at 402, n. 29. In determining whether a fine is heavy enough to indicate criminality, courts have not applied a per se dollar amount that would trigger an offender's right to counsel and jury trial. Instead, courts have looked to the circumstances surrounding the offense and the offender in determining whether the fine can be taken as a gauge of the social judgement of the community that the fine denotes criminality. See State v. Dutch Harbor Seafoods, 965 P.2d 738, 742 (Alaska 1998)(a $3000 fine for a first-offender and a $6000 fine for a repeat offender for fishing violations does not connote criminality in the context of a multi-million dollar fishing industry); Wood v. Superior Court, 690 P.2d 1225, 1233 (Alaska 1984)(a fine of $500 does not trigger right to counsel and jury trial for an attorney charged with contempt); State v. O'Neill Investigations, Inc., 609 P.2d 520, 537-38 (Alaska 1980)(Dimond, J., concurring, joined by Rabinowitz, C.J., approving $5,000

fine as non-criminal for debt-collection agency); Alaska Public Defender Agency v. Superior Court, 584 P.2d 1106, 1110 (Alaska 1978)($100 fine not indicate criminality "in this modern day of constantly rising inflation and devaluation of the dollar"); Booth v. State, 903 P.2d at 1087 (a $360 fine is not the sort of sanction that denotes criminality in a case with an adult offender); Beran v. State, 705 P.2d 1280, 1284 n. 4 (Alaska App. 1985)(fine is non-criminal in commercial fishing violations).

Evaluation of the circumstances of the offense and the offender in this case reveals that the $600 fine is a reflection of the community's judgment that underage drinking is criminal conduct. First, our Supreme Court has specifically recognized that society has traditionally viewed underage drinking as "criminal conduct." State v. Niedermeyer, 14 P.3d 264, 271 (Alaska 2000)(citing State v. District Court, 927 P.2d 1295, 1296-1297 (Alaska App. 1996)). According to the Alaska Supreme Court, "many members of the community attach significant social and moral opprobrium to the conduct [of underage drinking]." Id. Society certainly has not recently changed its perception that underage drinking is criminal conduct. If anything, society's perception that such conduct is criminal is clearer today than it ever has been. Alaska has very recently changed its driving while intoxicated laws to lower the breath-alcohol level required for a conviction and created a new court specifically to deal with driving while intoxicated offenders in response to the community's current interest in punishing such offenses. Teenage consumption of alcohol is currently seen as the gateway to the commission of more serious alcohol related offenses, like driving while intoxicated. See House Judiciary Minutes, March 31, 2001. Thus, society's view of underage drinking as criminal conduct has

heightened, rather than decreased, in recent years.

Accordingly, the legislature chose a potential $600 fine to "make a strong enough statement that it gets the attention of the youth of the state." House Judiciary Minutes, March 31, 2001. While $600 may not be a substantial imposition on most adults, it is a substantial imposition on a minor. Most minors are unemployed. If the minor is employed, the minor is most likely earning a minimum wage. Furthermore, the $600 fine can be imposed in addition to the other monetary sanctions A.S. 04.16.050 places upon minors. The statute also requires the minor to pay for any treatment the court orders, which can be quite expensive. A.S. 04.16.050(e). The minor can also be charged with the cost of installing and maintaining an ignition interlock device on his car. A.S. 12.55.102.

4. Requiring court-appointed counsel and jury trial for first-offenders will avoid collateral attacks on prior convictions under the repeat offender portions of the statute

Enhancing a mandatory minimum penalty based upon a non-criminal conviction in which the defendant did not have a right to counsel violates Alaska and, potentially, federal constitutional guarantees of due process. Pananen v. State, 711 P.2d 528, 532 (Alaska App. 1985). For example, in Pananen, the defendant pleaded no contest to two counts of driving while intoxicated, in violation of A.S. 28.35.030. Id. at 529. The state gave notice, prior to sentencing, that Pananen had two prior convictions, in other states, for driving while intoxicated. Id. Pananen argued that one of the prior convictions could not be used to enhance the mandatory minimum term of imprisonment because he had not been afforded the right to counsel in that case. Id. The sentencing court upheld both prior convictions and

sentenced Pananen as a third time offender. Id.

Pananen argued, on appeal, that it was fundamentally unfair to treat him as a third-time offender under A.S. 28.35.030(c) because he was not entitled to court-appointed counsel and was unrepresented in his prior case. Id. This court, largely in reliance on Baldasar v. Illinois, 446 U.S. 222, 100 S.Ct. 1585, 64 L.Ed. 2d 169 (1980), agreed. Pananen v. State, 711 P.2d at 530-31. This court specifically noted that "in construing the Alaska Constitution, the Alaska Supreme Court has long recognized the special importance of the right to counsel in criminal cases and the significant relationship between that right and the integrity of the truth-finding process." Id. at 531. This court held that using a non-criminal infraction in which the defendant did not have a right to counsel to enhance a mandatory minimum period of imprisonment violates the Alaska Constitution's guarantee of due process. Id. at 532.

Just as in Pananen, the repeat offender portions of A.S. 04.16.050 rely upon prior convictions to enhance the penalties a minor faces under the statute. A.S. 04.16.050(c)-(d). A second-time offender is subject to a $1,000 fine, 48 hours of community work service, driver's license revocation and probation. A.S. 04.16.050(c)(1)-(4). A third-time offense is a class B misdemeanor: the offender is subject to imprisonment, fine, community work service and driver's license revocation. A.S. 04.16.050(d).

Should this court hold that a minor charged as a first-time offender under A.S. 04.16.050 is not entitled to court-appointed counsel or to trial by jury, the repeat offender provisions of the statute will violate due process. By holding that a minor charged as a first offender under A.S. 04.16.050 is entitled to court-appointed

counsel and to trial by jury, however, this court will protect the constitutional rights of minors and effectuate the intent of the legislature. Minors charged as first offenders under the statute will receive the benefits of counsel and to trial by jury in order to ensure that convictions are reliably obtained. If convicted, both first-time and repeat offenders will be subject to the penalties imposed by the statute, which are intended by the legislature to prevent future alcohol-related criminal conduct.

CONCLUSION

For the reasons set forth above, this court should affirm Judge Esch's order granting Ms. Aullye's request for court-appointed counsel and a jury trial.

DATED at Anchorage, Alaska January 9, 2002.

PUBLIC DEFENDER AGENCY

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ASSISTANT PUBLIC DEFENDER

By: _____
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