

**HB**

**303**

<TARGET><BILL>HB 303</BILL><SUBJECT>HB  
303</SUBJECT><COMM>HJUD27</COMM></TARGET>

Reid  
Rep. Johansen's

WORK DRAFT

WORK DRAFT

WORK DRAFT

27-LS1385A  
Bailey  
2/16/12

HB 203 ?

**HOUSE BILL NO.**

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY REPRESENTATIVE JOHANSEN

Introduced:  
Referred:

**A BILL**

**FOR AN ACT ENTITLED**

1 "An Act providing for purging records when a criminal charge is dismissed or a person  
2 is acquitted of a crime; and adding Rule 35.3 to the Alaska Rules of Criminal  
3 Procedure."

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

5 \* **Section 1.** AS 12.62 is amended by adding a new section to read:

6 **Sec. 12.62.195. Purging records after dismissal or acquittal.**

7 Notwithstanding AS 12.62.190, as soon as practicable following the dismissal of  
8 criminal charges against a defendant or arrestee, a judgment or order of acquittal, or  
9 other discharge of the proceedings in favor of the defendant or arrestee, the court in  
10 which charges were brought shall issue an order to purge, delete, or destroy from all  
11 official records in the state so that no trace of the information remains all records  
12 relating to the charges brought against the defendant or arrestee, including court  
13 records, information collected, stored, processed, or disseminated or records of arrest,  
14 complaint, indictment, information, trial, dismissal, or discharge. The effect of the

1 order shall be to restore the person, in the contemplation of the law and in the public  
2 record, to the status occupied by the person before charges, arrest, indictment, or  
3 information. Upon entry of the order, the arrest or other proceeding shall be  
4 considered not to have occurred, and the defendant or arrestee may answer  
5 accordingly any questions relating to its occurrence.

6 \* **Sec. 2.** The uncodified law of the State of Alaska is amended by adding a new section to  
7 read:

8 DIRECT COURT RULE AMENDMENT. The Alaska Rules of Criminal  
9 Procedure are amended by adding a new rule to read:

10 **Rule 35.3. Records purged on acquittal or dismissal.** As soon as practicable  
11 following the dismissal of criminal charges against a defendant or arrestee, a judgment  
12 or order of acquittal, or other discharge of the proceedings in favor of the defendant or  
13 arrestee, the court in which charges were brought shall issue an order to purge, delete,  
14 or destroy from all official records in the state so that no trace of the information  
15 remains all records relating to the charges brought against the defendant or arrestee,  
16 including court records, information collected, stored, processed, or disseminated or  
17 records of arrest, complaint, indictment, information, trial, dismissal, or discharge. The  
18 effect of the order shall be to restore the person, in the contemplation of the law and in  
19 the public record, to the status occupied by the person before charges, arrest,  
20 indictment, or information. Upon entry of the order, the arrest or other proceeding  
21 shall be considered not to have occurred, and the defendant or arrestee may answer  
22 accordingly any questions relating to its occurrence.

23 \* **Sec. 3.** The uncodified law of the State of Alaska is amended by adding a new section to  
24 read:

25 APPLICABILITY. AS 12.61.195, enacted by sec. 1 of this Act, applies to charges  
26 dismissed or judgments of acquittal ordered on or after the effective date of this Act.

27 \* **Sec. 4.** The uncodified law of the State of Alaska is amended by adding a new section to  
28 read:

29 CONDITIONAL EFFECT. AS 12.61.195, enacted by sec. 1 of this Act, takes effect  
30 only if sec. 2 of this Act receives the two-thirds majority vote of each house required by art.  
31 IV, sec. 15, Constitution of the State of Alaska.

## Melanie Lesh

---

**From:** Reid Harris  
**Sent:** Tuesday, February 21, 2012 3:06 PM  
**To:** Melanie Lesh  
**Subject:** Purge Public Records draft  
**Attachments:** Public Records - Draft.pdf

Hello Melanie,

Please see the attached bill draft. If you have any input of suggestions based on your expert background I'd appreciate them.

Best regards,

Reid Harris  
Legislative Staff to  
Rep. Kyle Johansen  
907-465-3424

ALASKA STATE LEGISLATURE



received  
2/2/2012  
9:49 AM PS

REPRESENTATIVE LES GARA

MEMORANDUM

DATE: February 2, 2012  
TO: Representative Carl Gatto  
FROM: Representative Les Gara  
RE: Hearing Request for HB 303: Suspended Imposition of Certain Criminal Offenses

I respectfully request that House Bill 303, relating to suspended imposition of sentence for certain criminal offences, be scheduled for a hearing in the Judiciary Committee. Please feel free to contact me, or my aide Toby Smith, with questions at 465-2647.

Attached you will find a background packet for HB 303. This includes the current version of the bill, a sponsor statement, and backup materials.

Thank you for your consideration.

Representative Les Gara

# ALASKA STATE LEGISLATURE



REPRESENTATIVE LES GARA  
REPRESENTATIVE BETH KERTTULA

## Sponsor Statement

HB 303 Relating to Suspended Imposition of Certain Criminal Offences

Removing a Discharged Conviction: A Jobs and Fairness Issue

There is currently an anomaly under Alaska law. If you commit a lesser, non-violent, non-sexual crime; otherwise have a clean record; show good evidence that you won't commit another crime; and go through probation cleanly; in rare cases a judge will, under current law, remove your conviction. We don't change that law at all by this legislation.

However, it is unclear under Alaska law whether a person, such as a minor who had one Minor Consuming conviction, can state on a job application that they have never been convicted of a crime. If they say they have, of course, their job prospects are harmed.

HB 303 says that if your conviction is removed, you should be allowed to say you have not been convicted of a crime on things like job applications. This will give people who have done little wrong in life the chance to succeed in school and our economy, by not having to jeopardize employment, or admittance, based on a conviction that does not exist.

Feel free to call with any questions. Thank you.

**HOUSE BILL NO. 303**

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SEVENTH LEGISLATURE - SECOND SESSION

BY REPRESENTATIVES GARA, Kerttula

Introduced: 1/27/12

Referred: Judiciary

**A BILL**

**FOR AN ACT ENTITLED**

1 **"An Act relating to suspended imposition of sentence for certain criminal offences."**

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

*Suspending imposition of sentence*

3 \* **Section 1.** AS 12.55.085(e) is amended to read:

4 (e) Upon the discharge by the court without imposition of sentence, the court  
5 may set aside the conviction and issue to the person a certificate to that effect. As a  
6 matter of state law and policy, a person who receives a certificate under this  
7 subsection may truthfully answer questions relating to the offense that the person  
8 has not been convicted of the offense that was set aside.

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
LEGISLATIVE AFFAIRS AGENCY  
STATE OF ALASKA

(907) 465-3867 or 465-2450  
FAX (907) 465-2029  
Mail Stop 3101

State Capitol  
Juneau, Alaska 99801-1182  
Deliveries to: 129 6th St., Rm. 329

## MEMORANDUM

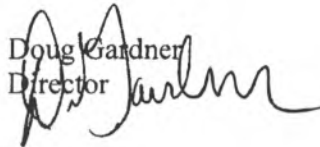
February 1, 2012

**SUBJECT:** Suspending Imposition of Sentence Under AS 12.55.085;  
Excluded Offenses and Exclusions (HB 303; Work Order No. 27-  
LS1192\M)

**TO:** Representative Les Gara  
Attn: Toby Smith

**FROM:**

Doug Gardner  
Director



**The question you asked is which crimes qualify for a suspended imposition of sentence (SIS) under AS 12.55.085, and which offenses are excluded.**

The answer to your question may be found by reading AS 12.55.085(f), which provides:

(f) The court may not suspend the imposition of sentence of a person who

(1) is convicted of a violation of AS 11.41.100 - 11.41.220, 11.41.260 - 11.41.320, 11.41.360 - 11.41.370, 11.41.410 - 11.41.530, AS 11.46.400, or AS 11.61.125 - 11.61.128;

(2) uses a firearm in the commission of the offense for which the person is convicted; or

(3) is convicted of a violation of AS 11.41.230 - 11.41.250 or a felony and the person has one or more prior convictions for a misdemeanor violation of AS 11.41 or for a felony or for a violation of a law in this or another jurisdiction having similar elements to an offense defined as a misdemeanor in AS 11.41 or as a felony in this state; for the purposes of this paragraph, a person shall be considered to have a prior conviction even if that conviction has been set aside under (e) of this section or under the equivalent provision of the laws of another jurisdiction.

As you can see from reviewing the statute, policy decisions have been made by the legislature to exclude the granting of an SIS to offenders convicted of all offenses in the range from murder (AS 11.41.100) through assault in the third degree (AS 11.41.220), which is a C felony. Note that assault in the fourth degree (AS 11.41.230) is an offense eligible for an SIS unless otherwise excluded by the statute because it involved a firearm, or the offender's record otherwise precluded the offender from being eligible for an SIS.

Representative Les Gara  
February 1, 2012  
Page 2

Continuing through the list of offenses not eligible for an SIS are stalking, assault on an unborn child, kidnapping and custodial interference in the first degree (AS 11.41.260 - 11.41.320) (note custodial interference in the second degree is an offense eligible for an SIS; AS 11.41.330), and human trafficking (AS 11.41.360 - 11.41.370). The statute continues to exempt all sexual offenses from sexual assault in the first degree (AS 11.41.410) through coercion (AS 11.41.530), arson in the first degree (AS 11.46.400), and distribution of child pornography (AS 11.61.125) through distribution of indecent materials to minors (AS 11.61.128).

You indicated in your request for advice that you intended that only "non-serious" crimes be eligible for an SIS. Previous legislatures have exercised judgment on what offenses should and should not be eligible for an SIS. Please review the offenses discussed above, and referred to in AS 12.55.085(f) the type of conduct the offense involved (using a firearm, etc.), to determine if an SIS only applies to your view of what constitutes a "non-serious" offense.

DDG:ljw  
12-077.ljw

# FISCAL NOTE

**STATE OF ALASKA**  
**2012 LEGISLATIVE SESSION**

Bill Version HB 303  
Fiscal Note Number \_\_\_\_\_  
( ) Publish Date \_\_\_\_\_

Identifier (file name) HB303-LAW-CRIM-02-03-12 Dept. Affected Law  
Title An Act relating to suspended imposition of sentence Appropriation Criminal  
for certain criminal offences. Allocation Criminal Justice Litigation  
Sponsor Representative Gara  
Requester (H) Judiciary OMB Component Number 2202

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
			FY14	FY15	FY16	FY17	FY18
<b>OPERATING EXPENDITURES</b>	<b>FY13</b>	<b>FY13</b>	<b>FY14</b>	<b>FY15</b>	<b>FY16</b>	<b>FY17</b>	<b>FY18</b>
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

FUND SOURCE		(Thousands of Dollars)					
1002	Federal Receipts						
1003	GF Match						
1004	GF						
1005	GF/Prgm (DGF)						
1037	GF/MH (UGF)						
1178	temp code (UGF)						
<b>TOTAL</b>		<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

POSITIONS							
Full-time							
Part-time							
Temporary							

CHANGE IN REVENUES							

Estimated SUPPLEMENTAL (FY12) operating costs \_\_\_\_\_ (separate supplemental appropriation required)  
(discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs \_\_\_\_\_ (separate capital appropriation required)  
(discuss reasons and fund source(s) in analysis section)

**Why this fiscal note differs from previous version (if initial version, please note as such)**

Not applicable, initial version.

Prepared by Eileen Donahue, Division Operations Manager  
Division Administrative Services  
Approved by Michael C. Geraghty, Attorney General  
Department of Law

Phone 465-5427  
Date/Time 2/3/12 5:10PM  
Date 2/3/2012

**FISCAL NOTE**

**STATE OF ALASKA  
2012 LEGISLATIVE SESSION**

**BILL NO. HB 303**

**Analysis**

HB 303 provides that as a matter of state law a person who receives a certificate stating that his or her conviction has been set aside under the provisions of AS 12.55.085 (suspended imposition of sentence) may truthfully say that the person had not been convicted of the offense.

The fiscal impact to Department of Law is zero.

# FISCAL NOTE

**STATE OF ALASKA**  
**2012 LEGISLATIVE SESSION**

Bill Version HB303  
 Fiscal Note Number \_\_\_\_\_  
 () Publish Date \_\_\_\_\_

Identifier (file name) HB303-DOA-OPA-1-30-12 Dept. Affected Administration  
 Title Suspended Imposition of Sentence Appropriation Legal and Advocacy Services  
 Allocation Office of Public Advocacy  
 Sponsor Representatives Gara and Kerttula  
 Requester House Judiciary OMB Component Number 43

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
			FY14	FY15	FY16	FY17	FY18
<b>OPERATING EXPENDITURES</b>	<b>FY13</b>	<b>FY13</b>	<b>FY14</b>	<b>FY15</b>	<b>FY16</b>	<b>FY17</b>	<b>FY18</b>
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

**FUND SOURCE** (Thousands of Dollars)

1002	Federal Receipts							
1003	GF Match							
1004	GF							
1005	GF/Prgm (DGF)							
1037	GF/MH (UGF)							
1178	temp code (UGF)							
<b>TOTAL</b>		<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

**POSITIONS**

Full-time							
Part-time							
Temporary							

**CHANGE IN REVENUES**

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Estimated **SUPPLEMENTAL (FY12) operating costs** \_\_\_\_\_ (separate supplemental appropriation required)  
 (discuss reasons and fund source(s) in analysis section)

Estimated **CAPITAL (FY13) costs** \_\_\_\_\_ (separate capital appropriation required)  
 (discuss reasons and fund source(s) in analysis section)

**Why this fiscal note differs from previous version (if initial version, please note as such)**

Not applicable, initial version.

Prepared by Richard Allen, Director  
 Division Office of Public Advocacy  
 Approved by John Cramer, Deputy Commissioner  
Department of Administration

Phone 907-269-3504  
 Date/Time 1/30/12 1:05 p.m.  
 Date 1/30/2012

**FISCAL NOTE**

**STATE OF ALASKA  
2012 LEGISLATIVE SESSION**

**BILL NO. HB303**

**Analysis**

This bill amends AS 12.55.085 by adding language that specifically allows a person who has a conviction set aside to say they have not been convicted of the offense in response to questions related to the offense. The Office of Public Advocacy does not anticipate any increased costs related to this legislation and therefore submits a zero impact fiscal note.

# FISCAL NOTE

STATE OF ALASKA cost # codes  
 2012 LEGISLATIVE SESSION

Bill Version HB303  
 Fiscal Note Number \_\_\_\_\_  
 Publish Date \_\_\_\_\_

Identifier (file name) HB303-DOA-PDA-1-30-12 Dept. Affected Administration  
 Title Suspended Imposition of Sentence Appropriation Legal and Advocacy Services  
 Allocation Public Defender Agency  
 Sponsor Representatives Gara and Kerttula  
 Requester House Judiciary OMB Component Number 1631

**Expenditures/Revenues** (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	FY13 Appropriation Requested	Included in Governor's FY13 Request	Out-Year Cost Estimates				
			FY14	FY15	FY16	FY17	FY18
<b>OPERATING EXPENDITURES</b>							
Personal Services							
Travel							
Services							
Commodities							
Capital Outlay							
Grants, Benefits							
Miscellaneous							
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>FUND SOURCE</b>		(Thousands of Dollars)					
1002	Federal Receipts						
1003	GF Match						
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1005	GF/Prgm (DGF)						
1037	GF/MH (UGF)						
1178	temp code (UGF)						
<b>TOTAL</b>		<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>POSITIONS</b>							
Full-time							
Part-time							
Temporary							

<b>CHANGE IN REVENUES</b>							
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Estimated SUPPLEMENTAL (FY12) operating costs \_\_\_\_\_ (separate supplemental appropriation required)  
 (discuss reasons and fund source(s) in analysis section)

Estimated CAPITAL (FY13) costs \_\_\_\_\_ (separate capital appropriation required)  
 (discuss reasons and fund source(s) in analysis section)

Why this fiscal note differs from previous version (if initial version, please note as such)

Not applicable, initial version

Prepared by Quinlan Steiner  
 Division Public Defender Agency  
 Approved by John Cramer, Deputy Commissioner  
Department of Administration

Phone 907 334-4414  
 Date/Time 1/30/12 9:45 AM  
 Date 1/30/2012

**FISCAL NOTE**

**STATE OF ALASKA  
2012 LEGISLATIVE SESSION**

**BILL NO. HB303**

**Analysis**

This bill amends AS 12.55.085 by adding language that specifically allows a person who has a conviction set aside to say they have not been convicted of the offense in response to questions relating to the offense.  
The Public Defender Agency does not anticipate any increased costs related to this legislation and submits a zero fiscal note.

AMENDMENT

OFFERED IN THE HOUSE

TO: HB 303

- 1 Page 1, line 7, following "subsection":
- 2       Insert "for a misdemeanor offense"
- 3
- 4 Page 1, line 8, following "the":
- 5       Insert "misdemeanor"

**Collateral references.** — Appealability of order suspending imposition or execution of sentence. 51 ALR4th 939.

**Sec. 12.55.085. Suspending imposition of sentence.** (a) Except as provided in (f) of this section, if it appears that there are circumstances in mitigation of the punishment, or that the ends of justice will be served, the court may, in its discretion, suspend the imposition of sentence and may direct that the suspension continue for a period of time, not exceeding the maximum term of sentence that may be imposed or a period of one year, whichever is greater, and upon the terms and conditions that the court determines, and shall place the person on probation, under the charge and supervision of the probation officer of the court during the suspension.

(b) At any time during the probationary term of the person released on probation, a probation officer may, without warrant or other process, rearrest the person so placed in the officer's care and bring the person before the court, or the court may, in its discretion, issue a warrant for the rearrest of the person. The court may revoke and terminate the probation if the interests of justice require, and if the court, in its judgment, has reason to believe that the person placed upon probation is

- (1) violating the conditions of probation;
- (2) engaging in criminal practices; or
- (3) violating an order of the court to participate in or comply with the treatment plan of a rehabilitation program under AS 12.55.015(a)(10).

(c) Upon the revocation and termination of the probation, the court may pronounce sentence at any time within the maximum probation period authorized by this section, subject to the limitation specified in AS 12.55.086(c).

(d) The court may at any time during the period of probation revoke or modify its order of suspension of imposition of sentence. It may at any time, when the ends of justice will be served, and when the good conduct and reform of the person held on probation warrant it, terminate the period of probation and discharge the person held. If the court has not revoked the order of probation and pronounced sentence, the defendant shall, at the end of the term of probation, be discharged by the court.

(e) Upon the discharge by the court without imposition of sentence, the court may set aside the conviction and issue to the person a certificate to that effect.

(f) The court may not suspend the imposition of sentence of a person who

(1) is convicted of a violation of AS 11.41.100 — 11.41.220, 11.41.260 — 11.41.320, 11.41.360 — 11.41.370, 11.41.410 — 11.41.530, AS 11.46.400, or AS 11.61.125 — 11.61.128;

(2) uses a firearm in the commission of the offense for which the person is convicted; or

(3) is convicted of a violation of AS 11.41.230 — 11.41.250 or a felony and the person has one or more prior convictions for a misdemeanor violation of AS 11.41 or for a felony or for a violation of a law in this or another jurisdiction having similar elements to an offense defined as a misdemeanor in AS 11.41 or as a felony in this state; for the purposes of this paragraph, a person shall be considered to have a prior conviction even if that conviction has been set aside under (e) of this section or under the equivalent provision of the laws of another jurisdiction. (§ 1 ch 50 SLA 1965; am § 2 ch 32 SLA 1979; am §§ 1, 2 ch 36 SLA 1988; am § 2 ch 188 SLA 1990; am § 1 ch 196 SLA 1990; am § 7 ch 40 SLA 1993; am §§ 1, 2 ch 96 SLA 1994; am § 1 ch 55 SLA 1996; am § 13 ch 18 SLA 2010)

**Cross references.** — For restrictions on suspending imposition of sentence, see AS 04.16.200(d), AS 12.55.125(f), (g), and (l), 12.55.135(e) and (i), AS 16.30.010(c), AS 28.33.150(b), 28.35.030(b) and (n), and 28.35.032 (g) and (p).

**Effect of amendments.** — The 2010 amendment, effective July 1, 2010, in (f), in the introductory

language, added "11.41.360 — 11.41.370" and "or AS 11.61.125 — 11.61.128", and in (f)(3) deleted "substantially" preceding "similar elements to an offense".

**Editor's notes.** — Section 2, ch. 55, SLA 1996 provides that the amendments to subsection (f) made by § 1, ch. 55, SLA 1996 apply "to offenses committed on or after September 4, 1996." except that references

“to prior convictions refer to convictions occurring before, on, or after September 4, 1996”.

Section 21(a), ch. 18, SLA 2010, provides that the 2010 amendment of (f) of this section applies to offenses committed on or after July 1, 2010.

**Legislative history reports.** — For governor's transmittal letter for ch. 18, SLA 2010 (Senate Bill 222), relating to the amendment of (f) of this section, see 2010 Senate Journal 1237 — 1239.

#### NOTES TO DECISIONS

- I. General Consideration.
- II. Conditions of Probation.
- III. Revocation of Probation.
- IV. Setting Conviction Aside.

#### I. GENERAL CONSIDERATION.

**AS 12.55.080 and subsection (a) now apply to Title 17.** *Stonefield v. State*, 635 P.2d 494 (Alaska Ct. App. 1981).

**Application of paragraph (f)(1).** — Because the rule of lenity must prevail where legislative intent is ambiguous, and because it could not be said with certainty that the legislature intended to bar courts from imposing a suspended sentence for convictions of conspiracy, the appellate court ruled that this section did not preclude a court from granting a suspended sentence to persons convicted of conspiracy to commit one of the listed crimes. *George v. State*, 988 P.2d 1116 (Alaska Ct. App. 1999).

**Application of paragraph (f)(2).** — Defendant's claim that paragraph (f)(2) should be interpreted as applying only to crimes against people, not all crimes, was held not persuasive. *Orr-Hickey v. State*, 973 P.2d 612 (Alaska Ct. App. 1999).

**Disposition should be limited.** — A suspended imposition of sentence is primarily meant to be a one-time opportunity for particularly deserving first-offenders. It is a disposition ill-suited for repeated use with a persistent offender. *State v. Huletz*, 838 P.2d 1257 (Alaska Ct. App. 1992).

**State law prohibits city from enacting ordinance providing for mandatory minimum sentence.** *City of Kodiak v. Jackson*, 584 P.2d 1130 (Alaska 1978).

Mandatory minimum sentences created by city ordinances are invalid when in irreconcilable conflict with state law. *Wright v. Municipality of Anchorage*, 590 P.2d 425 (Alaska 1979).

**Municipal enactments consistent with state laws.** — Because municipalities are generally authorized to enact traffic laws consistent with state motor vehicle statutes, a municipality does not violate the sentencing provisions of AS 12.55.080 and this section if it follows the lead of the state legislature and enacts mandatory jail sentences and mandatory fines for the offenses of driving while under the influence and breath-test refusal. *McCormick v. Municipality of Anchorage*, 999 P.2d 155 (Alaska Ct. App. 2000).

**Different limitations of probation period.** — Under AS 12.55.080, a court may suspend the execution of all or a portion of a sentence and place the defendant on probation “for a period and upon the terms and conditions as the court considers best.” That period of probation, however, is specifically limited by AS 12.55.090(c). This differs from probation granted after the court suspends the imposition of any sentence under subsection (a) of this section. *Tiedeman v. State*, 576 P.2d 114 (Alaska 1978).

Where probation is granted after the court suspends the imposition of any sentence, the legislature has specifically limited the period of probation to a

term not to exceed the maximum sentence which could be imposed for the particular offense. *Tiedeman v. State*, 576 P.2d 114 (Alaska 1978).

Where the court actually imposed sentence and suspended the execution of a portion thereof, the only statutory limitation on the term of probation is that contained in AS 12.55.090(c). *Tiedeman v. State*, 576 P.2d 114 (Alaska 1978).

**Granting credit toward sentence.** — This section merely defines the period in which sentencing may be imposed after it has been deferred; it in no sense precludes the granting of credit towards that sentence. *Lock v. State*, 609 P.2d 539 (Alaska 1980).

Upon revocation of probation, one is entitled to credit against his sentence on the original offense for time spent, as a condition of probation, in a rehabilitation program which imposes substantial restrictions on one's freedom of movement and behavior. *Lock v. State*, 609 P.2d 539 (Alaska 1980).

The limitation contained in AS 12.55.090(c) applies only to the period of probation to be served after the imposition of a sentence and suspension of all or a portion thereof pursuant to AS 12.55.080. Therefore, in calculating the period of probation allowable under AS 12.55.090(c), the court was not bound to consider the period of probation already served by defendant under its original order suspending the imposition of sentence pursuant to subsection (a). *Elstad v. State*, 599 P.2d 137 (Alaska 1979); *Rice v. State*, 603 P.2d 913 (Alaska 1979).

**Period of suspension must begin when order entered.** — The trial court was not clearly mistaken in imposing a sentence of six years' imprisonment for a forgery count, with three years suspended, and in suspending imposition of sentence for a count of uttering a check with insufficient funds for a stated period of five years the period of suspension to run consecutively to the sentence for forgery, except to the extent that the trial court appeared to have suspended the imposition of sentence for the uttering count for a period of time one year in excess of that permitted by this section. *Cochran v. State*, 586 P.2d 175 (Alaska 1978).

Since there was no logical way that the trial court could cause the period of suspension to begin several years in the future, i.e., at the end of the six-year term for forgery, and the period of suspension and probationary term had to begin when the trial court's order was entered, the supreme court held that what the judgment meant was that the imposition of sentence on the charge of uttering a check with insufficient funds was suspended, and defendant placed on probation, from the date of its entry until five years after the defendant's six-year term of imprisonment expired. *Cochran v. State*, 586 P.2d 175 (Alaska 1978).

**Discretion of sentencing court.** — Whether or not a sentencing court should impose a suspended

imposition of sentence in a given case is, by subsection (a), left to the discretion of the sentencing court. *Nattrass v. State*, 554 P.2d 399 (Alaska 1976).

Subsection (a) of this section reposes discretion in the trial court to suspend imposition of the sentence and place the defendant on probation. *Mullins v. State*, 573 P.2d 860 (Alaska 1978).

The state legislature has conferred broad discretionary powers on the sentencing court to establish conditions of probation when imposition of sentence is to be deferred. *Sprague v. State*, 590 P.2d 410 (Alaska 1979).

**When sentencing alternative should be considered.** — Generally, in the circumstances of youthful first offenders, who have committed nonviolent crimes, serious consideration should be given by Alaska's trial courts to the sentencing alternative offered by subsection (a) of this section. *Nattrass v. State*, 554 P.2d 399 (Alaska 1976); *Wharton v. State*, 590 P.2d 427 (Alaska 1979); *Troyer v. State*, 614 P.2d 313 (Alaska 1980); *Burrell v. State*, 626 P.2d 1087 (Alaska Ct. App. 1981).

**When suspended sentence prohibited.** — The prohibition against the granting of a suspended imposition of sentence applies to persons convicted of an attempt to commit one of the sexual offenses defined in the criminal code. *Mack v. State*, 900 P.2d 1202 (Alaska Ct. App. 1995).

**Superior court did not abuse discretion in failing to impose suspended imposition of sentence.** — See *Nattrass v. State*, 554 P.2d 399 (Alaska 1976).

Where at the time of sentencing for the crime of embezzlement by an employee of property worth more than \$100, defendant was 22 years old, had been working several years and had spent two semesters in college, and, other than minor traffic violations, he had no previous criminal record, the trial court was not clearly mistaken in failing to order a suspended imposition of sentence, instead of actually imposing a sentence of three years and four months, with the entire period suspended upon the condition that he enter a twelve-month period of public service. *Mullins v. State*, 573 P.2d 860 (Alaska 1978).

**Alaska's trial judges totally barred from engaging in either charge or sentencing bargaining.** — See *State v. Buckalew*, 561 P.2d 289 (Alaska 1977).

**Sentence modification.** — Where the defendant detrimentally relied on the statement of an assistant district attorney that a plea agreement would not affect the renewal of his hunting license, he was to be provided with the opportunity to request that the sentencing court modify his sentencing conditions, notwithstanding any statute of limitations otherwise imposed on such modification. *Boyd v. State*, Dep't of Commerce & Economic Dev., 977 P.2d 113 (Alaska 1999).

**Applied** in *Speas v. State*, 511 P.2d 130 (Alaska 1973); *Call v. State*, 511 P.2d 135 (Alaska 1973); *White v. State*, 523 P.2d 428 (Alaska 1974); *Andrews v. State*, 552 P.2d 150 (Alaska 1976); *Franzen v. State*, 573 P.2d 55 (Alaska 1978); *Wharton v. State*, 590 P.2d 427 (Alaska 1979); *Anderson v. State*, 621 P.2d 1345 (Alaska 1981); *Lowry v. State*, 655 P.2d 780 (Alaska Ct. App. 1982); *Davis v. State*, 706 P.2d 1198 (Alaska Ct. App. 1985); *Owings v. State*, 771 P.2d 455 (Alaska Ct. App. 1989); *Christensen v. State*, 844 P.2d 557 (Alaska Ct. App. 1993); *State v. Hernandez*, 877 P.2d 1309 (Alaska Ct. App. 1994).

**Quoted** in *Fresneda v. State*, 458 P.2d 134 (Alaska

1969); *Edinger v. State*, 598 P.2d 943 (Alaska 1979); *Mangold v. State*, 613 P.2d 272 (Alaska 1980); *Benboe v. State*, 738 P.2d 356 (Alaska Ct. App. 1987); *Gwalthney v. State*, 964 P.2d 1285 (Alaska Ct. App. 1998).

**Cited** in *Barrett v. State*, 546 P.2d 161 (Alaska 1976); *Thomas v. State*, 566 P.2d 630 (Alaska 1977); *Gilbert v. State*, 598 P.2d 87 (Alaska 1979); *Schmid v. State*, 615 P.2d 565 (Alaska 1980); *M.O.W. v. State*, 645 P.2d 1229 (Alaska Ct. App. 1982); *Baker v. State*, 655 P.2d 1324 (Alaska Ct. App. 1983); *Dodd v. State*, 686 P.2d 737 (Alaska Ct. App. 1984); *Luepke v. State*, 765 P.2d 988 (Alaska Ct. App. 1988); *State v. Staael*, 807 P.2d 513 (Alaska Ct. App. 1991).

## II. CONDITIONS OF PROBATION.

**Authority to impose period of incarceration as condition of probation prior to enactment of AS 12.55.086.** — See *Boyne v. State*, 586 P.2d 1250 (Alaska 1978); *Sprague v. State*, 590 P.2d 410 (Alaska 1979).

**Imposition of jail time as condition of probation.** — Imposition of jail time as a special condition of probation is not authorized under the Alaska statutes governing probation generally. Alaska law does, however, permit the imposition of jail time as a special condition of probation when the imposition of sentence is suspended under this section, as provided by AS 12.55.086(a). *Whittlesey v. State*, 626 P.2d 1066 (Alaska 1980).

When it was not imposed in accordance with AS 12.55.086(a), the requirement of jail time as a special condition of probation was illegal, and the sentence must, therefore, be vacated and the case remanded for resentencing. *Whittlesey v. State*, 626 P.2d 1066 (Alaska 1980).

## III. REVOCATION OF PROBATION.

**Subsection (b) provides for the revocation of probation** for the violation of conditions imposed or engaging in criminal practices. *Snyder v. State*, 496 P.2d 62 (Alaska 1972).

**In order to revoke probation**, the state must prove a violation of a specific condition of probation. *Holton v. State*, 602 P.2d 1228 (Alaska 1979).

**This section provides an independent basis for the court's terminating probation** at any point during the period of the suspended imposition of sentence if the probationer engages in criminal practices. *Burrell v. State*, 626 P.2d 1087 (Alaska Ct. App. 1981).

**Revocation of probation before the probationary term begins** does not impermissibly extend the term in violation of AS 12.55.090(c). *Enriquez v. State*, 781 P.2d 578 (Alaska Ct. App. 1989).

When the accused has engaged in "criminal practices," the sentencing court has the authority to revoke probation, even when the probationary term has not yet commenced. *Enriquez v. State*, 781 P.2d 578 (Alaska Ct. App. 1989).

**Probation can be revoked on the basis of a conviction which is on appeal** and, therefore, not yet final. *Alexander v. State*, 578 P.2d 591 (Alaska 1978).

**Prior notice of charges required.** — Constitutional due process does require that a probationer accused of violating a condition of his probation receive prior notice of the charges against him and that he be given an opportunity to meet and refute the

charges. *Burrell v. State*, 626 P.2d 1087 (Alaska Ct. App. 1981).

**As well as independent determination of good cause.** — The requirement of an independent determination of good cause beyond mere proof of a probation violation for revocation of probation applies to cases involving suspended impositions of sentence under AS 12.55.080 and subsection (a) of this section, as well as to cases involving suspended executions of sentence under AS 12.55.080. *Rich v. State*, 640 P.2d 159 (Alaska Ct. App. 1982).

**State's burden in seeking probation revocation** is to establish a probation violation by a preponderance of the evidence. *Burrell v. State*, 626 P.2d 1087 (Alaska Ct. App. 1981).

**Disposition on probation revocation.** — The disposition when probation is revoked should be based on consideration of all relevant matters, including the probationer's original crime, his intervening conduct; and the violations of probation. *Nix v. State*, 624 P.2d 825 (Alaska Ct. App. 1981).

#### IV. SETTING CONVICTION ASIDE.

**When set-aside orders may be entered.** — Set-aside orders may be entered only in cases where a sentence has never formally been imposed against the defendant. *Richey v. State*, 717 P.2d 407 (Alaska Ct. App. 1986); *Champion v. State*, 908 P.2d 454 (Alaska Ct. App. 1995).

Where the judge had already rescinded defendant's suspended imposition of sentence and had formally imposed sentence and defendant was never discharged from probation under subsection (d), the judge had no authority to set aside his conviction under subsection (e). *Richey v. State*, 717 P.2d 407 (Alaska Ct. App. 1986).

**Granting set-aside as matter of right.** — No affirmative showing or finding of rehabilitation need be made before a set-aside is granted; rather, a set-aside should be granted as a matter of right unless some specific reason for denial is established. *Wickham v. State*, 770 P.2d 757 (Alaska Ct. App. 1989).

**Notice of refusal to set aside conviction.** — Before a sentencing court may refuse to set aside a conviction under subsection (e), the defendant must be given notice that there is reason to believe a set-aside should not be granted, with a precise statement of the reason or reasons, and must be afforded an opportunity for a hearing on the set-aside issue. *Mekiana v. State*, 707 P.2d 918 (Alaska Ct. App. 1985), *rev'd* on other grounds, 726 P.2d 189 (Alaska 1986).

**Explanation by court.** — By enacting the set-aside language of subsection (e), the legislature clearly intended to provide probationers who received a suspended imposition of sentence with the prospect of a clean slate and the promise of a new beginning upon successful completion of probation: a sentencing court cannot thwart this legislative goal — or, for that matter, hinder appellate review — by denying such relief without explanation. *Mekiana v. State*, 707 P.2d 918 (Alaska Ct. App. 1985), *rev'd* on other grounds, 726 P.2d 189 (Alaska 1986).

**Correct remedy where defendant discharged from probation and denied set aside** without prior notice and hearing was not an automatic set-aside but a delayed hearing on the set aside issue. *State v. Mekiana*, 726 P.2d 189 (Alaska 1986).

**Effect of setting aside conviction on registration requirement.** — Applying the Alaska Sex Of-

fender Registration Act, AS 12.63.010 et seq., to a person whose conviction was set aside under this section, before the Act became specifically applicable to convictions that were set aside unconstitutionally interfered with the individual's liberty interests and was not justified by a compelling governmental interest. *Doe v. Dep't of Public Safety*, 92 P.3d 398 (Alaska 2004).

**Effect on professional certification of setting aside conviction.** — Nursing board, in denying an application for certification as a nurse aide, did not err in considering the applicant's previous felony forgery conviction, notwithstanding that the conviction had been set aside; setting aside an individual's conviction does not expunge the conviction from the individual's criminal record, and the applicant remained a person who was "convicted" of a criminal offense within the meaning of AS 08.68.334(2). *State v. Platt*, 169 P.3d 595 (Alaska 2007).

**Belated set-aside hearing comporting with due process.** — A belated set-aside hearing will not offend due process as long as the trial court (1) considers only those facts existing at the time the probationer was discharged and (2) explains on the record its reasons for denying a set aside. In other words, the court must decide the set-aside question based upon an evaluation of the defendant's conduct and situation as of the date of discharge from probation. *State v. Mekiana*, 726 P.2d 189 (Alaska 1986).

**Belated set-aside hearing related back to date defendant was discharged from probation.** where the defendant completed probation on a suspended imposition of sentence and had the conviction set aside in a belated set-aside hearing. *Hansen v. State*, 824 P.2d 1384 (Alaska Ct. App. 1992).

**When expungement authorized.** — The inherent authority of courts to expunge criminal records did not extend to a defendant who received a suspended sentence and had his conviction set aside after he completed probation, but who never established his factual innocence nor challenged the conviction or the underlying arrest; nor is there authority to expunge a charge which was dismissed because the state obtained evidence in violation of a warrant, since neither the validity of the substantive information nor fundamental fairness was implicated. *Journey v. State*, 850 P.2d 663 (Alaska Ct. App. 1993), *aff'd*, 895 P.2d 955 (Alaska 1995).

**Expunction not part of set aside.** — Expunction of a defendant's criminal record is not authorized under the set-aside provisions of subsection (e). The district court lacked statutory authority to order the criminal record expunged upon "discharge by the court without imposition of sentence" and the subsequent setting aside of his conviction. *Journey v. State*, 895 P.2d 955 (Alaska 1995).

**Set-aside conviction not to be used for impeachment.** — The set-aside provisions of this section "require a substantial showing of rehabilitation." within the meaning of Alaska Rule of Evidence 609 (d)(2). Accordingly, a prior conviction may not be relied on for impeachment purposes after it has been set aside pursuant to this section. *Wickham v. State*, 844 P.2d 1140 (Alaska Ct. App. 1993).

**Set-aside order properly denied.** — Trial court properly denied defendant's motion to set aside his prior convictions because, although defendant's three-year probationary term had passed, defendant had made no effort to contact the Department of Corrections or to fulfill his obligations; therefore, defendant

did not successfully complete his probation. *Hanson v. State*, 210 P.3d 1240 (Alaska Ct. App. 2009).

**Collateral references.** — Propriety of considering acts because of which probation was revoked in imposing sentence for original offense after revocation of probation. 65 ALR3d 1100.

**Sec. 12.55.086. Imprisonment as a condition of suspended imposition of sentence.** (a) When the imposition of sentence is suspended under AS 12.55.085, the court may require, as a special condition of probation, that the defendant serve a definite term of continuous or periodic imprisonment, not to exceed the maximum term of imprisonment that could have been imposed. The court may recommend that the defendant serve all or part of the term in a correctional restitution center.

(b) A defendant imprisoned under this section is entitled to a deduction from the term of imprisonment for good conduct under AS 33.20.010. Unless otherwise specified in the order of suspension of imposition of sentence, a defendant imprisoned under this section is eligible for parole if the term of imprisonment exceeds one year and is eligible for any work furlough, rehabilitation furlough, or similar program available to other state prisoners.

(c) If probation is revoked and the defendant is sentenced to imprisonment, the defendant shall receive credit for time served under this section. Deductions for good conduct under AS 33.20.010 do not constitute "time served." (§ 1 ch 32 SLA 1979; am § 4 ch 72 SLA 1985)

#### NOTES TO DECISIONS

**For legislative history of this section,** see *Zurfluh v. State*, 620 P.2d 690 (Alaska 1980).

**Retroactive application.** — This section may be applied retrospectively to the 153-day period between the decision in *State v. Boyne*, 586 P.2d 1250 (Alaska 1978) and the effective date of this section. *Zurfluh v. State*, 620 P.2d 690 (Alaska 1980).

Logic used by court in *Zurfluh v. State*, 620 P.2d 690 (Alaska 1980), to make this section retroactive applies with equal force to cases in which sentencing occurred prior to the decision in *Boyne v. State*, 586 P.2d 1250 (Alaska 1978), and cases in which sentencing took place after *Boyne* was decided, but before this section took effect. *Whittemore v. State*, 650 P.2d 411 (Alaska Ct. App. 1982).

**This section has no application to a children's proceeding.** *M.O.W. v. State*, 645 P.2d 1229 (Alaska Ct. App. 1982).

**When jail time may be imposed as condition of probation.** — Imposition of jail time as a special condition of probation is not authorized under the Alaska statutes governing probation generally. Alaska law does, however, permit the imposition of jail time as a special condition of probation when the imposition of sentence is suspended under AS 12.55.085, as provided by subsection (a) of this section. *Whittlesey v. State*, 626 P.2d 1066 (Alaska 1980).

When it was not imposed in accordance with subsection (a) of this section, the requirement of jail time as a special condition of probation was illegal, and the sentence must, therefore, be vacated and the case remanded for resentencing. *Whittlesey v. State*, 626 P.2d 1066 (Alaska 1980).

**120-day incarceration requirement for possession of marijuana for sale.** — Where the superior court suspended the imposition of sentence for possession of marijuana for purpose of sale and placed

defendant on probation for a period of two years but required, as one of the conditions of his probation, that defendant serve 120 days of incarceration, the supreme court held that the incarceration requirement did not amount to an excessive sentence although recently developed sentencing guidelines suggested a sentence of no more than 30 days for a marijuana sale involving the same quantity of the drug, for a first-time felony offender, since the sale of drugs on school premises, as occurred in this case, is particularly objectionable. *Anderson v. State*, 621 P.2d 1345 (Alaska 1981).

**Sentence of six months' incarceration as a condition of receiving a suspended imposition of sentence,** upon conviction of one count of selling intoxicating beverages without a license in a local option area, was not clearly mistaken, where defendant had set up a commercial enterprise, although of short duration, and sold a pint of whiskey to a man who murdered a woman shortly after buying the whiskey. *Wassillie v. State*, 790 P.2d 1385 (Alaska Ct. App. 1990).

**Credit against sentence.** — Upon revocation of probation, one is entitled to credit against his sentence on the original offense for time spent, as a condition of probation, in a rehabilitation program which imposes substantial restrictions on one's freedom of movement and behavior. *Lock v. State*, 609 P.2d 539 (Alaska 1980).

**Quoted** in *Mangold v. State*, 613 P.2d 272 (Alaska 1980).

**Stated** in *State v. Brueggeman*, 24 P.3d 583 (Alaska Ct. App. 2001).

**Cited** in *Schmid v. State*, 615 P.2d 565 (Alaska 1980); *State v. First Nat'l Bank*, 660 P.2d 406 (Alaska 1982); *State v. Hernandez*, 877 P.2d 1309 (Alaska Ct. App. 1994).