

ALASKA LEGISLATURE COMMITTEE FILES 1900-1900 00/2

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HB 554

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Background

Since 1980 the State's correctional system has had to cope with a rapidly escalating prisoner population. The incarcerated prisoner population tripled over the past five years (770 at year end 1980 to 2311 at year end 1985), and is expected to double again between 1986 and 1991, the next five year period. Department of Corrections' population projections, used to compute prisoner population growth, have been based conservatively upon a relatively simple linear trend model and the actual inflow over the past four years of 300 new prisoners received each year above and beyond those released. Additional and more sophisticated projections have recently been published by the School of Justice at the University of Alaska, Anchorage. The bed space needs for the correctional system are herein calculated at, or between, the Department of Corrections and School of Justice population projections for each of the next five years.

Since January 1983, the Department has constructed or otherwise added over 800 new institutional beds to the correctional system. Additionally, the Department has maintained just under 200 state prisoners within the Federal Bureau of Prisons at a variety of locations around the nation and recently reached a new high of nearly 300 state prisoners maintained via private sector contracts in a variety of community residential centers within the state.

The Department of Corrections withstood a comprehensive class action lawsuit (Cleary v. Smith) in which the court did not find the state short of either constitutional or statutory mandates. The court expressed real concern, however, related primarily to the state's ability to continue to provide sufficient bed space for the burgeoning prison population.

The Department of Corrections currently has under contract the construction of 436 additional beds which will be "on-line" in calendar years 1986 and 1987. (See table following for present and future bed space summary.) These new beds, however, will be insufficient to house the continually growing prisoner population.

The Problem

The State of Alaska will need to obligate approximately \$140 million in capital funds over the next three fiscal years in order to bring approximately 2100 new prisoner beds on line over the next five calendar years if it is to keep up with the influx of offenders into the state's correctional system. While a combination of new facility construction, additions to existing facilities, and conversions of former military or construction camp sites can be utilized to control capital costs to some degree, it is estimated that approximately \$25 million will need to be allocated in FY 87, \$57 million in FY 88, and another \$57 million in FY 89 in order to keep even with prisoner population growth. The FY 87 figure (\$25 million) does not include the \$22.7 million needed for construction of phase two of the Spring Creek Correctional Center at Seward. It has been assumed that funding for the second half of the Seward project will be based upon city, not State, financing and, upon completion of construction, the city-built facility would be leased to the State. These figures do not

reflect the staffing and other operating costs which follow upon completion of facility construction.

Alternatives

There are two principal policy choices available to the State of Alaska for managing the rapidly expanding prisoner population. Each major policy choice has within it some flexibility. First, the State can elect to dedicate \$25 million to \$57 million per year over the next three fiscal years for capital construction of new correctional bed space. Second, the state could choose to modify the criminal law which feeds offenders into the correctional system.

The latter policy option does not necessarily have to eliminate the concept of presumptive sentencing, but could modify various aspects of it. It appears that even if the presumptive sentencing provision of the criminal code were totally repealed immediately, it would take seven years before a noticeable impact would be felt by the correctional system. Therefore, the FY 87 capital improvements will be necessary whether policies and laws are changed or not.

For example, the following modifications to criminal justice policy and law could have a dramatic and less costly affect than continued high rates of incarceration:

1. Increased good time provisions for good behavior;
2. An expansion of prisoners eligible for parole consideration;
3. Increased prisoner furlough programs;
4. Additional private sector contracting authority for holding and treating prisoners;
5. Improved emergency release provisions at times of system overcrowding;
6. Intensive probation/parole supervision in lieu of incarceration;
7. Incentives for guilty pleas in lieu of trial;
8. Increased use of citations in lieu of arrest for minor offenders;
9. Elimination of misdemeanor offenses and offenders from state responsibility except in those areas of the state lacking any other form of governmental authority;
10. Increased use of restitution sentences including development of a day-fine system in which non-violent offenders make restitution to the victim and/or the state based upon the offender's legal income computed on a daily basis, i.e., certain crimes are valued at two days' pay, other crimes five days' pay, still others thirty days' pay, etc., similar to the Scandinavian concept of social justice. The day-fine is an economic sanction which affects offenders equally based upon their ability to pay.

Any, or most, if not all, of the foregoing 10 examples could be incorporated into bills now before the current legislature, especially HB 114 and HB 141, both of which have passed the House and now reside in the Senate.

If the executive and legislative branches of government do not agree to these or similar such changes in policy and law, the Department of Corrections will, of necessity, require funding for both substantial

capital improvements and operating expenses for these improvements. Even if substantial changes in policy and law were to be made immediately, there remains the need for construction of additional beds to house long term violent offenders and the over 500 sex offenders serving sentences or now entering the correctional system.

Summary

In spite of the tremendous effort of the state to keep abreast of the rapidly escalating prisoner population, that population which tripled in the past five years, is expected to double again by 1991.

In order to continue to cope with the continuing influx of prisoners, the state will either have to commit funds (approximately \$140 million) for construction of approximately 2100 prisoner beds over the next five years, or it must make immediate and substantial changes to criminal policies and laws.

Even if rapid and substantive changes to the criminal law were possible, the need still exists for the addition of a substantial number of new correctional beds to house the high number of sex offenders and long term violent offenders.

In summary then, because it is criminal policy and law which determines and drives the size of the correctional population, the state must either pay for the confinement of the offenders it sends to prison, or it must provide improved mechanisms (i.e., policy and law) for adjusting the number of persons who enter into and exit from the state correctional system each year. Based upon the assumption that major law and policy changes will not soon be forthcoming, the following table of bed space needs through 1991 is provided. A brief description of each asterisked project follows the table.

Finally, it must be recognized that there is the possibility of a third and fourth option from which the state may proceed. The third option would realistically include a combination of construction and criminal law and policy change. The last and most dangerous option is inaction if for no other reason than approximately 2100 new inmates will be sent into the correctional system over the next five years whether the correctional system is prepared for them or not.

January 1986

ALASKA DEPARTMENT OF CORRECTIONS
Institutional Operational Capacities

On Line Bed Space Needs Summary:

	1985	1986	1987	1988	1989	1990	1991
1. Cook Inlet Pre-Trial	397						
2. Sixth Avenue	100					*(FY88) 320	
3. Hiland Mtn/Meadow Creek	216		22				
4. Palmer Medium	100		40				
Palmer Minimum	130						
Mat-Su Pre-Trial			62				
5. Goose Bay	108						*(FY89) 320
6. Wildwood	300						*(FY89) 240
7. Fairbanks	232	(44)			*(FY87) 240		
8. Anvil Mtn.	88						
9. Yukon-Kuskokwim	72	24					
10. Lemon Creek	162					*(FY88) 232	
11. Ketchikan	63						
12. Spring Creek			288	*(FY87) 320			
13. Delta		*(FY87) 200		*(FY87) 300			
14. CRC	260	35					
15. FBP	200			(188)			
Sub-Total	2428	215	412	432	240	552	560
TOTAL BEDS	2428	2643	3055	3487	3727	4279	4839
POP ₁ Projections:							
UAA ₂	2344	2709	3070	3469	3907	4375	4889
DOC ²	2311	2600	2900	3200	3500	3800	4100

* (FY) Represents year of capital funding request

¹ UAA -incarcerated plus community residential center offenders.

² DOC figures do not include a backlog of 575 short term offenders in the Anchorage area and 36 in the Ketchikan area.

Capital Projects Description by Fiscal Year

The following provides, in outline form, a brief description of each of the seven asterisked capital projects from the Table. The projects are prioritized by fiscal year and are required to be ready for occupancy in the column year indicated in the Table in order to meet the population pressure projected for that year.

FY 87

- Project: Delta Pipeline Camp
- Offenders: Up to 500 medium security inmates, including 350 sex offenders.
- Estimated Costs: \$8 million to re-open, renovate, repair, convert to correctional center. \$3 million to purchase numerous buildings on approximately 135 acres, or a least of same at \$600,000 per year for 10 years after which state owns.
- Critical Factors: Lowest cost, most rapid development possible anywhere in Alaska. Potential to hold large number of prisoners over 10-year period at least. Must develop perimeter fence and start-up utilities in early summer 1986 or lose entire year of construction. Work-oriented facility where offender population will do most of the renovation and repair work.
- Project: Seward-Spring Creek Phase II
- Offenders: 320 long term high security offenders, total at Seward nearly 640.
- Estimated Costs: \$22.7 million, to be financed and built by the City of Seward, and leased upon completion to the State, the same as Phase I now under construction.
- Critical Factors: Phase I of the Spring Creek facility will be full when it opens in 1987. Phase II will hold 320 similar long term high security offenders and prevent the need to expand all other correctional centers in order to hold high security sentenced offenders. In order to save construction dollars, Spring Creek Phase II should be approved in FY 87 and the City of Seward notified to proceed.
- Project: Fairbanks Correctional Center-Double Housing Unit and Remodeling
- Offenders: 240 pre- and post-trial offenders from the Fairbanks area.
- Estimated Costs: \$12.8 million on existing site.

Critical Factors: Continued overcrowding in the Fairbanks facility and the growth of the Fairbanks area including the Light Infantry expansion at Fort Wainwright; utilization of the double housing unit prototype will save design costs, construction time, and operational costs. New kitchen, dining, and food storage space will be built and present dining/kitchen and dorm areas converted to essential inmate program space.

FY 88

Project: Anchorage-Replacement of Sixth Avenue-Classification and Diagnostic Center

Offenders: 320 pre- and post-trial Anchorage area offenders, classification, diagnostic center.

Estimated Costs: \$40.3 million (land not identified)

Critical Factors: The Municipality of Anchorage owns the present Sixth Avenue facility which it leases to the State. The MOA has notified the State that it should plan to give up the facility sometime during the next few (unspecified) years.

A classification and diagnostic center will replace the current Sixth Avenue facility and will provide mental health care.

Project: Juneau-Lemon Creek Correctional Center Expansion

Offenders: 232 pre- and post-trial offenders from the Southeastern Region.

Estimated Costs: \$15.5 million on existing site.

Critical Factors: Utilization of the double housing unit prototype will save design costs, construction time, and operational costs. Some institutional remodeling (i.e., kitchen) and conversion of existing dormitory space to essential inmate program space. Facility is at or above capacity at all times and will be able, with expansion, to house increasing pre-trial and local relatively short term sentenced populations.

FY 89

Project: Kenai-Wildwood Correctional Center Expansion

Offenders: 240 post-trial medium security offenders.

Estimated Costs: \$15.5 million on existing site.

Critical Factors: Utilization of double housing unit prototype will save design costs, construction time, and operational costs. Regional as well as statewide growth and inmate program space will be the driving force for Wildwood expansion.

NOTE: Wildwood is currently a leased facility. It could and should be purchased for approximately \$5 million as early as possible in order to preserve the State's current and substantial but sound investment.

Project: Wasilla-Goose Bay Correctional Center-New Facility
 Offenders: 320 sentenced medium security offenders.
 Estimated Costs: \$40.3 million on existing site.
 Critical Factors: By 1991 this facility will be required in order to accommodate the increased number of inmates generated in the Southcentral area of Alaska and statewide. The totally new correctional facility would supplement, not replace, the existing minimum security facility at the Goose Bay site.

Summary Capital Projects

<u>FY 87</u>	<u>FY 88</u>	<u>FY 89</u>	<u>Total</u>
Delta 11.0	Anchorage 40.3	Kenai 15.5	
Seward (22.7)*	Juneau 15.5	Goose Bay 40.3	
Fairbanks 12.8	Ren & Rep 1.0	Ren & Rep 1.0	
Ren & Rep 1.0			
<u>24.8</u>	<u>56.8</u>	<u>56.8</u>	138.4

*to be financed by the City of Seward and leased to the State upon completion.

ALASKA DEPARTMENT OF LAW - CRIMINAL DIVISION

A Briefing Paper On Presumptive Sentencing
Prepared For The
House and Senate Judiciary Committees

February 13, 1985

OVERVIEW: PRESUMPTIVE SENTENCING

1. What is Presumptive Sentencing?

In 1978, as part of the comprehensive revision of the criminal code, the Alaska legislature adopted an equally sweeping revision of the state's sentencing laws. The most significant aspect of the sentencing revision was the enactment of presumptive sentencing.

Presumptive sentencing is a system in which judicial discretion is channeled by the legislature. The legislature sets a specific term of imprisonment which is "presumed" to be appropriate for the average offender (thus the use of the term "presumptive") in the absence of specific aggravating or mitigating factors. If such factors are present the sentence may be varied by the court within a designated range. Other features of the system are ineligibility for parole, increasingly higher presumptive sentences for repeat offenders, and a "safety valve" that allows deviation from the presumptive sentence in extraordinary and unanticipated circumstances before a three-judge sentencing panel.

When Alaska adopted presumptive sentencing in 1978, six other states had already adopted similar sentencing schemes: Arizona, California, Colorado, Illinois, Indiana and New Mexico. Today, seven additional states have also adopted presumptive sentencing schemes: Florida, Minnesota, New Jersey, North Carolina, Pennsylvania, South Carolina, and Washington.

The two most frequently asked questions about presumptive sentencing are (1) why do we need presumptive sentencing; and (2) are the numbers which have been set by the legislature (i.e., the specific presumptive terms) too high or too low as to a particular offense or a particular group of offenses? To answer these questions we have to take a look at how sentencing works, why presumptive sentencing was developed, and how the specific terms were arrived at.

2. Why Presumptive Sentencing?

To understand why presumptive sentencing was adopted, one has to understand how sentencing works without a presumptive system. Prior to 1980, sentencing in Alaska (and in most other states) was indeterminate and solely at the judge's discretion up to a statutory maximum. A judge could impose any sentence, ranging from zero to the maximum allowed under the law. (In cases where the person was convicted of more than one offense, the judge could also impose "consecutive" sentences which meant that the maximum sentence in many cases was almost unlimited.) This type of sentencing system works fine in a perfect world but judges are subject to the same human frailties that affect us all. They therefore make mistakes and are subject to being influenced, either consciously or unconsciously, by inappropriate considerations.

However when an improper sentence is imposed, it is often difficult if not impossible to correct that sentence. The courts have told us that, although an excessive sentence

can be lowered, a sentence which is too lenient cannot be increased. With sentences that are too lenient, the only thing that the appellate court can do is "disapprove" of the sentence. Even with sentences that many people would find to be improper (either too harsh or too light), the appellate court will require that the sentence be reduced only if the court is convinced that the judge was "clearly mistaken" in imposing the sentence. Thus the legal system has certain inherent limitations on its ability to change a sentence that has been lawfully imposed.

This kind of system with unlimited discretion inevitably leads to widely varying sentences in similar types of cases. In the mid-70's the Alaska Judicial Council conducted two studies of felony sentencing practices in Alaska. Several hundred cases were analyzed from all over the state and with all types of crimes. The conclusion reached by these studies was that the two most significant factors affecting a person's sentence were (1) the race of the defendant, and (2) the identity of the sentencing judge. The summary section of the council's 1975 study noted that

[a] higher percentage of some groups of persons were convicted or sentenced more harshly than other groups, however. Even when many other factors were held equal, some groups of persons still appeared to receive disparate treatment. For example, two-thirds of all Blacks sentenced for robbery received sentences of five years or greater, while less than one-third of Caucasians did, even though twice as many Caucasians sentenced for robbery had prior felony records as Blacks.

ALASKA JUDICIAL COUNCIL, SENTENCING IN ALASKA: A DESCRIPTION OF THE PROCESS AND SUMMARY OF STATISTICAL DATA FOR 1973 (1975) (B. Cutler, Research Attorney), page 175.

The Judicial Council's studies directly led to the consideration and adoption of a system that would channel the judge's discretion toward uniform sentences based on appropriate sentencing criteria, and away from disparate sentences that were potentially affected by inappropriate criteria. The purpose of Alaska's presumptive sentencing system was made clear in the legislative commentary that accompanied the passage of the criminal code: "the elimination of unjustified disparity in sentences imposed on defendants convicted of similar offenses - disparity which is not related to legally relevant sentencing criteria." ALASKA SENATE J. SUPP. NO. 47, at 148 (June 12, 1978).

Alaska's presumptive sentencing system still leaves a great deal of discretion with the sentencing judge. With few exceptions, presumptive sentencing only applies to repeat felons. There is no mandated presumptive term for first time offenders except in cases of (1) sexual assault in the first degree or sexual abuse of a minor in the first degree; (2) class A felonies, i.e., robbery, arson, assault with serious physical injury, manslaughter; and (3) assaults on peace officers and other emergency service providers.

With this discretion still remaining under Alaska law, trial judges at times continue to sentence too harshly or

too leniently in the view of the appellate courts. In Langton v. State, 662 P.2d 954 (Alaska App. 1983), the Alaska Court of Appeals was faced with 3 similar cases of child abuse where one defendant got 6 years, one got no jail time at all, and one got 20 years. (At the time, such offenses were not subject to presumptive sentencing.)

Judge Singleton's concluding paragraphs in Langton concisely summarized the three disparate sentences imposed on each defendant and the unsatisfactory modifications of the sentences that the court of appeals was able to affect.

Langton, Doe and Joe were convicted of sexual assaults of children. Of the three, Langton was the worst offender since he committed many separate assaults over a long period of time. Doe assaulted two children on one occasion and Joe committed a single assault. In all other respects, the offenses are virtually indistinguishable. In a rational system seeking to eliminate disparity and attain reasonable uniformity, Langton should have received the most severe sentence and Doe and Joe similar and substantially less severe sentences. In actuality, Langton received a much less severe sentence than Joe, and Doe received no period of imprisonment at all. While we have modified two of the sentences, the modified sentences still leave substantial disparity in place. This unsatisfactory result is a necessary concomitant of the substantial trial court discretion which still exists for first-felony offenders where the ultimate decision must rest upon an application of the clearly mistaken standard.

Id. at 962-63 (footnotes omitted, emphasis added).

Under a discretionary sentencing system, it is not surprising that the sentencing disparities described in Langton occurred. In such systems some defendants are treated much differently than other similar defendants based on a judge's

individual sentencing attitudes, and this serves to undermine public confidence in the entire criminal justice system. Presumptive sentencing minimizes, if not eliminates, these unjustified disparities. It was for this reason that in 1978 the legislature enacted presumptive sentencing for all repeat felony offenders. Cases such as Langton serve to emphasize the continued need for presumptive sentencing.

3. The Specific Presumptive Terms

The original presumptive sentencing system enacted in 1978 (with an effective date of January 1, 1980) has only been modified slightly since then. The specific presumptive terms enacted by the legislature were the result of a great deal of careful thought and study, and in some instances were based on information provided by the Alaska Judicial Council relating to past sentencing practices in Alaska. The various proposals for presumptive terms considered by the legislature in 1978 appear in Chart A (Criminal Code Revision Subcommittee version) and Chart B (House Judiciary version, Terry Gardiner, Chairman). The final version as adopted in 1978 is set out in Chart C and the present system is displayed in Chart D. In addition, a comparison of Alaska's system with the systems in other states shows that the specific terms imposed under Alaska law are consistent with, and in many cases lower, than those imposed by the laws of other states. The Arizona scheme (one of the original presumptive sentencing states) appears in Chart E.

The present sentencing system in Alaska is based on the need for uniformity, certainty, and equal treatment. The specific presumptive terms have been based on past sentencing practices, sentencing systems from other states, and the legislature's assessment of sentences which are appropriate to the crime committed. However, these same considerations can and should be periodically reviewed in light of actual practice to determine whether there is any need for modification. For example, in 1982 and 1983 the legislature provided for additional specific presumptive terms when the defendant possessed a firearm, assaulted a peace officer, or committed a crime of sexual assault in the first degree. If it is determined that the presumptive sentencing system is in need of change then there are several ways to go about it:

(1) the specific presumptive terms can simply be reduced or increased, or a narrow range can be substituted for a specific number of years;

(2) additional mitigating or aggravating factors, which are precisely worded to avoid overbroad interpretations, can be considered;

(3) parole eligibility can be expanded or limited; and

(4) sentence reductions based on "good time" credit can be expanded or limited.

The most important thing to keep in mind, however, is that any change in the presumptive sentencing system should be

made with the same degree of careful study, consideration, and debate that accompanied its original adoption.

PROPOSAL OF CRIMINAL CODE REVISION SUBCOMMISSION: HB 661 (1978)

<u>Current Offense</u>	<u>First Felony Offender</u>	<u>Second Felony Offender</u>	<u>Third Felony Offender</u>
Class A Felony	0 - 15	3-7 (7-11) 11-16	7-11 (11-18) 18-30
Class B Felony	0 - 7	1-3 (3-5) 5-7	3-7 (7-11) 11-16
Class C Felony	0 - 3	0-3mo. (3mo.-3) 3-4 1/2	1-3 (3-5) 5-7

Presumptive range is circled. Numbers to right is range of sentence if factors in aggravation are established. Numbers to left is range of sentence if factors in mitigation are established.

CHART "A"

HOUSE JUDICIARY PROPOSAL: CSHB 661

<u>Current Offense</u>	<u>First Felony Offender</u>	<u>Second Felony Offender</u>	<u>Third Felony Offender</u>
Class A Felony	3 - 15* ^ - 15	5 (10) 15	7 1/2 (15) 22 1/2
Class B Felony	0 - 7	2 1/2 (5) 7 1/2	5 (10) 15
Class C Felony	0 - 3	1 (2) 3	2 (4) 6

* If firearm used.

Presumptive terms are circled. Number to right is highest sentence for factors in aggravation; number to left is lowest for factors in mitigation.

CHART "B"

PRESUMPTIVE SENTENCING AS ENACTED IN 1978

<u>Current Offense</u>	<u>First Felony Offender</u>	<u>Second Felony Offender</u>	<u>Third Felony Offender</u>
Class A Felony	0 - 20 3 - (6*) - 20	5 (10) 20	7 1/2 (15) 20
Class B Felony	0 - 10	0 (4) 10	3 (6) 10
Class C Felony	0 - 5	0 (2) 5	0 (3) 5

Number in circle is presumptive sentence. Number to left is lowest mitigated sentence; number to right is highest aggravated sentence.

Only if firearm used or if victim suffers serious physical injury and offense is not manslaughter.

CHART "C"

PRESUMPTIVE SENTENCING TODAY

<u>Current Offense</u>	<u>First Felony Offender</u>	<u>Second Felony Offender</u>	<u>Third Felony Offender</u>
Sexual Assault or Sexual Abuse of a Minor in the First Degree	4 (8) 30 5 (10*) 30	7 1/2 (15) 30	12 1/2 (25) 30
Class A Felony	2 1/2 (5) 20 3 1/2 (7**) 20	5 (10) 20	7 1/2 (15) 20
Class B Felony	0 (2***) 10 0 - 10	0 (4) 10	3 (6) 10
Class C Felony	1/2 (1***) 5 0 - 5	0 (2) 5	1 1/2 (3) 5

* Ten year presumptive term only applies in cases where the defendant possesses a firearm, uses a dangerous instrument, or causes serious physical injury during the offense. All other cases are subject to the eight year presumptive term.

** Seven year presumptive term only applies if crime is a class A felony other than manslaughter and the defendant possesses a firearm, uses a dangerous instrument, causes serious physical injury or knowingly directed the conduct constituting the offense at a uniformed or otherwise identified peace or correctional officer, fire fighter, ambulance attendant, or other emergency responder engaged in official duties. All other cases are subject to the five year presumptive term.

*** Presumptive term of imprisonment only applies if defendant knowingly directed the conduct constituting the offense at a uniformed or otherwise identified peace or correctional officer, fire fighter, ambulance attendant, or other emergency responder engaged in official duties. All other cases are not subject to presumptive sentencing and the defendant faces a maximum term of imprisonment of ten years for a class B felony and five years for a class C felony.

PRESUMPTIVE SENTENCING IN ARIZONA

<u>Current Offense</u>	<u>First Felony Offender</u>	<u>Second Felony Offender</u>	<u>Third Felony Offender</u>
Class 2 Felony (residential burglary, sexual assault, arson)	5 ⑦ 14	7 ⑫ 21	14 ⑰ 28
	7 ⑫ 21	14 ⑲ 28	21 ⑳ 35
Class 3 Felony (manslaughter, armed robbery, aggravated assault)	4 ⑤ 10	5 ⑨ 15	10 ⑭ 20
	5 ⑧ 15	10 ⑭ 20	15 ⑳ 25
Class 4 Felony (negligent homicide, perjury, unarmed robbery)	2 ④ 5	4 ⑥ 8	8 ⑩ 12
	4 ⑥ 8	8 ⑩ 12	12 ⑭ 16
Class 5 Felony (credit card theft, shoplifting)	1 ② 3	1 ③ 4	4 ⑤ 6
	2 ③ 4	2 ⑤ 6	6 ⑦ 8
Class 6 Felony (animal fighting, jury tampering, false swearing)	3/4 ① 1/2 2	1 ② 3	3 ④ 5
	1 1/2 ② 3	3 ④ 4 1/2	4 ⑤ 6

Numbers below broken line involve offense committed with deadly weapon or a victim who suffers serious physical injury. Parole eligibility for all offenders is restricted to last half or third of sentence, depending on length of sentence. Probation is precluded for second and third felony offenders.

TERMS OF IMPRISONMENT AND AUTHORIZED FINES
FIRST OFFENSES UNDER CRIMINAL CODE

<u>FELONY</u>	<u>TERMS OF IMPRISONMENT</u>
"A" felony	2½ - [5-7]* - 20
"B" felony	0 - [2]** - 20
"C" felony	0 - [1]*** - 5

KEY

Number in bracket is presumptive sentence.
Number to left is lowest mitigated sentence.
Number to right is highest aggravated sentence.

*Five year presumptive term if first offense; a seven year presumptive term applies if first A felony conviction, other than manslaughter, and defendant possessed a firearm or used dangerous instrument or caused serious physical injury during the offense or knowingly directed the conduct at a uniformed peace officer or emergency responder engaged in official duties.

**Two year presumptive sentence applies if first B felony conviction and defendant knowingly directed the conduct at a uniformed peace officer or emergency responder engaged in official duties.

***One year presumptive sentence applies if first C felony conviction and defendant knowingly directed the conduct at a uniformed peace officer or emergency responder engaged in official duties.

<u>MISDEMEANOR</u>	<u>MAXIMUM TERM</u>
A misdemeanor	1 year
B misdemeanor	90 days

MAXIMUM FINES-PERSONS

<u>OFFENSE</u>	<u>FINE</u>
Sexual assault I, misconduct involving a controlled substance, murder or kidnapping	\$75,000
A, E, or C felony	\$50,000
A misdemeanor	\$ 5,000
B misdemeanor	\$ 1,000
Violation	\$ 300

MAXIMUM FINES-ORGANIZATIONS

All offenses - \$100,000 or 3 times pecuniary gain - whichever is greater

CLASSIFICATION OF OFFENSES IN CRIMINAL CODE

UNCLASSIFIED FELONIES

Murder I
AS 11.41.100
20 - 99 years

Murder II
AS 11.41.110
5 - 99 years

Kidnapping
AS 11.41.300
5 - 99 years

Misconduct involving controlled substance I
AS 11.71.010
5 - 99 years

Sexual assault I or sexual abuse of minor I
AS 11.41.410 & AS 11.41.434

First offense not involving firearms, use
of dangerous instrument, or causing
serious injury
[8] - 30 years

First offense involving one of the above
[10] - 30 years

CLASSIFIED FELONIES

A

B

C

Attempted murder I, sexual assault
sexual assault of minor,
misconduct involving a controlled
substance I, kidnapping
AS 11.31.100(d) (1)

Solicitation of murder, sexual
assault I, sexual assault of a
minor, misconduct involving a
controlled substance II, kidnapping
AS 11.31.110(c) (1)

Attempted A felony
AS 11.31.100(d) (2)

Solicitation of A felony
AS 11.31.110(c) (2)

Assault II
AS 11.41.210

Sexual assault II
AS 11.41.420

Attempted B felony
AS 11.31.100(d) (3)

Solicitation of B felony
AS 11.31.110(c) (3)

Criminally negligent homicide
AS 11.41.130

Custodial interference I
AS 11.41.320

CLASSIFIED FELONIES

A	B	C
Manslaughter AS 11.41.120	Unlawful exploitation of a minor AS 11.41.455	Sexual assault III AS 11.41.430
Assault I AS 11.41.200	Sexual abuse of minor II AS 11.41.436	Assault III AS 11.41.220
Robbery I AS 11.41.500	Robbery II AS 11.41.510	Sexual abuse of a minor III AS 11.41.438
Arson I AS 11.46.400	Extortion AS 11.41.520	Incest AS 11.41.450
Escape I AS 11.56.300	Theft I AS 11.46.120	Coercion AS 11.41.530
Criminal Possession of explosives with intent to commit murder or kidnapping AS 11.61.240(b) (1)	Issuing a bad checks, \$25,000 or more AS 11.46.280(d) (1)	Theft II AS 11.46.130
Promoting person under 16 to engage in prostitution AS 11.66.110(a) (2)	Burglary I AS 11.46.300	Concealment of merchandise, \$500 or more AS 11.46.220(c) (1)
Misconduct involving controlled substance II AS 11.71.020	Arson II AS 11.46.410	Removal of identification marks, \$500 or more AS 11.46.260(b) (1)
	Criminal mischief I AS 11.46.480	Unlawful possession (of altered property), \$500 or more AS 11.46.270(b) (1)
	Forgery I AS 11.46.500	

CLASSIFIED FELONIES

B

C

Scheme to defraud
AS 11.46.600

Defrauding creditors,
\$25,000 or more
AS 11.46.730(c)(1)

Bribery
AS 11.56.100

Receiving a bribe
AS 11.56.110

Perjury
AS 11.56.200

Escape II
AS 11.56.310

Interference with
official proceedings
AS 11.56.510

Receiving a bribe by
Witness or juror
AS 11.56.520

Criminal possession of
explosives with intent
to commit A felony
AS 11.61.240(b)(2)

Promoting prostitution I
AS 11.66.110

Issuing a bad check, \$500
or more
AS 11.461280(d)(2)

Fraudulent use of a credit
card, \$500 or more
AS 11.46.285(b)(1)

Obtaining a credit card by
fraudulent means
AS 11.46.290

Burglary II
AS 11.46.310

Criminal Mischief II
AS 11.46.482

Forgery
AS 11.46.505

Criminal possession of
forgery device
AS 11.46.520

Criminal simulation \$500
or more
AS 11.46.530(b)(1)

Offering a false instrument
for recording
AS 11.46.550

CLASSIFIED FELONIES

B

C

Misconduct involving
controlled substance III
AS 11.71.030

Delivery of imitation
controlled substance
AS 11.73.030

Misapplication of property
\$500 or more
AS 11.46.620

Falsifying business records
AS 11.46.630

Commercial bribe receiving
AS 11.46.660

Commercial bribery
AS 11.46.670

Defrauding creditors,
\$500 - \$25,000
AS 11.46.730(c) (2)

Criminal use of computer
AS 11.46.740

Endangering welfare of minor
AS 11.51.100

Perjury by inconsistent
statements
AS 11.56.230

Escape III
AS 11.56.320

Permitting an escape
AS 11.56.370

Promoting contraband I
AS 11.56.375

CLASSIFIED FELONIES

C

Tampering with witness I
AS 11.56.540

Jury tampering
AS 11.56.590

Misconduct by a juror
AS 11.56.600

Tampering with physical evidence
AS 11.56.610

Harming a police dog I
AS 11.56.705

Hindering prosecution I
AS 11.56.770

False Accusation
AS 11.56.805

Terroristic threatening
AS 11.56.810

Riot
AS 11.61.100

Distribution of child pornography
AS 11.61.125

Promoting an exhibition of
fighting animals
AS 11.61.145(a) (1) & (2)

CLASSIFIED FELONIES

C

Misconduct involving weapons I
AS 11.61.200

Criminal possession of explosives
with intent to commit B felony
AS 11.61.240(b) (3)

Unlawful furnishings of explosives
AS 11.61.250

Promoting prostitution II
AS 11.66.120

Promoting gambling I
AS 11.66.210

Possession of gambling records I
AS 11.66.230

Misconduct involving controlled
substance IV
AS 11.71.040

Manufacture or delivery of
imitation controlled substances
AS 11.73.010

Possession of substance with
intent to manufacture imitation
controlled substance
AS 11.73.020

Advertisement to promote delivery
of controlled substance
AS 11.73.040

ARTICLES

PRESUMPTIVE SENTENCING IN ALASKA

BARRY JEFFREY STERN*

As part of its comprehensive revision of the Criminal Code in 1978, the Alaska legislature adopted a sweeping revision of the state's sentencing laws.¹ The most significant aspect of the sentencing revision was the enactment of a presumptive sentencing system. Presumptive sentencing substantially restricts judicial sentencing discretion by specifying in advance the presumptive term of imprisonment that the typical defendant convicted of an offense should receive.² Legislative

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1. Act of July 17, 1978, ch. 166, 1978 Alaska Sess. Laws 219 (effective Jan. 1, 1980) [hereinafter referred to as the Criminal Code].

2. The presumptive term of imprisonment is set by the legislature, or other body designated by the legislature, and may be varied by the trial court within a designated range if the presence of aggravating or mitigating factors is established at sentencing. Other features of a presumptive sentencing scheme include: the specification of increasingly severe presumptive terms of imprisonment based on the prior criminal history of the defendant; provisions allowing deviation from the presumptive term of imprisonment in extraordinary and unanticipated circumstances; and significant restrictions on the authority of a parole board or other administrative agency to release a prisoner before the expiration of his sentence. See generally TASK FORCE ON CRIMINAL SENTENCING, TWENTIETH CENTURY FUND, FAIR AND CERTAIN PUNISHMENT 19-22 (1976) [hereinafter cited as TASK FORCE REPORT].

Thirteen states in addition to Alaska have now adopted some form of presumptive sentencing system. ARIZ. REV. STAT. ANN. §§ 13-601 to -604, 13-701 to -709 (1978 & Supp. 1984-1985); CAL. PENAL CODE §§ 1170-1170.95, 12022-12022.7 (West 1982 & Supp. 1984); COLO. REV. STAT. § 18-1-105 (Supp. 1984); FLA. STAT. ANN. § 921.001 (West Supp. 1984); ILL. ANN. STAT. ch. 38, §§ 1005-5-3 to -3.2, 1005-8-1 to -7 (Smith-Hurd 1982 & Supp. 1984-1985); IND. CODE ANN. §§ 35-50-1A-1 to -2-9 (Burns 1979 & Supp. 1984); MINN. STAT. ANN. § 244 (West Supp. 1984); N.J. STAT. ANN. §§ 2C:43-1 to :44-5 (West 1982 & Supp. 1984-1985); N.M. STAT. ANN. §§ 31-18-15 to -20 (1981 & Supp. 1984); N.C. GEN. STAT. §§ 15A-1340.1-7 (1983); 42 PA.

commentary³ makes it clear that the purpose of the presumptive sentencing system is "the elimination of unjustified disparity in sentences imposed on defendants convicted of similar offenses — disparity which is not related to legally relevant sentencing criteria."⁴

Studies of felony sentencing practices published by the Alaska Judicial Council⁵ dramatically brought the problem of unjustified disparity in sentencing to the attention of the state legislature. The studies' most disturbing finding was that for some crimes, all other factors being equal, the defendant's race was a significant factor affecting both

CONS. STAT. ANN. § 9721 (Ordon 1982); S.C. CODE ANN. §§ 24-27-10 to -70 (Law Co-op. Supp. 1983); WASH. REV. CODE ANN. § 9.94A.010-.910 (Supp. 1985).

The Criminal Code Revision Subcommittee which proposed the Criminal Code to the legislature, *see infra* note 62, relied on a report by the Task Force on Criminal Sentencing, established by the Twentieth Century Fund, *see TASK FORCE REPORT, supra* in drafting its version of a presumptive sentencing system. *See ALASKA CRIMINAL CODE REVISION SUBCOMMISSION, ALASKA CRIMINAL CODE REV.* pt. 6, at 9 (Tent. Draft 1978) (citing the reader to the task force report for a "full discussion of presumptive sentencing.") [hereinafter cited as *ALASKA CRIMINAL CODE REVISION*]; *see also* Heathcock v. State, 670 P.2d 1155, 1159 n.2 (Alaska Ct. App. 1983) (Singleton, J., concurring and dissenting).

The task force recommended presumptive sentencing as an alternative to what it referred to as the then existing "dominant sentencing structure currently employed in the United States . . . based on the indeterminate sentence." *TASK FORCE REPORT, supra* at 11. Additionally, the task force viewed presumptive sentencing as a preferable alternative to proposals for flat-time or mandatory minimum sentencing. *Id.* at 15-18.

3. The Alaska Senate published the commentary to the Criminal Code as a supplement to its daily journal. *ALASKA SENATE COMM. ON THE JUDICIARY, COMMENTARY ON THE ALASKA REVISED CRIMINAL CODE, ALASKA SENATE J. SUPP. NO. 47* (June 12, 1978) [hereinafter cited as *ALASKA SENATE COMMENTARY*]. The Alaska House of Representatives subsequently adopted this commentary. *ALASKA HOUSE COMM. ON THE JUDICIARY, COMMENTARY ON THE ALASKA REVISED CRIMINAL CODE, ALASKA HOUSE J.* at 1716 (June 16, 1978). The Alaska Court of Appeals has frequently referred to the commentary in determining the legislature's intent in enacting particular sections of the Criminal Code. *See, e.g., State v. Rastopsoff*, 659 P.2d 630, 635-36 (Alaska Ct. App. 1983); *Wasson v. State*, 652 P.2d 117, 119 (Alaska Ct. App. 1982).

4. *ALASKA SENATE COMMENTARY, supra* note 3, at 148 (citations omitted). *See also* Juneby v. State, 641 P.2d 823, 829-30 (Alaska Ct. App. 1982), *modified*, 655 P.2d 30 (Alaska Ct. App. 1983).

5. *ALASKA JUDICIAL COUNCIL, ALASKA FELONY SENTENCING PATTERNS: A MULTIVARIATE STATISTICAL ANALYSIS (1974-1976)* (Prelim. Report 1977) [hereinafter cited as *ALASKA FELONY SENTENCING*]; *ALASKA JUDICIAL COUNCIL, SENTENCING IN ALASKA: A DESCRIPTION OF THE PROCESS AND SUMMARY OF STATISTICAL DATA FOR 1973 (1975)* (D. Cutler, Research Attorney) [hereinafter cited as *SENTENCING IN ALASKA*]. These studies are cited in the legislative commentary to the Criminal Code immediately following the legislature's declaration that the purpose of the sentencing revisions is to eliminate unjustified disparity in sentencing. *ALASKA SENATE COMMENTARY, supra* note 3, at 148.

the type of sentence imposed and its length.⁶ The studies also showed that the sentencing judge's character as a "strict" or "lenient" sentencer was another critical factor influencing sentence length for some crimes.⁷ Surprisingly, the studies showed that factors usually expected to play a significant role in determining sentence length were of little importance.⁸

6. The summary section of the council's 1975 study noted that:

A higher percentage of some groups of persons were convicted or sentenced more harshly than other groups, however. Even when many other factors were held equal, some groups of persons still appeared to receive disparate treatment. For example, two-thirds of all Blacks sentenced for robbery received sentences of five years or greater, while less the one-third of Caucasians did, even though twice as many Caucasians sentenced for robbery had prior felony records as Blacks.

SENTENCING IN ALASKA, supra note 5, at 175.

The council found that the incidence of probation sentences varied more by race than by any other factor. *Id.* at 139. "Statewide, only 23% of Blacks and only 25% of Alaska Natives received probation, while 43% of Caucasians received probation." *Id.* The council cautioned that the apparent disparities highlighted in its 1975 study could be "the correct result of differences in individual sentencing needs." *Id.* at 175-76. Nevertheless, it concluded that "disparities of such great proportion as noted [in the study], especially among racial groups, suggests strongly an anomalous influence in the sentencing process that warrants careful follow-up investigation." *Id.* at 176.

The "follow-up investigation" called for was conducted in the subsequent council study of statewide felony sentences in Alaska between August, 1974 and August, 1976. *ALASKA FELONY SENTENCING, supra* note 5. This report confirmed at least some of the fears first raised in the 1975 study.

One of the most disturbing findings of the study concerned the impact on sentence length of membership in the black race. After taking into account the independent contribution of all other factors in the study, being black in and of itself contributed an estimated 11.9 months to drug felony sentences and 6.5 months to sentences for crimes of theft or unlawful entry. This independent "blackness factor" survived both statistical tests and was shown to increase the severity of sentences entirely aside from such considerations as employment history, educational level, occupation, income, prior criminal history and probation or parole status. Blackness was not a factor, however, in crimes of violence or in frauds, forgeries or embezzlements.

Id. at v-vi.

The council noted that the average additional 11.9 months imposed upon blacks convicted of drug felonies "is more than the estimated contribution of a record of three or more prior misdemeanors, or that of being convicted of sale of narcotics (the most serious drug felony studied)." *Id.* at 43. The council further found that for those defendants convicted of burglary, larceny, and receiving and concealing stolen property, blacks received sentences averaging about 6.4 months longer than whites. *Id.* at 28. "This estimate takes all other factors recorded in the study into account. In other words, entirely apart from criminal record, type of offense charged, income, etc., being black was associated with a significantly higher sentence." *Id.* The council suggested that this "disturbing" finding may be interpreted either as a reflection of minority group disadvantages, or as evidence "that the criminal justice system in Alaska discriminates against blacks." *Id.* at 28-29.

7. *ALASKA FELONY SENTENCING, supra* note 5, at 20-22, 40-46.

8. The council found "that in the violent crime category, neither extent of physi-

Presumptive sentencing has now been in effect in Alaska for five years.⁹ During that period, the legislature has made several significant amendments to the statutory scheme and Alaska's appellate courts have decided numerous cases interpreting the scope of individual sections. This article examines Alaska's presumptive sentencing system in light of the legislative and judicial developments since enactment. The article is divided into three sections. The first section provides an overview of the presumptive sentencing system. The second section examines in greater detail two of its key components: the use of prior convictions to establish repeat felony offender status, and the aggravating and mitigating factors used by courts to adjust the presumptive term. The third section discusses how presumptive sentencing has affected appellate review of sentences imposed on first felony offenders¹⁰ not covered by presumptive sentencing.

I. AN OVERVIEW OF PRESUMPTIVE SENTENCING

A defendant is subject to presumptive sentencing if he is convicted of a crime classified as a class A felony,¹¹ sexual assault in the

cal injury to the victim (short of death) nor the use of a firearm by the defendant had any significant independent impact on sentence length." ALASKA FELONY SENTENCING, *supra* note 5, at ii. Only where the victim died did injury to the victim affect the length of the offender's sentence. *Id.* at 24.

9. Although the legislature passed the Criminal Code in 1978, the Code did not take effect until January 1, 1980. Act of July 17, 1978, ch. 166, 1978 Alaska Sess. Laws 219. This article will examine legislative and judicial developments pertaining to presumptive sentencing occurring before April 12, 1985.

10. The term first felony offender will hereinafter be used to refer to a defendant who has no prior felony convictions that a court can consider for purposes of presumptive sentencing. The term second felony offender will hereinafter be used to refer to a defendant who has one prior felony conviction that can be considered for purposes of presumptive sentencing. See *infra* note 24 (defining the terms third felony offender and repeat felony offender for the purposes of this article).

11. ALASKA STAT. § 12.55.125(c) (1984). The Criminal Code classifies the overwhelming majority of offenses into six categories according to the seriousness of the conduct defined — class A, B, and C felonies; class A and B misdemeanors; and violations. *Id.* § 11.81.250(a)(1)-(6) (1983). A limited number of the most serious offenses defined in the Criminal Code are not classified under this structure, see *id.* § 11.81.250(a), and are referred to as unclassified felonies.

Class A felonies are the most serious classified offenses in the Criminal Code and "involve conduct resulting in serious physical injury or a substantial risk of serious physical injury to a person." *Id.* § 11.81.250(a)(1). See, e.g., *id.* § 11.41.120 (1983) (manslaughter); *id.* § 11.41.500 (1983) (robbery in the first degree).

When it enacted the Criminal Code, the legislature did not reclassify offenses defined outside the Criminal Code under the classification scheme specified in ALASKA STAT. § 11.81.250 (1983). In subsequent years, however, the legislature used the Criminal Code's classification scheme in authorizing penalties for crimes defined outside the Criminal Code. See, e.g., *id.* §§ 04.16.180-200 (1980 & Supp. 1984) (classifying crimes pertaining to the violation of Title 4 of the Alaska Statutes (concerning

first degree,¹² or sexual abuse of a minor in the first degree.¹³ Presumptive sentencing also applies to defendants convicted of class B felonies¹⁴ or class C felonies,¹⁵ but as a general rule, only if the defendant has previously been convicted of another felony.¹⁶ The presumptive sentencing statutes, however, do not apply to sentencing for three categories of crimes: (1) misdemeanors;¹⁷ (2) felonies defined outside the Criminal Code that carry their own specified penalties and are not classified as class A, B, or C felonies;¹⁸ and (3) the unclassified felonies in the Criminal Code of murder in the first degree, murder in the second degree, kidnapping, and misconduct involving a controlled substance in the first degree.¹⁹

A defendant subject to presumptive sentencing faces a term of imprisonment that varies according to the crime he committed and his

alcoholic beverages) under the classification scheme of the Criminal Code). Once a felony is classified as a class A, B, or C felony, the terms of imprisonment specified in ALASKA STAT. § 12.55.125 (1984), including any prescribed presumptive term of imprisonment, apply to persons convicted of that felony.

12. ALASKA STAT. § 12.55.125(i) (1984). The crime of sexual assault in the first degree is defined in *id.* § 11.41.410 (1983).

13. ALASKA STAT. § 12.55.125(i) (1984). The crime of sexual abuse of a minor in the first degree is defined in *id.* § 11.41.434 (1983).

14. Class B felonies "involve conduct resulting in less severe violence against a person than class A felonies, aggravated offenses against property interests, or aggravated offenses against public administration or order." ALASKA STAT. § 11.81.250(a)(2). See, e.g., *id.* § 11.46.300 (1983) (burglary in the first degree); *id.* § 11.56.200 (1983) (perjury).

15. Class C felonies "involved conduct serious enough to deserve felony classification but not serious enough to be classified as A or B felonies." ALASKA STAT. § 11.81.250(a)(3). See, e.g., *id.* § 11.41.530 (coercion); *id.* § 11.46.520 (criminal possession of a forgery device).

16. See ALASKA STAT. § 12.55.125(d)-(e) (1984). A very limited category of class B and C felonies is also subject to presumptive sentencing, regardless of whether the defendant has previously been convicted of a felony. See *infra* note 155 (discussion of ALASKA STAT. § 12.55.125(d)(3), (e)(3) (1983). The type of prior felony conviction that can satisfy the previous felony conviction requirement is discussed *infra* text accompanying notes 63-105.

17. The Criminal Code specifies two classes of misdemeanors, class A and class B. ALASKA STAT. § 11.81.250(a)(4)-(5) (1983). Class A misdemeanors are punishable by a maximum term of imprisonment of one year while class B misdemeanors are punishable by a maximum term of imprisonment of 90 days unless otherwise specified in the provision defining the offense. *Id.* § 12.55.135(a)-(b) (1984).

18. Since presumptive terms of imprisonment are specified only for class A, B, and C felonies, and for the crimes of sexual assault in the first degree and sexual abuse of a minor in the first degree, unclassified crimes outside the Criminal Code are not subject to presumptive sentencing. See ALASKA STAT. § 12.55.125(c)-(e), (i) (1984). If, however, a felony defined outside the Criminal Code does not include a penalty provision, it is automatically classified as a class C felony, *id.* § 11.81.250(b) (1983), and consequently, is subject to the presumptive terms of imprisonment specified in *id.* § 12.55.125(c).

19. See ALASKA STAT. § 12.55.125(a)-(b) (1984).

prior criminal history.²⁰ The sentence length equals an amount "the average defendant convicted of an offense should be sentenced to, absent the presence of legislatively prescribed factors in aggravation or mitigation or extraordinary circumstances."²¹ For example, a defendant sentenced for a class C felony who has one prior felony conviction²² faces a presumptive term of imprisonment of two years.²³ A defendant sentenced for the same felony but with two or more prior felony convictions²⁴ faces a presumptive term of imprisonment of three years.²⁵

The trial court may increase or decrease a presumptive term of imprisonment depending on the presence of certain aggravating or mitigating factors.²⁶ The legislature has identified twenty-six aggravating and fifteen mitigating factors.²⁷ The trial court may consider only these forty-one factors in adjusting a presumptive term of imprisonment.²⁸ The parties must establish the presence of any aggravating

20. See *id.* § 12.55.125(c)-(c), (i). A defendant who is subject to presumptive sentencing but is sentenced without regard to the requirements of presumptive sentencing is sentenced illegally. On appeal, the sentence will be vacated. *Kelly v. State*, 663 P.2d 967, 974-75 (Alaska Ct. App. 1983).

21. ALASKA SENATE COMMENTARY, *supra* note 3, at 153.

22. The type of prior felony conviction that can be considered for purposes of presumptive sentencing is discussed *infra* text accompanying notes 63-105.

23. ALASKA STAT. § 12.55.125(e)(1) (1984).

24. The term third felony offender will hereinafter be used to refer to a defendant who has two or more prior felony convictions that can be considered for purposes of presumptive sentencing. The terms first felony offender and second felony offender, see *supra* note 10, as well as the term third felony offender are frequently used by the Alaska Court of Appeals to describe the status of a defendant subject to presumptive sentencing. See, e.g., *Shaw v. State*, 673 P.2d 781, 785 (Alaska Ct. App. 1983); *Fry v. State*, 655 P.2d 789, 791 (Alaska Ct. App. 1983).

The term repeat felony offender will hereinafter be used to refer to a defendant who is a second or third felony offender, if, in the context in which the term is used, it is not necessary to distinguish between a second and third felony offender.

25. ALASKA STAT. § 12.55.125(e)(2) (1984).

26. *Id.* § 12.55.155(a) (1984). If the trial court imposes a sentence different from the presumptive term of imprisonment without having found aggravating or mitigating factors, it has imposed an illegal sentence that will be vacated on appeal. See *State v. LaPorte*, 672 P.2d 466, 467-68 (Alaska Ct. App. 1983); see also *McManners v. State*, 650 P.2d 414, 416 (Alaska Ct. App. 1982) (irrelevant that sentence in excess of the presumptive term is suspended).

The inability of a trial court to reduce a presumptive term of imprisonment unless mitigating factors are established does not violate the separation of powers doctrine or the constitutional requirement that "[p]enal administration shall be based on the principle of reformation and upon the need for protecting the public." *Koteles v. State*, 660 P.2d 1199, 1200 n.1 (Alaska Ct. App. 1983) (citing ALASKA CONST. art. I, § 12).

27. ALASKA STAT. § 12.55.155(c)-(d) (1984).

28. *Juneby v. State*, 641 P.2d 823, 831-32 (Alaska Ct. App. 1982) (citing ALASKA SENATE COMMENTARY, *supra* note 3, at 160), *modified*, 665 P.2d 30 (Alaska Ct. App. 1983). If the trial court adjusts the presumptive term of imprisonment for aggravating

and mitigating factors at the sentencing hearing by clear and convincing evidence.²⁹ The court may rely on evidence presented at trial as well as additional information presented at the sentencing hearing in determining whether any aggravating and mitigating factors are present.³⁰

Voluntary drug or alcohol intoxication or addiction is specifically excluded from consideration as an aggravating or mitigating factor.³¹ Additionally, an aggravating factor may not be used to increase the presumptive term if the same factor was used previously to trigger presumptive sentencing or to require a higher presumptive term of imprisonment for the crime, or if the factor is a necessary element of the offense in question.³² Similarly, a mitigating factor may not be used to

or mitigating factors that have not been specified by the legislature, the sentence imposed will be vacated on appeal. See *Woods v. State*, 667 P.2d 184, 186-87 (Alaska 1983).

29. ALASKA STAT. § 12.55.155(f) (1984).

30. *Wolf v. State*, 647 P.2d 609, 610-11 (Alaska Ct. App. 1982).

31. ALASKA STAT. § 12.55.155(g) (1984). The exclusion of voluntary intoxication from consideration as a mitigating factor does not violate equal protection. *Wright v. State*, 656 P.2d 1226, 1227-28 (Alaska Ct. App. 1983); see also *State v. Ahwinona*, 635 P.2d 488, 491 n.3 (Alaska Ct. App. 1981).

Since only the aggravating and mitigating factors listed in ALASKA STAT. § 12.55.155(c)-(d) (1984) may be considered by the trial court in adjusting the presumptive term of imprisonment, see *supra* note 28 and accompanying text, it might be argued that it was unnecessary to specifically exclude voluntary intoxication or addiction from consideration as an aggravating or mitigating factor. Nevertheless, the specific exclusion of intoxication or addiction as a sentencing consideration probably reflects the legislature's intent to prevent courts from using those factors as a basis for a finding of manifest injustice authorizing referral of a case to a three-judge sentencing panel under ALASKA STAT. §§ 12.55.165-.175 (1984). See *infra* text accompanying notes 43-59.

32. ALASKA STAT. § 12.55.155(e) (1984). See *Woods v. State*, 667 P.2d 184, 187-88 (Alaska 1983) (causing physical injury can be used to increase presumptive term for sexual assault in the first degree because physical injury is not a necessary element of sexual assault); *Roberts v. State*, 680 P.2d 503, 508 n.13 (Alaska Ct. App. 1984) (aggravating factor of causing physical injury can be used to increase presumptive term for robbery in the second degree because physical injury is not a necessary element of robbery).

The prohibition specified in section 12.55.155(e) does not "preclude the use of a prior conviction to invoke presumptive sentencing when that prior conviction is a necessary element of the present offense." *Fry*, 655 P.2d at 791.

In *Juneby*, the court of appeals cited ALASKA STAT. § 12.55.155(e) in support of its holding that conduct for which a defendant has been separately convicted and sentenced may not be considered to establish an aggravating factor to increase the presumptive term imposed for another crime. 641 P.2d at 842-43. The trial court had ruled that Juneby's unlawful entry into the victim's home "was among the most serious conduct included in the definition" of sexual assault. *Id.* at 842. Juneby had also been convicted and sentenced for burglary for that same unlawful entry. *Id.* The court of appeals ruled that it was improper to use the illegal entry to increase Juneby's presumptive term for sexual assault, *id.* at 842-43, stating that the legislative policy of

decrease the presumptive term if previously used at trial to reduce the charge to a lesser included offense.³³

If the prosecution establishes an aggravating factor, the trial court may increase the presumptive term of imprisonment, provided that the sentence imposed does not exceed the statutory maximum sentence for the crime.³⁴ If the defendant establishes a mitigating factor, the trial court may reduce the presumptive term of imprisonment by a maximum amount that depends upon the length of the presumptive term of imprisonment.³⁵ A presumptive term of imprisonment of four years or less can be reduced by any amount.³⁶ A court may reduce a presumptive term of greater than four years to no less than one-half the presumptive term.³⁷

In the vast majority of cases subject to presumptive sentencing, the trial court cannot suspend imposition of a sentence.³⁸ Furthermore, the power of the trial court to suspend even a portion of the sentence or to place the defendant on probation is substantially re-

ALASKA STAT. § 12.55.155(e) sought to "avoid double punishment for the same conduct." *Id.* at 842. Thus, "[t]he judge's finding that Juneby's sexual assault was the most serious within the definition of the offense . . . amounted to punishing Juneby twice for the same conduct: first, by imposing the sentence for burglary; second, by aggravating his presumptive term for sexual assault." *Id.*

33. ALASKA STAT. § 12.55.155(e).

34. *Id.* § 12.55.155(a) (1984). Guidelines that a trial court must use when varying a presumptive term to account for aggravating factors are discussed *infra* text accompanying notes 121-45.

35. ALASKA STAT. § 12.55.155(a).

36. *Id.* § 12.55.155(a)(1). Guidelines that a trial court must use when varying a presumptive term to account for mitigating factors are discussed *infra* text accompanying notes 129-41.

37. ALASKA STAT. § 12.55.155(a)(2).

38. *Id.* § 12.55.155(g)(2) (1984). The restrictions on the trial court's ability to vary the presumptive sentence discussed *infra* text accompanying notes 39-42, do not apply in the very limited number of cases where a first felony offender convicted of a class B or C felony is subject to presumptive sentencing. See *infra* note 155. When the legislature created this category of first felony offenders subject to presumptive sentencing in 1983, it neglected to make a conforming amendment to the statute which restricts a trial court's ability to suspend imposition of sentence, place a defendant on probation, or otherwise reduce a term of imprisonment when the defendant is subject to presumptive sentencing. ALASKA STAT. § 12.55.125(g). See Act of July 3, 1983, ch. 92, § 1-3, 1983 Alaska Sess. Laws 1, 1-2. This group of first felony offenders is apparently subject to presumptive sentencing but the trial court's ability to suspend imposition of sentence or place the defendant on probation for any or all of the sentence remains unrestricted. See *infra* note 60 (discussing the parole eligibility of these offenders). Furthermore, these restrictions only apply to the trial court's ability to suspend imposition of sentence or impose probation. If the trial court finds that manifest injustice would result from its inability to exercise one of these sentencing options, and the three-judge panel agrees with that finding, the panel may suspend imposition of sentence or impose probation. See *infra* text accompanying notes 43-59; see also ALASKA STAT. § 12.55.015(a)(2), (a)(7), (a)(8) (1984).

stricted.³⁹ The extent of this restriction depends on whether the trial court used aggravating or mitigating factors to impose a sentence other than the presumptive term of imprisonment. If neither party established aggravating or mitigating factors, the presumptive term must be imposed and no portion of it may be suspended.⁴⁰ If only aggravating factors are established and the court imposes a term of imprisonment in excess of the presumptive term, the court may suspend a portion of that sentence, but the unsuspended portion must be at least equal to the presumptive term of imprisonment.⁴¹ If mitigating factors are established, the court may suspend all or a portion of the term, provided that the remaining term is not less than the minimum sentence allowed by establishment of mitigating factors.⁴²

The following chart shows the presumptive terms of imprisonment in years (circled) authorized for defendants subject to presumptive sentencing classified according to the offense for which sentence is to be imposed and whether the defendant is a first, second, or third felony offender. The figure to the right of the presumptive term specifies the maximum term of imprisonment that a court can impose if factors in aggravation are established, and the figure to the left of the presumptive term specifies the minimum term of imprisonment a court can impose if factors in mitigation are established.

39. See ALASKA STAT. § 12.55.125(g)(1); see also *Lacquement v. State*, 644 P.2d 856, 862-64 (Alaska Ct. App. 1982).

40. *Lacquement*, 644 P.2d at 863.

41. *Id.* at 863, n.17.

42. *Id.* at 863. For example, a second felony offender convicted of a class B felony could possibly have the entire four-year presumptive term of imprisonment specified in ALASKA STAT. § 12.55.125(d)(1) (1984) suspended if mitigating factors are established, since the trial court may reduce a presumptive term of four years or less by an amount as great as the presumptive term for factors in mitigation. See *supra* note 36 and accompanying text. By contrast, if a third felony offender is convicted of a class B felony and factors in mitigation are established, the court may suspend a portion of the sentence that is imposed, provided that the offender would still be required to serve at least three years of imprisonment. The presumptive term of imprisonment for a third felony offender convicted of a class B felony is six years, ALASKA STAT. § 12.55.125(d)(2), and under section 12.55.155(a)(2) the court may not reduce that sentence below three years for factors in mitigation. See *supra* note 37 and accompanying text. A trial court's decision to suspend any portion of the sentence because of factors in mitigation is nevertheless subject to compliance with the *Juneby* guidelines discussed *infra* text accompanying notes 131-45.

Current Offense	First Felony Offender	Second Felony Offender	Third Felony Offender
Sexual Assault or Sexual Abuse of a Minor in the First Degree	4 (8) 30		
	5 (10) 30	7½ (15) 30	12½ (25) 30
Class A Felony	2½ (5) 20		
	3½ (7) 20	5 (10) 20	7½ (15) 20
Class B Felony	0 (2) 10 0 - 10		
	0 (2) 10	0 (4) 10	3 (6) 10
Class C Felony	½ (2) 5 0 - 5		
	½ (2) 5	0 (2) 5	1½ (3) 5

Explanatory Notes

* Ten year presumptive term only applies if the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the offense. ALASKA STAT. § 12.55.125(i)(2) (1984). All other cases are subject to the eight year presumptive term.

** Seven year presumptive term only applies if the crime is other than manslaughter and the defendant possessed a firearm, used a dangerous instrument, caused serious physical injury or knowingly directed the conduct constituting the offense at a uniformed or otherwise identified peace or correctional officer, firefighter, ambulance attendant, or other emergency responder engaged in official duties. ALASKA STAT. § 12.55.125(c)(2) (1984). All other cases are subject to the five year presumptive term.

*** Presumptive term of imprisonment only applies if the defendant knowingly directed the conduct constituting the offense at a uniformed or otherwise identified peace or correctional officer, fire fighter, ambulance attendant, or other emergency responder engaged in official duties. ALASKA STAT. § 12.55.125(d)(3), (e)(3) (1984). All other cases are not subject to presumptive sentencing and the defendant faces a maximum term of imprisonment of ten years for a class B felony and five years for a class C felony. ALASKA STAT. § 12.55.125(d)-(e) (1984).

The presumptive sentencing system limits judicial sentencing discretion and minimizes the possibility that a sentence will reflect considerations other than the nature of the offense and the prior criminal history of the defendant. Since presumptive sentencing so significantly restricts a trial court's sentencing discretion, however, the possibility exists that the required sentence would be clearly inappropriate in a particular case. "Wisely, [the legislature] included a safety valve to deal with situations where the statute rigidly applied would work an

injustice."⁴³ That "safety valve" is a panel of three superior court judges which may sentence the defendant without regard to the presumptive sentencing system.⁴⁴

In order for a defendant to be sentenced by the three judge panel, the trial court must first find by clear and convincing evidence that manifest injustice⁴⁵ would result from imposing the sentence required by the presumptive sentencing statutes.⁴⁶ Injustice could result from the trial court's inability to consider a relevant circumstance at sentencing because it had not been included in the list of aggravating or mitigating factors.⁴⁷ Manifest injustice could also result if the presumptive term of imprisonment, even after it is adjusted for all relevant aggravating and mitigating factors, is clearly inappropriate considering the nature of the offense and the offender.⁴⁸

The legislature anticipated that only rarely would compliance with the presumptive sentencing statutes produce manifest injustice.⁴⁹ While the court of appeals has concluded that it would be inconsistent with the purpose of presumptive sentencing for trial courts to routinely send cases to the three-judge panel,⁵⁰ it also has stated that "where the issue of manifest injustice appears to be a close one, we would urge sentencing judges to resolve any doubt in favor of a referral" to the panel.⁵¹ If a party disagrees with the trial court's finding on manifest injustice, it may appeal that determination to the court of appeals, but that court will reverse only "clearly mistaken" decisions.⁵²

The three-judge panel may review the sentencing issue *de novo* and consider evidence that was not before the trial court.⁵³ If the

43. *Heathcock v. State*, 670 P.2d 1155, 1166 (Alaska Ct. App. 1983) (Singleton, J., concurring and dissenting).

44. See ALASKA STAT. §§ 12.55.165-175 (1984).

45. The term manifest injustice was not defined by the legislature. See *id.* It may, however, be equated with the concept of "shocking to the conscience" or "obvious unfairness." *Lloyd v. State*, 672 P.2d 152, 154 (Alaska Ct. App. 1983).

46. ALASKA STAT. § 12.55.165; see also *Heathcock*, 670 P.2d at 1156-57.

47. ALASKA STAT. § 12.55.165. A trial court may not base a finding of manifest injustice on the nature of the prior convictions which made the defendant a repeat felony offender. See *Walsh v. State*, 677 P.2d 912, 919 (Alaska Ct. App. 1984).

48. ALASKA STAT. § 12.55.165 (1984); see also *Heathcock*, 670 P.2d at 1157; *LaPorte*, 672 P.2d at 468 & n.4.

49. ALASKA SENATE COMMENTARY, *supra* note 3, at 162. The legislature, when it enacted section 12.55.165 (1984) "recognize[d] that in rare situations, imposition of a presumptive term of imprisonment, whether or not adjusted for aggravating or mitigating factors, [might] result in manifest injustice The legislature expect[ed], however, that the probability of such a result [would] be minimal." *Id.*

50. *Walsh*, 677 P.2d at 919.

51. *Lloyd*, 672 P.2d at 155.

52. *Walsh*, 677 P.2d at 918.

53. ALASKA STAT. § 12.55.175(b) (1984); see also *Shaw*, 673 P.2d at 784.

panel disagrees with the trial court's finding of manifest injustice, it must remand the case to the trial court for imposition of the sentence required by the presumptive sentencing system.⁵⁴ If, however, the panel agrees with the trial court's finding of manifest injustice, the panel may sentence the defendant to any term authorized for the crime by statute.⁵⁵ Consequently, if the trial court found that the requirements of presumptive sentencing would cause manifest injustice by mandating the imposition of too lenient a sentence, the panel, if it agrees with that finding, may sentence the defendant to any term of imprisonment up to the maximum sentence for the crime.⁵⁶ On the other hand, if the trial court found that the requirements of presumptive sentencing would cause manifest injustice by requiring the imposition of too severe a sentence, the panel, if it agrees with that finding, may impose a less severe sentence.⁵⁷ The sentence imposed by the panel may be less than that required by the presumptive sentencing system, or it may be any other available sentencing option including probation or a suspended imposition of sentence.⁵⁸ The panel's findings may be appealed to the court of appeals, which again may reverse only "clearly mistaken" decisions.⁵⁹

Most defendants sentenced under presumptive sentencing are not eligible for parole.⁶⁰ The length of a term of imprisonment imposed under presumptive sentencing can only be reduced for good behavior while in prison. For every three days of good conduct served, the defendant will receive a one day reduction in the sentence required to be

54. ALASKA STAT. § 12.55.175(b); see also *Shaw*, 673 P.2d at 786.

55. ALASKA STAT. § 12.55.175(b)-(c) (1984). The panel may not sentence the defendant if it merely finds that manifest injustice would result from imposition of the sentence required under the presumptive sentencing statutes. It must also agree with the trial court's finding on why manifest injustice would result. For example, if the trial court finds that manifest injustice would result because the required sentence is too high, a finding by the panel that manifest injustice would result because the sentence is too low would not constitute an agreement with the trial court's finding of manifest injustice. Under such circumstances, the panel must remand the case to the trial court for sentencing consistent with the presumptive sentencing scheme. See *Heathcock*, 670 P.2d at 1158; see also *Winfree v. State*, 683 P.2d 284, 286 (Alaska Ct. App. 1984).

56. ALASKA STAT. § 12.55.175(c); see also ALASKA SENATE COMMENTARY, *supra* note 3, at 162.

57. ALASKA STAT. §§ 12.55.015, 175(c) (1984).

58. *Id.*

59. *Shaw*, 673 P.2d at 784.

60. See ALASKA STAT. § 33.15.180 (1982). This restriction does not apply in the very limited number of cases where a first felony offender convicted of a class B or C felony is subject to presumptive sentencing. See *infra* note 155 and accompanying text. When the legislature created this category of first felony offenders subject to presumptive sentencing, it neglected to make a conforming amendment to the parole eligibility statute, ALASKA STAT. § 33.15.180 (1982), to preclude parole for this category of offenders. See Act of July 3, 1983, ch. 92, 1983 Alaska Sess. Laws 1, 1-2.

served.⁶¹

II. TWO KEY FEATURES OF PRESUMPTIVE SENTENCING

Two components of the presumptive sentencing system proposed by the Criminal Code Revision Subcommittee⁶² were the subject of substantial scrutiny when the legislature adopted the Criminal Code. Not surprisingly, these areas have also been subject to considerable legislative amendment and judicial review since enactment.

A. Prior Felony Convictions Used to Establish Status as a Repeat Felony Offender

Proof that the defendant has previously been convicted of a felony is critically important under the presumptive sentencing system. The length of the presumptive sentence varies directly with the number of the defendant's previous felony convictions.⁶³ Additionally, most class B and C felony convictions are not even subject to presumptive sentencing unless the defendant is a repeat felony offender.⁶⁴

The Alaska legislature specified the type of prior convictions that can be used to establish the defendant's status as a repeat felony offender.⁶⁵ The legislature also specified the procedures for establishing prior convictions at sentencing.⁶⁶ The Alaska Court of Appeals subse-

61. See ALASKA STAT. § 33.20.010 (1982).

62. In 1976, the legislature established the Criminal Code Revision Subcommittee and charged it with the responsibility of recommending "a comprehensive revision of the state's criminal laws including, but not limited to, necessary and topical revisions of crimes, criminal procedure, sentencing, and parole and probation of offenders, for submission to the legislature" by December 1, 1977. Act of June 3, 1976, ch. 114, §§ 2-4, 1976 Alaska Sess. Laws 1, 2-4. The Subcommittee's proposed statutes and accompanying commentary appear in a six-part Tentative Draft of the Criminal Code published between February, 1977 and February, 1978. ALASKA CRIMINAL CODE REVISION SUBCOMMISSION, ALASKA CRIMINAL CODE REV., pt. 1-6 (Tent. Draft 1977-1978). Legislation encompassing the recommendations of the subcommittee was introduced in the Alaska House of Representatives on January 19, 1978. H.R. 661, 10th Leg., 2d Sess. (Alaska 1978).

63. See ALASKA STAT. § 12.55.125(c)-(e), (i) (1984).

64. See *supra* notes 14-16 and accompanying text.

65. Act of July 17, 1978, ch. 166, 1978 Alaska Sess. Laws 108-09 (amended 1982). The restrictions on using prior convictions to establish that the defendant is a repeat felony offender do not otherwise limit the ability of a trial court to consider prior convictions in imposing sentence. See *Lee v. State*, 673 P.2d 892, 895 (Alaska Ct. App. 1983) and cases cited therein; see also *Bloomstrand v. State*, 656 P.2d 584, 591 (Alaska Ct. App. 1982).

66. Act of July 17, 1978, ch. 166, 1978 Alaska Sess. Laws 109-10 (amended 1982). The legislature made several amendments to the prior conviction statute in 1982. See *infra* note 67. The statute now provides that "prior convictions not expressly admitted by the defendant must be proved by authenticated copies of court records served"

quently interpreted these specifications and the Alaska legislature amended some of them in 1982.⁶⁷

1. *Type of Prior Conviction a Court May Consider.* As originally proposed by the Criminal Code Revision Subcommittee, a prior conviction could not be used to establish the defendant's status as a repeat felony offender unless it was of the same or more serious class of crime than the crime for which sentence was to be imposed.⁶⁸ For example, a defendant to be sentenced for a class B felony would be considered a second felony offender only if previously convicted of a class B or class A felony. The subcommittee's proposal, however, was rejected by the legislature, which decided that the classification of the prior conviction under the Criminal Code was irrelevant.⁶⁹ Instead, the legislature merely required that the prior conviction, whether it occurred in Alaska or in another jurisdiction, be for an offense "having elements similar to those of a felony defined as such under Alaska law."⁷⁰

One of the first issues to arise in applying the legislature's standard for identifying prior convictions was whether the elements of the

at least 20 days before sentencing. ALASKA STAT. § 12.55.145(b) (1984). See *Huitt v. State*, 578 P.2d 415, 422 (Alaska Ct. App. 1984) (failure of defendant to object at sentencing hearing to lack of notice of prosecution's reliance on defendant's prior conviction, absent any indication that defendant lacked opportunity to contest issue, or suggestion that prior conviction is not a felony conviction, does not invalidate sentence imposed); see also *Maldonado v. State*, 676 P.2d 1093, 1094-95 (Alaska Ct. App. 1984); *Kelly v. State*, 663 P.2d 967, 974 (Alaska Ct. App. 1983).

A defendant may contest the authenticity of a prior judgment or other matters pertaining to why the prior conviction should not be considered for repeat felony status. ALASKA STAT. § 12.55.145(c) (1984). The defendant's objections are heard by the court sitting without a jury. *Id.* § 12.55.145(d). The court of appeals has held that the denial of a jury determination on whether a prior conviction can be used to establish that the defendant is a repeat felony offender does not violate the constitutional right to trial by jury. *Huitt*, 678 P.2d at 422-23.

67. Act of July 3, 1982, ch. 143, §§ 32-35, 1982 Alaska Sess. Laws 1, 26-27 (effective Oct. 1, 1982).

68. See ALASKA CRIMINAL CODE REVISION, *supra* note 2, at 8, 71-72.

69. See ALASKA STAT. § 12.55.145(a)(2).

70. *Id.* The statutory definition of a prior conviction does not require that the prior conviction be for a felony. *Id.* Indeed, one judge on the court of appeals has concluded that the definition should be read "literally so that conviction of any offense, whether classified as a misdemeanor or a felony in another jurisdiction, which had elements substantially identical to those of a felony defined as such under Alaska law, would qualify as a prior felony conviction." *Wells v. State*, 687 P.2d 346, 352 n.5 (Alaska Ct. App. 1984). While the court of appeals left this issue unresolved in *Wells*, *id.* at 352, and despite the absence of the requirement within the statute, the legislature clearly intended to require that the prior conviction be a felony conviction. See, e.g., ALASKA STAT. § 12.55.125(d)(1) (1984) (specifying a four year presumptive term "if the offense is a second felony conviction" (emphasis added)); *id.* § 12.55.185(7) (1984) (defining second felony conviction to mean "that the defendant previously has been convicted of a felony" (emphasis added)).

prior offense were to be compared to the elements of a felony in existing law or in the law that existed when the prior offense was committed. In *Wasson v. State*,⁷¹ the defendant argued that his prior Alaska felony conviction for the theft of \$387 under the repealed grand larceny statute could not be used to establish that he was a third felony offender.⁷² The repealed statute set a dividing line between felony and misdemeanor larceny at \$250.⁷³ The present Criminal Code, effective at the time Wasson was sentenced, sets the dividing line at \$500.⁷⁴ Since the theft of \$387 is only a misdemeanor under current law,⁷⁵ Wasson argued that he had not been convicted of an offense that had "elements substantially identical to those of a felony defined as such under Alaska law,"⁷⁶ and that, therefore, the grand larceny conviction could not be used to establish that he was a third felony offender.⁷⁷

Relying in part on the legislative commentary to the Criminal Code, the court of appeals ruled that Wasson's grand larceny conviction was improperly used to establish that he was a third felony offender.⁷⁸ Its holding, however, does not appear to be based on the fact that the theft of \$387 is a misdemeanor and not a felony under existing law. Instead, after comparing the elements of Wasson's offense under the former and current codes, the court of appeals concluded that the value of the stolen property was an element of the prior offense and, therefore, "it necessarily follows that a former statute providing a lesser value for . . . felony grand larceny does not 'have [elements] substantially identical to those of a felony defined as such under [current] Alaska law.'" ⁷⁹ Subsequent cases emphasized that the court must examine the specific elements of the prior felony for which the defendant was convicted, and not the defendant's actual conduct in committing that crime. If the specific elements were substantially

71. 652 P.2d 117 (Alaska Ct. App. 1982).

72. *Id.* at 118. Wasson conceded that another prior felony conviction could be used to establish that he was a second felony offender. *Id.*

73. ALASKA STAT. § 11.20.400 (1976) repealed by ALASKA STAT. § 11.46.130 (effective Jan. 1, 1980).

74. See ALASKA STAT. §§ 11.46.130-140 (1983).

75. See *id.* § 11.46.140.

76. *Id.* § 12.55.145(a)(2).

77. *Wasson*, 652 P.2d at 118.

78. *Id.* at 119. The court of appeals cited the legislature's commentary that a conviction "will be considered a prior felony conviction if the crime is defined by elements substantially identical to a felony under the Code." *Id.* (quoting ALASKA SENATE COMMENTARY, *supra* note 3, at 157 (emphasis added by the court)). The court of appeals concluded that "[i]n context, it is clear that it is the revised code to which the comment refers." *Id.*; see also *Wright v. State*, 656 P.2d 1226, 1228 (Alaska Ct. App. 1983).

79. 652 P.2d at 119.

identical to an existing Alaska felony, the prior conviction would be considered a prior felony conviction under presumptive sentencing.⁸⁰

While the holding in *Wasson* may have been a correct interpretation of the legislature's intent when it adopted presumptive sentencing in 1978, the holding did not reflect the intent of a subsequent legislature. In 1982, the prior conviction definition was amended to require only that the prior offense have "elements similar to those of a felony defined as such under Alaska law at the time the offense was committed."⁸¹ In the commentary that accompanied the amendment, the legislature clarified the type of prior conviction that could be used to establish repeat felony status under presumptive sentencing:

[A] prior offense will be considered a prior felony conviction for purposes of presumptive sentencing if the conduct was similar to a felony in Alaska at the time the offense was committed, regardless of whether the offense is classified as a felony under existing law. For example, if the defendant was convicted of the felony offense of grand larceny in Oregon in 1962 for stealing \$400, and that conduct would have been a felony in Alaska in 1962, that offense may be counted as a prior felony conviction under [ALASKA STAT. §] 12.55.145 even though the revised Criminal Code now requires that a felony theft involve property in an amount of \$500 or more.⁸²

Under this definition then, *Wasson's* prior conviction would make him a third felony offender since it was for an offense that was a felony under Alaska law at the time it was committed.⁸³

2. *When a Conviction is Obtained "Prior" to the Current Offense.* Assuming that a conviction can otherwise be used to establish the defendant's status as a repeat felony offender, the requirements that it be obtained prior to the offense for which sentence is to be imposed would not seem to present difficult interpretative questions for the sen-

80. See, e.g., *Wells*, 687 P.2d at 351 ("We have consistently interpreted ALASKA STAT. § 12.55.145(a)(2) to apply to the statute establishing the elements of the offense for which the defendant was previously convicted."); *Garrouette v. State*, 683 P.2d 262, 268-69 (Alaska Ct. App. 1984) (prior Alaska conviction for the felony of receiving stolen property cannot be used to establish that the defendant was a second felony offender since statute under which defendant was convicted did not require proof of value of property involved, while comparable current statute requires that the property have value of \$500 or more; trial court had found value of property stolen to exceed \$500).

81. Act of July 3, 1982, ch. 143, § 32, 1982 Alaska Sess. Laws 1, 2-6 (effective Oct. 1, 1982). The amendment has been referred to as "a change rather than a clarification of existing law." *Walsh v. State*, 677 P.2d 912, 914 n.1 (Alaska Ct. App. 1984). In *Lee*, the court of appeals noted that the amendment was "to resolve future problems of the type involved in this case and in *Wasson*." 673 P.2d at 895 n.4.

82. ALASKA SENATE COMM. ON THE JUDICIARY, COMMENTARY ON THE ALASKA REVISED CRIMINAL CODE, ALASKA SENATE J. SUPP. No. 64, 21-22 (June 2, 1982).

83. See *supra* text accompanying note 72.

tencing court. Indeed, the terms first, second, and third felony conviction are defined in a manner that appears to state the obvious.⁸⁴ A second felony conviction, for example, "means that the defendant previously has been convicted of a felony."⁸⁵ Nonetheless, the meanings of the terms first, second, and third felony convictions are not free from ambiguity.

In *State v. Rastopsoff*,⁸⁶ the defendant argued that a conviction could not be used to establish repeat felony offender status if he was convicted after he committed the offense for which sentence was to be imposed.⁸⁷ *Rastopsoff* faced sentencing for four crimes at a time when he had already been convicted of a felony.⁸⁸ That conviction, however, was not entered until *after* *Rastopsoff* had committed the four crimes for which he currently faced sentencing.⁸⁹

Despite the apparently unambiguous definition of repeat felony offender status,⁹⁰ which both the superior court and the three-judge sentencing panel had held applied to *Rastopsoff*,⁹¹ the court of appeals agreed with *Rastopsoff's* argument. Relying in part on a decision by the Alaska Supreme Court interpreting the scope of Alaska's repealed habitual criminal statute,⁹² the court of appeals held that *Rastopsoff*

84. See ALASKA STAT. § 12.55.185(4), (7), (9) (1984).

85. *Id.* § 12.55.185(7).

86. 659 P.2d 630 (Alaska Ct. App. 1983).

87. *Id.* at 633.

88. In June of 1980, *Rastopsoff* committed forgery in the second degree, a class C felony. *Id.* at 631-32. On August 26, 1980, he committed a burglary in the first degree and a robbery in the second degree, both class B felonies. *Id.* *Rastopsoff* committed another burglary in the first degree on September 13, 1980, during which he also committed assault in the third degree, a class C felony. *Id.* Indicted for all five crimes, he pleaded guilty to the June forgery in October, 1980, and was sentenced. *Id.* at 632. On February 24, 1981, he pleaded *nolo contendere* to the remaining four charges. *Id.*

In sentencing *Rastopsoff* for the August and September crimes, the superior court found that the October conviction for the June forgery was *Rastopsoff's* first felony conviction, the August offenses constituted his second felony conviction, and the September offenses his third felony conviction. *Id.* The court, however, found that it would be manifestly unjust to sentence *Rastopsoff* as a repeat felony offender on the August and September crimes and referred the case to the three-judge panel. *Id.* The panel agreed with the superior court's classification of the August and September convictions, and held that this application of presumptive sentencing violated the equal protection clause of the Alaska Constitution. *Id.* The state subsequently appealed the three judge panel's constitutional holding to the court of appeals. *Id.* at 633.

89. See *supra* note 88.

90. See *supra* notes 83-85 and accompanying text.

91. See *supra* note 88.

92. In *State v. Carlson*, 560 P.2d 26 (Alaska 1977), the Alaska Supreme Court held that a defendant could not be sentenced under the provision of Alaska's former habitual criminal statute, ALASKA STAT. § 12.55.050 (1976) (repealed 1978), when he was convicted of two felonies on the same day. 560 P.2d at 28-29. The former statute

must be treated as a first felony offender for each of the four crimes that occurred before he was convicted of his previous felony.⁹³ In a subsequent case, the court of appeals held that a defendant is not convicted of a prior offense until sentenced for that offense.⁹⁴ Consequently, a conviction cannot be used to establish repeat felony offender status unless the defendant was sentenced for that conviction before committing the offense for which sentence is to be imposed.

3. Miscellaneous Issues Pertaining to Prior Convictions.

a. Statute of limitations for use of prior convictions. In 1978, the legislature provided that a prior conviction could not be used to establish that the defendant is a repeat felony offender "if a period of seven or more years has elapsed between the date of the defendant's unconditional discharge on the immediately preceding offense and commission of the present offense."⁹⁵ The seven-year period did not begin to run until the defendant completed all of the requirements of the prior sentence, including any probationary or parole period.⁹⁶ Under this standard, for example, a defendant sentenced in 1985 would be a second felony offender if he had been convicted of a felony in 1970 but did not complete the parole period for that felony until 1979. Additionally, so long as the most recent prior conviction falls within the seven year period, any conviction otherwise eligible as a prior conviction, no matter how old, can be used to establish third felony offender status.⁹⁷

In 1982, the legislature made two amendments to the statute of

specified an increased sentence for a defendant who is convicted of felony and "who has been previously convicted of a felony." *Id.* at 27 n.2 (emphasis added). As the court of appeals noted in *Rastopsoff*, the highlighted language in the former habitual criminal statute is virtually identical to the definition of "second felony conviction" in the Criminal Code. *Rastopsoff*, 659 P.2d at 634.

The court of appeals placed significant emphasis on the rule of statutory construction that "when a legislature adopts specific statutory language that has previously been interpreted by the high court of the state in connection with other statutes involving a similar subject matter, the legislature is presumed to have intended to adopt the court's interpretation of that language, unless otherwise expressly indicated." *Id.* at 635 (citation omitted). The court of appeals dismissed the state's argument that an intent to reverse the *Carlson* approach to the use of prior convictions was apparent from the "just deserts" sentencing philosophy in the Criminal Code, *id.* at 637-40, and the legislative commentary to the prior conviction statute. *Id.* at 635-37.

93. 659 P.2d at 641.

94. *Sawyer v. State*, 663 P.2d 230, 232 (Alaska Ct. App. 1983).

95. ALASKA STAT. § 12.55.145(a)(1) (1980) (amended 1982).

96. *Id.* § 12.55.185(10) (1984).

97. *Griffith v. State*, 653 P.2d 1057, 1058 (Alaska Ct. App. 1982) (per curiam). The court of appeals noted that if the application of this rule results in manifest injustice, the case could be sent to the three-judge panel under ALASKA STAT. §§ 12.55.165-175 (1984). 653 P.2d at 1058.

limitations provision that expand the category of prior convictions that can be used to establish repeat felony offender status.⁹⁸ First, the legislature increased the seven year limitations period to ten years.⁹⁹ Second, the legislature provided that a court must consider an unclassified felony or a class A felony conviction as a prior conviction no matter when it occurred.¹⁰⁰

b. Significance of the pendency of an appeal from a prior conviction. The legislature has never addressed the issue of whether a prior conviction on appeal can be used to establish that the defendant is a repeat felony offender. The court of appeals, however, held that the pendency of an appeal does not prevent the court from using the conviction to establish repeat felony offender status.¹⁰¹

c. Prior suspended imposition of sentence. In *Shaw v. State*,¹⁰² the court of appeals held that a conviction resulting in a suspended imposition of sentence can be used to establish repeat felony offender status.¹⁰³ In a subsequent case, however, the court of appeals held that a prior conviction that was subsequently set aside cannot be used to establish repeat felony offender status.¹⁰⁴

d. Juvenile status at time of prior conviction. The fact that the defendant was convicted of a prior offense in another jurisdiction as an adult is irrelevant even if, at the time he committed that offense, he would have been treated as a juvenile under Alaska law. Under such circumstances, an otherwise eligible prior conviction can be used to establish repeat felony offender status.¹⁰⁵

98. Act of July 3, 1982, ch. 143, § 33, 1982 Alaska Sess. Laws 1, 26 (effective Oct. 1, 1982) (codified as amended at ALASKA STAT. § 12.55.145(a)(1) (1984)).

99. ALASKA STAT. § 12.55.145(a)(1) (1984).

100. *Id.*

101. *Wright*, 656 P.2d at 1229; see also *Bell v. State*, 658 P.2d 787, 789 (Alaska Ct. App. 1983). Of course, if the prior conviction is reversed on appeal, the sentence imposed in the case where the prior conviction was used to establish repeat felony status could be challenged as an illegal sentence. See *Wright*, 656 P.2d at 1229.

102. 673 P.2d 781 (Alaska Ct. App. 1983), modified on other grounds, 677 P.2d 259 (Alaska Ct. App. 1984).

103. *Id.* at 786.

104. *Larson v. State*, 688 P.2d 592, 597 (Alaska Ct. App. 1984). ALASKA STAT. § 12.55.085(e) (1984) permits a court to "set aside the conviction and issue to the person a certificate to that effect," after the defendant has completed the conditions of a suspended imposition of sentence.

105. *McManners v. State*, 650 P.2d 414, 415-16 (Alaska Ct. App. 1982); see also *Wells*, 687 P.2d at 352.

B. Aggravating and Mitigating Factors: Adjustments to the Presumptive Term

In its tentative draft of the Criminal Code, the Criminal Code Revision Subcommittee proposed the establishment of an Advisory Commission on Prison Terms and Parole Standards to specify the factors for adjusting a presumptive term of imprisonment.¹⁰⁶ The subcommittee, of course, recognized the importance of aggravating and mitigating factors under its proposed presumptive sentencing system.¹⁰⁷ The commentary to the tentative draft, for example, even included a list of the aggravating and mitigating factors that the subcommittee had considered adopting.¹⁰⁸ However, the subcommittee decided that aggravating and mitigating factors should not be statutorily prescribed, and the bill introduced in the legislature did not list any of these factors.¹⁰⁹ The legislature disagreed with the subcommittee and decided to statutorily prescribe aggravating and mitigating factors.¹¹⁰

As enacted in 1978, the Criminal Code included a list of eighteen aggravating and thirteen mitigating factors.¹¹¹ In subsequent years, as the number of crimes subject to presumptive sentencing increased¹¹² and oversights in the original lists were noted,¹¹³ the list of aggravating and mitigating factors grew. The statute now recognizes twenty-

106. ALASKA CRIMINAL CODE REVISION, *supra* note 2, at 72.

107. See PROPOSED ALASKA STAT. § 11.36.270(b)-(j), ALASKA CRIMINAL CODE REVISION, *supra* note 2, at 61-64.

108. See ALASKA CRIMINAL CODE REVISION, *supra* note 2, at 72-74.

109. See H.R. 661, 10th Leg., 2d Sess. (Alaska 1978). The Subcommittee concluded "that by their nature [aggravating and mitigating factors] were susceptible to change and that a legislatively prescribed list was too inflexible." ALASKA CRIMINAL CODE REVISION, *supra* note 2, at 72; see also Hirsch & Hanrahan, *Determinate Penalty System in America: An Overview*, 27 *CRIME & DELINQ.* 289, 300 (1981) ("A legislature, given the other demands on its time, will seldom be able or willing to devote much effort to . . . revising, and fine tuning a sentencing code approved in recent session."). But see *infra* notes 111-14 and accompanying text.

110. See ALASKA STAT. § 12.55.155(c)-(d) (1984).

111. *Id.* § 12.55.155(c)-(d) (1980) (amended 1982 & 1983).

112. The most significant increase in crimes covered by presumptive sentencing occurred in 1982 when the legislature comprehensively revised the laws pertaining to controlled substances offenses. Act of May 20, 1982, ch. 45, 1982 Alaska Sess. Laws 1, 1-8 (effective January 1, 1983). The legislature transferred controlled substances offenses from title 17 of the Alaska Statutes into the Criminal Code and classified the newly created offenses under the classification scheme in the Criminal Code. See ALASKA STAT. §§ 11.71.010-.070 (1983). Sections 19 and 20 of the Act added four aggravating and three mitigating factors to ALASKA STAT. § 12.55.155(c)-(d) (1984) which apply in the sentencing of controlled substances offenses. See ALASKA STAT. § 12.55.155(c)(23)-(c)(26), (d)(14)-(d)(16) (1984).

113. See, e.g., *Heathcock v. State*, 670 P.2d 1155, 1160 n.2 (Alaska Ct. App. 1983) (Singleton, J., concurring and dissenting), in which Judge Singleton noted that it was an oversight not to include the commission of an offense while on probation in the

six aggravating factors and fifteen mitigating factors.¹¹⁴ These factors frequently have been used to adjust presumptive terms of imprisonment, and Alaska appellate courts have had numerous opportunities to determine whether particular aggravating¹¹⁵ and mitigating¹¹⁶ factors were present and properly applied at sentencing.

original list of aggravating factors. The legislature subsequently rectified this oversight. See ALASKA STAT. § 12.55.155(c)(20) (1984).

114. See ALASKA STAT. § 12.55.155(c)-(d) (1984).

115. Alaska's appellate courts have applied the following aggravating factors:

"(1) a person, other than an accomplice, sustained physical injury as a direct result of the defendant's conduct;" ALASKA STAT. § 12.55.155(c)(1) (1984). In *Juneby v. State*, 641 P.2d 823 (Alaska Ct. App. 1982), modified, 665 P.2d 30 (Alaska Ct. App. 1983), the court of appeals held that in a prosecution of sexual assault in the first degree under ALASKA STAT. § 11.41.410(a)(1) (1983) "the mere fact of some physical injury to the victim as a result of the defendant's conduct, though technically an aggravating factor . . . , will not justify a significant increase in the presumptive term." *Id.* at 839. More substantial increases in presumptive terms are reserved for cases where serious physical injury is inflicted. *Id.* However, "where the crime charged is one that does not ordinarily involve the use of force or violence in its perpetration, the fact that a person sustains injury — even if the injury is relatively slight — assumes considerable importance as an aggravating factor." *Id.* at 838.

The continued validity of the court of appeals' conclusions in *Juneby* is questionable after the decision of the Alaska Supreme Court in *Woods v. State*, 667 P.2d 184 (Alaska 1983). In *Woods*, the court stated that in a prosecution for sexual assault in the first degree, the trial court may properly consider physical injury to the victim as an aggravating factor and that "[t]he weight to be assigned to this aggravating factor is a question which is committed to the sentencing court's discretion." *Id.* at 187-88. The court noted that to the extent that this holding "is inconsistent with *Juneby*, 641 P.2d at 837-40, and *Juneby II*, 665 P.2d 30 at 34-37 (Alaska Ct. App. 1983), those opinions of the court of appeals are hereby modified." *Id.* at 188 n.13. On rehearing in *Juneby*, the state had argued that the court of appeals' "treatment of the aggravating factor of physical injury is inconsistent with the basic holding of the *Juneby* opinion that the amount by which presumptive sentences should be increased or decreased in light of aggravating or mitigating factors must be determined by applying the *Chaney* criteria, as stated in ALASKA STAT. § 12.55.005, to the specific factors established in each case." *Juneby*, 665 P.2d at 36-37. See also *infra* notes 131-3' and accompanying text.

"(2) the defendant's conduct . . . manifested deliberate cruelty to another person;" ALASKA STAT. § 12.55.155(c)(2) (1984). In *Juneby*, the court of appeals stated that

the term 'deliberate cruelty,' as used in ALASKA STAT. § 12.55.155(c)(2) must be restricted to instances in which pain — whether physical, psychological, or emotional — is inflicted gratuitously or as an end in itself. Conversely, when the infliction of pain or injury is merely a direct means to accomplish the crime charged, the test for establishing the aggravating factor of deliberate cruelty will not be met.

Id. at 840.

For a particularly appropriate application of this factor, see *Larson v. State*, 688 P.2d 592 (Alaska Ct. App. 1984); see also *Pectook v. State*, 655 P.2d 1308, 1311 (Alaska Ct. App. 1982).

"(3) The defendant was the leader of a group of three or more persons who participated in the offense;" ALASKA STAT. § 12.55.155(c)(3) (1984). See *Willard v. State*,

When the legislature adopted the original list of aggravating and

662 P.2d 971, 980 (Alaska Ct. App. 1983) (factor established in prosecution for sexual assault in the first degree of defendant not subject to presumptive sentencing).

"(4) the defendant employed a dangerous instrument in furtherance of the offense;" ALASKA STAT. § 12.55.155(c)(4) (1984). See *Linn v. State*, 648 P.2d 150, 153-54 (Alaska Ct. App. 1983) (factor not established by proof of mere possession of a dangerous instrument).

"(5) the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, disability, ill health, or extreme youth or was for any other reason substantially incapable of exercising normal physical or mental powers of resistance;" ALASKA STAT. § 12.55.155(c)(5) (1984). See *Carlson v. State*, 696 P.2d 178, 179 (Alaska Ct. App. 1985); *Goenett v. State*, 695 P.2d 243, 245 (Alaska Ct. App. 1985); *Depp v. State*, 685 P.2d 712, 721 (Alaska Ct. App. 1984) (factor established in prosecution of defendant not subject to presumptive sentencing convicted of sexual assault of a ten-year old boy); *Hasslen v. State*, 667 P.2d 732, 732-33 (Alaska Ct. App. 1983); *State v. Coats*, 669 P.2d 1329, 1332-33 (Alaska Ct. App. 1983) (in case where presumptive sentencing did not apply, court of appeals cited this factor in discussing appropriate sentence for defendant who had sexually abused twelve-year old step-daughter); *Peetook*, 655 P.2d at 1311 (factor established in prosecution for sexual assault in the first degree of defendant not subject to presumptive sentencing who attacked victim while she was sleeping); *Koganaluk v. State*, 655 P.2d 339, 341 & n.4 (Alaska Ct. App. 1982).

"(8) the defendant's prior criminal history includes conduct involving aggravated or repeated instances of assaultive behavior;" ALASKA STAT. § 12.55.155(c)(8) (1984). In *Larson*, 688 P.2d at 597, the court of appeals held that it was proper to consider prior conduct resulting in an assault conviction under this factor even though the conviction had been set aside. *Larson* was decided under a prior enactment of this factor, but the court of appeals viewed the current version as a clarification of the prior version. *Id.* In *Larson*, the court of appeals also confronted the issue of the appropriate relation of juvenile adjudications to this factor. While the court of appeals left open the issue of whether prior juvenile adjudications can be used to initially establish this factor, it did hold that once the factor is otherwise established, prior juvenile adjudications can be used in determining the weight to be given to the factor. *Id.* at 598.

"(10) the conduct constituting the offense was among the most serious conduct included in the definition of the offense;" ALASKA STAT. § 12.55.155(c)(10) (1984). In *Juneby*, 641 P.2d at 8, the court of appeals interpreted legislative intent to require that a finding of this factor "be based on an assessment of the specific facts of each case, viewed in relation to the most serious potential conduct constituting the offense charged." (footnote omitted)

In *Brezenoff v. State*, 658 P.2d 1359 (Alaska Ct. App. 1983), this factor was established in a prosecution for theft in the first degree of a defendant not subject to presumptive sentencing who stole \$140,000 in 133 separate thefts during approximately one year. *Id.* at 1362. The court of appeals noted that this aggravating factor "stresses the conduct involved in the specific offense under consideration rather than the personal characteristics of the offender and requires comparison of the conduct constituting the crime in question with other conduct which would satisfy the elements of the offense." *Id.* at 1363.

The court of appeals has had many opportunities to apply this factor in sexual assault cases. See *Bolhouse v. State*, 687 P.2d 1166, 1174 (Alaska Ct. App. 1984) (factor established in prosecution for attempted sexual assault in the first degree, when attempt "came very close to constituting a completed rape."); *Hasslen*, 667 P.2d at

mitigating factors, it also included a formula for determining the extent to which a presumptive term could be varied once the presence of

732-33 (factor established in prosecution for sexual assault in the first degree and assault in the first degree where victim was assaulted in her own home, entry into house was premeditated, victim's dog was killed, telephone was rendered inoperable and victim was shot while attempting to escape); *Langton v. State*, 662 P.2d 954, 955-56 (Alaska Ct. App. 1983) (factor established where defendant, not subject to presumptive sentencing, convicted of sexual assault in the first degree on his eight-year old step-daughter); *Hunsen v. State*, 657 P.2d 862, 864 (Alaska Ct. App. 1983); *Peetook*, 655 P.2d at 1311; *Koganaluk*, 655 P.2d at 341 n.4; *Ecker v. State*, 656 P.2d 577, 577-78 (Alaska Ct. App. 1982); see also *Goenett*, 695 P.2d at 245 n.2; *Theodore v. State*, 692 P.2d 987, 988 (Alaska Ct. App. 1985) (Singleton, J., concurring); *Walsh*, 677 P.2d at 917-18; *Shaw*, 677 P.2d at 260; *Larson*, 688 P.2d at 598; *Lee*, 673 P.2d at 896; *Gilbreath v. State*, 668 P.2d 1354, 1358 (Alaska Ct. App. 1983); *Karr v. State*, 660 P.2d 450, 452 & n.4 (Alaska Ct. App. 1983); *Kimbrell v. State*, 647 P.2d 618, 622-23 (Alaska Ct. App. 1982) (Coats, J., concurring).

"(12) the defendant was on release under [ALASKA STAT. §] 12.30.020 or 12.30.040 for another felony charge or conviction or for a misdemeanor charge or conviction having assault as a necessary element;" ALASKA STAT. § 12.55.155(c)(12) (1984). See *Roberts v. State*, 680 P.2d 503, 508 n.13 (Alaska Ct. App. 1984), where the court of appeals held that the requirement that the prior offense have assault as a necessary element applies only when the defendant was on release for a misdemeanor. This factor is also established when a defendant commits an offense while on release on a charge of attempted sexual assault even though assault was not a necessary element of the sexual assault.

"(13) the defendant knowingly directed the conduct constituting the offense at an active officer of the court or at an active or former judicial officer, prosecuting attorney, law enforcement officer, correctional employee, fire fighter, emergency medical technician, paramedic, ambulance attendant, or other emergency responder during or because of the exercise of official duties;" ALASKA STAT. § 12.55.155(c)(13) (1984). In *Gilbreath*, 668 P.2d at 1354, this factor was established in the prosecution of a defendant for misconduct involving weapons in the first degree. *Id.* at 1357. The defendant argued that even though he had pointed a gun at a police officer, the aggravating factor did not apply because his offense was "one of possession" and, therefore, could not have been "directed at" a law enforcement officer. *Id.* The court of appeals rejected this characterization, holding that the factor applied because the defendant's "conduct" during the possessory offense was directed at a police officer. *Id.* at 1357-58. The court of appeals noted that the defendant's conduct harmed the public interest in "having the duties of public safety officers carried out efficiently and free from hindrance" and avoiding the "possibility of public danger generated wherever a public safety officer is challenged or hindered in the execution of his duties." *Id.* at 1358.

"(18) the offense was a crime specified in [ALASKA STAT. §] 11.41 and was committed against a spouse, a former spouse, or a member of the social unit comprised of those living together in the same dwelling as the defendant;" ALASKA STAT. § 12.55.155(c)(18) (1984). In *Carlson*, the court of appeals held that in a prosecution for sexual assault in the first degree under former ALASKA STAT. § 11.41.410(a)(4) "the fact that Carlson's victim was a member of his family is typical of the specific crime for which he was convicted and therefore did not warrant an increase in the presumptive term." *Id.* at 179 (footnote omitted). But see *Woods*, discussed *supra* in this footnote under aggravating factor (1), where the Alaska Supreme Court emphasized that the amount by which a presumptive term should be increased once an ag-

gravating factor is established, "is a question which is committed to the sentencing court's discretion." 667 P.2d at 187-88.

"(20) the defendant was on furlough under [ALASKA STAT. §] 33.30 or on parole or probation for another felony charge or conviction;" ALASKA STAT. § 12.55.155(c)(20) (1984). See *Kuvaas v. State*, 696 P.2d 684, 684-85 (Alaska Ct. App. 1985), in which a defendant was convicted of robbery in the first degree. At the time he committed the robbery in question, the defendant was on felony probation from Oregon for offenses that were not felonies under Alaska law at the time the defendant committed them. *Id.* at 684. The court of appeals accepted the defendant's argument that this factor should "apply only to defendants who were on probation for a charge or conviction which would have been a felony charge in Alaska." *Id.* The court applied the definition of "felony conviction" set out in ALASKA STAT. § 12.55.145(a)(2), defining those felony convictions the trial court may consider for purposes of presumptive sentencing. *Id.* at 685; see *supra* text accompanying notes 81-83.

"(22) the defendant knowingly directed the conduct constituting the offense at a victim because of that person's race, sex, color, creed, ancestry, or national origin;" ALASKA STAT. § 12.55.155(c)(22) (1984). See *Gregory v. State*, 689 P.2d 508, 509 (Alaska Ct. App. 1984) (factor found in prosecution for murder in the second degree, ALASKA STAT. § 11.41.110 (1983), a crime not subject to presumptive sentencing).

"(25) the defendant is convicted of an offense specified in [ALASKA STAT. §] 11.71 [any offense involving controlled substances] and the offense involved large quantities of a controlled substance;" ALASKA STAT. § 12.55.155(c)(25) (1984). See *Lausterer v. State*, 693 P.2d 887, 890-92 (Alaska Ct. App. 1985) ("It would ordinarily be appropriate to regard eight ounces or more of cocaine as a large quantity — one that is indicative of commercial activity at the wholesale level.")

116. The following mitigating factors have been applied by Alaska's appellate courts:

"(3) the defendant committed the offense under some degree of duress, coercion, threat, or compulsion insufficient to constitute a complete defense, but which significantly affected his conduct," ALASKA STAT. § 12.55.155(d)(3) (1984). In *Bell*, the court of appeals found that the legislature intended that duress under this factor be interpreted more broadly than the defense of duress. 658 P.2d at 790. "Evidence the defendant in good faith subjectively believed facts which if true would have established one of the defenses justifying his conduct under the revised code, but which the judge or jury concludes would have been unreasonable under the circumstances, may warrant mitigation of a presumptive sentence." *Id.* at 791; see also *Langton* 622 P.2d at 960 ("We apply a subjective standard in interpreting [this factor] and do not require that the person allegedly 'coerced' act reasonably." (citation omitted)); *Whitmore v. State*, 657 P.2d 859, 860-61 (Alaska Ct. App. 1983) (factor not established in prosecution for escape); *Lee*, 673 P.2d at 896 (factor not established by "behavior that is merely impulsive or the result of emotional stress"; there must be evidence that the defendant acted under "a good faith but unreasonable belief" that conduct was necessary).

"(9) the conduct constituting the offense was among the least serious conduct included in the definition of the offense;" ALASKA STAT. § 12.55.155(d)(9) (1984). See *Woods*, 680 P.2d at 1198 (a single incident of sexual abuse is not a mitigated offense); *Walsh*, 677 P.2d at 916-18. In *Walsh*, the court of appeals rejected the argument of a defendant convicted of manslaughter that because his conduct was only reckless, as opposed to intentional or knowing, the mitigating factor of least serious conduct should apply. The court of appeals noted that there is no indication that the legislature intended to treat manslaughter committed recklessly any less severely than man-

one or more of those factors was established.¹¹⁷ That formula apparently leaves substantial discretion to the trial court. For example, if both aggravating and mitigating factors are established for a second felony offender convicted of a class B felony,¹¹⁸ the court can reduce the four-year presumptive term by any amount or can increase it by any amount up to the maximum sentence of ten years.¹¹⁹ Aside from the general direction that "[s]entence increments and decrements . . . shall be based on the totality of the aggravating and mitigating factors,"¹²⁰ the legislature has provided little guidance on the specific amount a presumptive term of imprisonment should be modified once these factors are established.

In *Juneby v. State*,¹²¹ the court of appeals adopted general guidelines for adjusting a presumptive term of imprisonment for factors in aggravation and mitigation.¹²² In doing so, the court helped insure

slaughter committed intentionally or knowingly. The court of appeals, however, did discuss how this factor, or its opposite aggravating factor, ALASKA STAT. § 12.55.155(c)(10) (1984), see *supra* note 115, might be established in driving-while-intoxicated manslaughter cases; *Shaw*, 677 P.2d at 160 (in prosecution for misconduct involving weapons in the first degree for possessing a firearm capable of being concealed on one's person and where defendant had previously been convicted of a felony, court of appeals noted that "examples of the least serious conduct contemplated by the statute might include a case in which a defendant . . . has a weapon and possesses it briefly before returning it to its owner or turning it over to the police, or one in which a defendant, without illegal purpose, briefly acts as a carrier of a weapon on behalf of its owner." *Id.*); see also *Dunlop v. State*, 693 P.2d 891-92 (Alaska Ct. App. 1983); *Carlson*, 696 P.2d at 179; *Koteles v. State*, 660 P.2d 1199, 1201 (Alaska Ct. App. 1983) (factor not established in prosecution for burglary in the second degree); *Bell*, 658 P.2d at 789-90 (factor not found in escape case); *Fry*, 655 P.2d 789, 793 (Alaska Ct. App. 1983); *Born v. State*, 633 P.2d 1021, 1026 n.5 (Alaska Ct. App. 1981).

"(13) the harm caused by the defendant's conduct is consistently minor and inconsistent with the imposition of a substantial period of imprisonment;" ALASKA STAT. § 12.55.155(d)(13) (1984). In *Shaw* the court of appeals stated that this factor is not established when the defendant's conduct "exhibits contempt for the law and law enforcement warranting a substantial sanction." 673 P.2d 781, 785 (Alaska Ct. App. 1983). See also *Gilbreath*, 668 P.2d at 1358-59 (factor not established in prosecution of defendant for misconduct involving weapons in the first degree, "[s]iven the circumstances of the instant offense and the nature of Gilbreath's original felony, an assault with a dangerous weapon," trial court's refusal to find this factor not clearly mistaken); *Koteles*, 660 P.2d at 1201 (factor not found in prosecution for burglary in the second degree).

117. ALASKA STAT. § 12.55.155(a) (1984). See *supra* notes 34-44 and accompanying text.

118. See ALASKA STAT. § 12.55.125(d)(1) (1984).

119. See *id.* § 12.55.155(u)(1) (1984).

120. *Id.* § 12.55.155(b) (1984).

121. 641 P.2d 823 (Alaska Ct. App. 1982), *modified*, 665 P.2d 30 (Alaska Ct. App. 1983).

122. 641 P.2d at 833.

that the discretion permitted under the presumptive sentencing system once aggravating and mitigating factors are established does not defeat the purpose of the 1978 sentencing revisions — the elimination of unjustified disparity in sentencing.¹²³

Juneby was convicted of sexual assault in the first degree, which at that time was a class A felony, and burglary in the first degree, a class B felony.¹²⁴ Since Juneby was a second felony offender, he faced a presumptive term of imprisonment of ten years for the sexual assault.¹²⁵ At sentencing, the trial court found several aggravating factors to be present and increased the ten year presumptive term to twenty years, the maximum sentence for a class A felony.¹²⁶ Juneby appealed his sentence for the sexual assault, arguing that the trial court gave too much weight to the aggravating factors and that his twenty year sentence was excessive.¹²⁷

The court of appeals conducted a comprehensive review of the structure and purpose of presumptive sentencing.¹²⁸ It found that "[t]he presumptive sentencing provisions . . . reflect the legislature's intent to assure predictability and uniformity in sentencing by the use of fixed and relatively inflexible sentences, statutorily prescribed, for persons convicted of second and subsequent felony offenses."¹²⁹ Based on this interpretation of the legislative intent, the court adopted general guidelines for modifying a presumptive term of imprisonment for factors in aggravation and mitigation. The court stated it expected

that sentences equalling or varying only slightly from the presumptive terms will generally be suitable when presumptive sentencing applies. Minor adjustments for aggravating or mitigating circumstances might be appropriate in a significant number of cases; only in unusual cases, however, can it be anticipated that substantial deviation from the presumptive term will be called for.

. . . If sentencing courts were permitted, under the presumptive sentencing scheme, to deviate routinely and substantially from the presumptive terms prescribed by law, the fundamental purposes of eliminating disparity and establishing reasonable uniformity in sentencing would be completely undermined. Unless the provisions of ALASKA STAT. § 12.55.155 are adhered to strictly, and unless a

123. See *supra* text accompanying note 4.

124. 641 P.2d at 828. Sexual assault in the first degree was subsequently made an unclassified felony, punishable by a maximum term of imprisonment of 30 years and subject to presumptive sentencing regardless of the prior criminal history of the defendant. Act of July 3, 1982, ch. 143, § 30, 1982 Alaska Sess. Laws 1, 25 (effective October 1, 1982) (codified as amended at ALASKA STAT. § 12.55.125(i) (1984)).

125. 641 P.2d at 829.

126. *Id.*

127. *Id.* at 828-29. Juneby had also been sentenced to eight years imprisonment on the burglary conviction but did not appeal that sentence. *Id.* at 828.

128. *Id.* at 829-33.

129. *Id.* at 830.

measured and restrained approach is taken in the adjustment of presumptive sentences for both aggravating and mitigating factors, then the prospect of attaining the statutory goal of uniform treatment for similarly situated offenders would quickly be eroded, the potential for irrational disparity in sentencing would threaten to become reality, and the revised code's carefully fashioned system of escalating penalties for repeat offenders would be rendered utterly ineffective.¹³⁰

While the court of appeals called for "a measured and restrained approach" to the adjustment of a presumptive term of imprisonment for aggravating and mitigating factors,¹³¹ it refused to adopt "a mechanistic approach toward determining the amount by which a presumptive sentence should be adjusted in light of aggravating or mitigating factors."¹³² Instead, it held that once aggravating or mitigating factors are properly established, the sentencing criteria set out in *State v. Chaney*¹³³ should be applied to the "totality of the aggravating and mitigating factors" to determine the sentence to be imposed.¹³⁴

130. *Id.* at 833. On rehearing, the court of appeals phrased these guidelines somewhat differently, but the general thrust remained the same:

It can thus be expected that, in the great majority of cases, the appropriate sentence will be one that does not depart significantly from the specified presumptive term. The process of adjusting presumptive sentences for aggravating or mitigating factors is one that, while procedurally complex, must not be applied inflexibly or mechanistically. In each case, a realistic assessment of the totality of the evidence relating to aggravating and mitigating factors must be made in order to determine the extent to which the case may fairly be said to be more aggravated or more mitigated than the average for the particular offense. Increasingly larger adjustments to presumptive terms will be justified as cases deviate further from the norm for a given offense. The most significant upward or downward adjustments must be reserved for those cases that are truly atypical or unusual in severity or lack of severity.

Juneby v. State, 665 P.2d 30, 39 (Alaska Ct. App. 1983) *modifying* *Juneby v. State*, 641 P.2d 821 (Alaska Ct. App. 1982).

131. See *Juneby*, 641 P.2d at 847; see also *supra* text accompanying note 130.

132. 641 P.2d at 835 n.21.

133. For a discussion of the *Chaney* sentencing criteria, see *infra* text accompanying notes 178-81. See also ALASKA STAT. § 12.55.005(2)-(6) (1984), which sets out the factors that a court should consider in imposing a sentence. In its commentary to the Criminal Code the legislature noted that these legislative guidelines are "largely a restatement of the Alaska Supreme Court's interpretation of the mandate of article 1, section 12 of the Alaska Constitution which provides that '[P]enal administration shall be based on the principle of reformation and upon the need for protecting the public.' *State v. Chaney*, 447 P.2d 441 (Alaska 1970)." ALASKA SENATE COMMENTARY, *supra* note 3, at 148. See also *Nell v. State*, 642 P.2d 1361, 1369 (Alaska Ct. App. 1982) (noting that the *Chaney* criteria have essentially been incorporated into the Criminal Code as ALASKA STAT. § 12.55.005).

134. 641 P.2d at 835 & n.21. The court of appeals, however, added the following caution:

When applied to the adjustment of a presumptive sentence, however, the *Chaney* analysis should not be broadened into a consideration of all the circumstances of the offense, as if the sentence were being imposed anew, with-

Turning to Juneby's sentencing proceeding, the court of appeals noted that both the state and Juneby had given the required notice of an intent to raise aggravating and mitigating factors at sentencing.¹³⁵ The trial court had found that three aggravating factors and one mitigating factor were established.¹³⁶ The trial court "then engaged in an extensive consideration of the *Chaney* sentencing criteria,"¹³⁷ after which it followed the recommendation of the presentence report and sentenced Juneby to twenty years in prison.¹³⁸ The court of appeals found this sentencing proceeding improper because the trial court had never referred to the ten year presumptive term that applied to Juneby nor did it explain why the established aggravating and mitigating fac-

out regard for the presumptive term. Instead, consideration of the *Chaney* criteria should focus specifically on the aggravating or mitigating conduct in the particular case. The presumptive term should remain as the starting point of the analysis, and the *Chaney* criteria should be employed for the limited purpose of determining the extent to which the totality of the aggravating and mitigating factors will justify deviation from the presumptive term.

Id. at 835 n.21.

An example of a proper application of the *Chaney* criteria to adjust a presumptive term appears in *Nell*, 642 P.2d at 1371 n.18; see also *Lloyd*, 672 P.2d at 155 (trial court can consider defendant's lack of criminal record in determining extent of deviation from presumptive term once mitigating factors are established since "lack of any prior record is highly relevant to a proper application of the *Chaney* sentencing criteria" (footnote omitted)).

One option available to the trial court is to decide that the particular factors established, after considering the *Chaney* criteria, do not justify adjustment of the presumptive term. See ALASKA STAT. § 12.55.155(c), (d) (1984) (emphasis added), which provides that aggravating and mitigating factors "shall be considered by the sentencing court and may" aggravate or mitigate the presumptive term of imprisonment. In *Juneby*, the court stated that "[t]he mere proof of an aggravating or mitigating factor cannot be deemed sufficient, in and of itself, to justify an increase or decrease of a presumptive term." 641 P.2d at 838; see also *Staal v. State*, 697 P.2d 1050, 1058 (Alaska Ct. App. 1985); *Heathcock*, 670 P.2d at 1158 n.1 (Singleton, J., concurring and dissenting).

135. *Juneby*, 641 P.2d at 836. ALASKA STAT. § 12.55.155(f) (1984) provides that "[i]f the state seeks to establish a factor in aggravation at sentencing or if the defendant seeks to establish a factor in mitigation at sentencing, written notice must be served on the opposing party and filed with the court not later than 10 days before the date set for imposition of sentence." See *Nukapigak v. State*, 645 P.2d 215, 218-19 (Alaska Ct. App. 1982) (presentence report does not provide the required notice); *Hartley v. State*, 653 P.2d 1052, 1056 (Alaska Ct. App. 1982) (trial court may *sua sponte* consider an aggravating factor or mitigating factor in imposing sentence so long as it provides the required notice to the parties); see also *Hesslen*, 667 P.2d at 733 (upholding trial court's *sua sponte* finding of an aggravating factor without notice to the parties when the defendant did not claim surprise or prejudice as a result of the lack of notice).

136. 641 P.2d at 836.

137. *Id.*

138. *Id.* at 836-37.

tors justified an increase in the presumptive term to the maximum sentence of twenty years.¹³⁹ The court of appeals cited the statutory requirement that all findings of aggravating and mitigating factors "must be set out with specificity,"¹⁴⁰ and held that specificity requires

sentencing judges to include, in their remarks on the record, the following specific information: (1) the specific factors in aggravation and in mitigation found to have been established by clear and convincing evidence; (2) the evidence upon which the court has relied in finding the existence of aggravating or mitigating factors; (3) an explanation of the weight given by the court to each aggravating or mitigating factor, and the relative importance of each factor in comparison with other aggravating or mitigating factors established; and (4) an evaluation of the totality of the aggravating and mitigating factors in light of the *Chaney* criteria, as expressed in [ALASKA STAT. §] 12.55.005, in order to determine the amount by which the presumptive sentence for the particular offense should be adjusted.¹⁴¹

Of the many appellate decisions interpreting the presumptive sentencing statutes, *Juneby* is the most significant. Faced with a sentencing system designed to eliminate unjustified sentencing disparity by limiting judicial sentencing discretion,¹⁴² the court of appeals instead found a statutory scheme that still left substantial discretion to a trial court once aggravating or mitigating factors were established.¹⁴³ In calling for a measured and restrained approach to adjustment of presumptive terms,¹⁴⁴ and by requiring trial courts to articulate their reasons for modifying the presumptive terms,¹⁴⁵ the court of appeals insured that the discretion permitted under presumptive sentencing could not be used to subvert the purpose of presumptive sentencing.

III. SENTENCE REVIEW OF FIRST FELONY OFFENDERS NOT COVERED BY PRESUMPTIVE SENTENCING

The legislature in 1978 decided to apply presumptive sentencing only in cases where the defendant was a repeat felony offender.¹⁴⁶ The

139. *Id.* at 837.

140. ALASKA STAT. § 12.55.155(f) (1984).

141. 641 P.2d at 846 (footnote omitted). In subsequent cases brought before the court on appeal, all of which involved sentences imposed before *Juneby* was published, the court of appeals found that the sentencing proceedings failed to comply with the *Juneby* requirements and were thus unlawful. See *Linn*, 658 P.2d at 153; *Fry*, 655 P.2d at 793; *Dunn v. State* 653 P.2d 1071, 1091 (Alaska Ct. App. 1982); *Nukapigak*, 645 P.2d at 218.

142. See *supra* text accompanying note 4.

143. See *supra* notes 117-20 and accompanying text.

144. See *supra* text accompanying note 130.

145. See *supra* text accompanying note 141.

146. See Act of July 17, 1978, ch. 166, 1978 Alaska Sess. Laws 107 (amended 1982 & 1983). The type of prior felony conviction that can be used to establish that the

single exception was for a first felony offender convicted of a class A felony other than manslaughter, who had possessed or used a firearm or caused serious physical injury during the commission of the offense.¹⁴⁷ Except in these limited circumstances, first felony offenders were not covered by the presumptive sentencing system enacted in 1978.¹⁴⁸

At first glance, it might seem surprising that the legislature, which specifically found "that the elimination of unjustified disparity in sentences and the attainment of reasonable uniformity in sentences can best be achieved through a sentencing framework fixed by statute,"¹⁴⁹ would have exempted the vast majority of first felony offenders from presumptive sentencing. On the other hand, the institution of presumptive sentencing was a sharp break from the existing sentencing practices.¹⁵⁰ The legislature was thus somewhat cautious in applying this new sentencing system.

defendant is a repeat felony offender is discussed *supra* text accompanying notes 63-105.

147. Act of July 17, 1978, ch. 166, 1978 Alaska Sess. Laws 107 (1980) (amended 1982). The current version of this section is discussed *infra* at note 154.

148. The court of appeals has rejected and termed as frivolous the contention that the distinction between first and second felony offenders under the presumptive sentencing system violates a second felony offender's constitutional rights of equal protection and due process. *Koteles v. State*, 660 P.2d 1199, 1200 (Alaska Ct. App. 1983).

149. ALASKA STAT. § 12.55.005 (1984).

150. In its report proposing a presumptive sentencing system, the Task Force on Criminal Sentencing observed that:

The dominant sentencing structure currently employed in the United States is based on the indeterminate sentence, so called because it is characterized by wide separations between the legislatively authorized minimum and maximum sentences for generally defined crimes. There is an absence of articulated criteria for determining sentences. Judges are given vast discretion in sentencing offenders, and parole boards have like discretion in releasing them

Generally, there are few if any rules, standards, or guidelines, formally established through mandatory legislation, rule making, or regulation, to guide the exercise of judicial or administrative sentencing discretion. Nor are discretionary decisions on sentencing generally subject to judicial review, except in cases of clear abuse, which reviewing courts are reluctant to find. Similarly, the courts or administrative agencies generally have not articulated guidelines for sentencing typical offenders. Every judge and parole board member has his own notion of what a fairly typical crime "deserves" — and these notions are of course disparate in the extreme.

TASK FORCE REPORT, *supra* note 2, at 11-13.

The task force's characterization of the "dominant sentencing structure in the United States" also describes the indeterminate sentencing system that existed in Alaska before the enactment of the Criminal Code. Surveying the penalty provisions under the former Criminal Code, the Criminal Code Revision Subcommittee highlighted the wide range of judicial sentencing discretion authorized by the legislature.

While many substantive offenses appear to carry mandatory minimum prison terms and fines, [ALASKA STAT. §] 11.05.150 nonetheless permits a

When it decided to exempt most first felony offenders from pre-

judge to suspend all or part of the minimum prison term and impose a lesser sentence, either of a fine or imprisonment or both.

Prison terms in existing law evidence a wide variety of minimum and maximum sentences, ranging from 20 years to life for first degree murder ([ALASKA STAT. §] 11.15.010), 10 years to 20 years for assault on an officer in jail ([ALASKA STAT. §] 11.30.160), to 0 to 25 years for a second conviction on use of firearms during the commission of certain crimes ([ALASKA STAT. §] 11.15.295). Sentences in the range of 1-20, 1-10 and 1-5 appear more frequently than do other combinations but no particular combination of minimum and maximum prison terms and fines is common to title 11. The variety is endless.

ALASKA CRIMINAL CODE REVISION, *supra* note 2, at 4.

In addition to the courts' considerable discretion in imposing sentences, the parole board had substantial flexibility in determining the length of the sentence that a defendant would actually serve. Except when the court required a defendant to serve a specified portion of a sentence before being eligible for parole, the parole board had the authority to release a prisoner at any time after one-third of a sentence had been served. ALASKA STAT. §§ 33.15.080, .180, .230(a) (1982). The parole board frequently exercised its discretionary release authority.

The task force's observations on the lack of sentencing criteria and guidelines limiting judicial sentencing discretion, and the absence of effective judicial review of sentencing practices accurately described the sentencing structure existing in Alaska before 1969. Indeed, until it enacted the Criminal Code, the legislature had never specified the factors that should be considered by a court in imposing sentence. Additionally, in *Bear v. State*, 439 P.2d 432 (Alaska 1968), the Alaska Supreme Court had held that absent statutory authority, it lacked "jurisdiction to review and remand or to review and revise a criminal sentence for abuse of discretion." *Id.* at 435. Absent that authority, the court could not hope to specify the criteria that should be considered at sentencing.

In 1969, the legislature responded to *Bear* by authorizing appellate review of sentences on the ground that the sentence was either too lenient or too excessive. ALASKA STAT. § 12.55.120 (1984). The Alaska Supreme Court articulated guidelines for determining whether a sentence is too strict or too lenient in *State v. Chaney*, 477 P.2d 441 (Alaska 1970). For a discussion of what became known as the *Chaney* criteria, see *infra* text accompanying notes 177-81.

The judicial effort to articulate sentencing criteria and guidelines through appellate review of sentences under *Chaney* was insufficient to address all of the problems inherent in Alaska's indeterminate sentencing system for several reasons. First, since a "clearly mistaken" standard of review applied in sentence appeals, only the most serious sentencing errors could be corrected through the appellate process. Second, while a defendant's successful appeal would result in the imposition of a less severe sentence, if the state brought a successful appeal, and the defendant had not also appealed, the appellate court could only express its disapproval of the sentence. See ALASKA STAT. § 12.55.120(a)-(b) (1984). Thus, while appellate review of sentences offered some protection to a defendant who received an excessive sentence, it offered no protection to the public in insuring that a defendant who had been sentenced too leniently would receive an appropriate sentence. For example, upon application of the *Chaney* criteria, the courts found eight clearly mistaken lenient sentences imposed in prosecutions for crimes under the former Criminal Code. In each case, however, the appellate court was unable to impose an appropriate sentence. See *Putnam v. State*, 629 P.2d 35, 44-45 (Alaska 1980); *State v. Wassilie*, 578 P.2d 971, 972-75 (Alaska 1978); *State v. Abraham*, 566 P.2d 267, 270-71 (Alaska 1977); *State v. Lancaster*, 550

sumptive sentencing, the legislature largely followed the recommendation of the Criminal Code Revision Subcommittee which proposed that presumptive sentencing only apply to repeat felony offenders.¹⁵¹ The subcommittee, however, had been divided on this issue. The competing viewpoints were summarized in its Tentative Draft of the Criminal Code:

A closely divided Subcommittee then agreed to limit the application of presumptive sentencing to those defendants with prior felony convictions. While aware that this decision could result in some continued amount of sentencing disparity, those who favored the majority position were of the opinion that a new program as radical in concept as presumptive sentencing ought to be implemented slowly. They reasoned that if presumptive sentencing presented no problems in its areas of application, then the legislature could always later move to expand its applicability to all offenders.

Those in the minority argued that the concept was not so radical or complex, that it could eliminate a greater amount of potential or real disparity if applied across the board to all felony offenders, and that the failure to apply presumptive sentencing to those with no prior convictions could result in first time felony offenders receiving longer sentences than second or subsequent offenders.¹⁵²

When it adopted the Criminal Code in 1978, the legislature departed from the majority view of the subcommittee by applying presumptive sentencing to a limited category of first felony offenders convicted of class A felonies.¹⁵³ In 1982 the legislature expanded the category of first felony offenders subject to presumptive sentencing to include all first felony offenders convicted of class A felonies.¹⁵⁴ Addi-

P.2d 1257, 1258-60 (Alaska 1976); *State v. Wortham*, 537 P.2d 1117, 1118-19 & n.4 (Alaska 1975); *Chaney*, 477 P.2d at 445 & n.19, 446; *State v. Jensen*, 650 P.2d 422, 423-25 (Alaska Ct. App. 1982); *State v. Doe*, 647 P.2d 1107, 1107-11 (Alaska Ct. App. 1982).

Finally, the process of appellate sentence review failed to correct the disparities that can arise in an indeterminate sentencing system where the trial court is given substantial unguided discretion in imposing sentence. Indeed, little significance was placed on uniformity as a goal of sentence review. *Laquement v. State*, 644 P.2d 856, 861 (Alaska Ct. App. 1982); *Juneby v. State*, 641 P.2d 823, 830 & n.8 (Alaska Ct. App. 1982), *modified*, 665 P.2d 30 (Alaska Ct. App. 1983). Considering that uniformity in sentencing was not an important goal of appellate sentence review and also that only "clearly mistaken" sentencing errors would be corrected on appeal, it is not surprising that the appellate process did not correct the types of sentencing disparities noted by the judicial council, *see supra* notes 6-8 and accompanying text.

151. ALASKA CRIMINAL CODE REVISION, *supra* note 2, at 70.

152. *Id.*

153. *See supra* text accompanying notes 146-47.

154. Act of July 3, 1982, ch. 143, 1982 Alaska Sess. Laws 1 (effective October 1, 1982). The Act provides a five-year presumptive term of imprisonment for a first felony offender convicted of manslaughter. *See id.* § 28, at 24. Any other first felony offender convicted of a class A felony is subject to a five-year presumptive term unless "the defendant possessed a firearm, used a dangerous instrument, or caused serious

tionally, during that same 1982 session, the legislature further expanded the scope of presumptive sentencing to include first felony offenders convicted of class B or class C felonies, provided that the felony was knowingly directed at a limited category of public officials or emergency personnel engaged in the performance of their duties.¹⁵⁵

In support of the view that presumptive sentencing should apply to first felony offenders, a minority on the Criminal Code Revision Subcommittee argued that the failure to do so could result in a first felony offender being sentenced more severely than a second felony offender.¹⁵⁶ Theoretically, at least, this result is possible under the statutory scheme.¹⁵⁷ In *Austin v. State*,¹⁵⁸ the Alaska Court of Appeals considered whether a first felony offender should ever receive a harsher sentence than a second felony offender. The *Austin* decision insured that the sentencing of first felony offenders who were not covered by presumptive sentencing would nevertheless be directly affected by the presumptive sentencing scheme.

Austin was convicted of second degree criminal mischief, a class

physical injury during the commission of the offense," in which case the presumptive term is set at seven years. *Id.* The provisions of section 28 of the Act are codified in ALASKA STAT. § 12.55.125(c)(1)-(2) (1984).

155. Act of July 3, 1983, ch. 92, 1983 Alaska Sess. Laws 1. The Act provides that a first felony offender faces a presumptive term of two years if convicted of a class B felony, and a one year presumptive term if convicted of a class C felony, if the offender "knowingly directed the conduct constituting the offense at a uniformed or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense." *Id.* The provisions of the Act are codified in ALASKA STAT. § 12.55.125(d)(3), .125(e)(3) (1984). Committing a class A felony under these circumstances subjects a first felony offender to the seven year presumptive term of imprisonment specified in ALASKA STAT. § 12.55.125(c)(2) (1984).

As noted, *supra* notes 38 & 60, the legislature failed to make conforming amendments to the statutes restricting judicial discretion to suspend imposition of sentence or to grant probation to first felony offenders convicted of class B or C felonies despite the fact that they were made subject to presumptive sentencing in the 1983 Act. It also did not restrict the parole eligibility of those offenders.

156. *See supra* text accompanying note 152.

157. For example, consider a second felony offender convicted of a class B felony. Assuming that no aggravating or mitigating factors are established, the presumptive term of imprisonment that must be imposed, absent a finding of manifest injustice, is four years. *See* ALASKA STAT. § 12.55.125(d)(1) (1984). On the other hand, consider a first felony offender who commits the same class B felony under identical circumstances as the second felony offender. Since presumptive sentencing does not apply to the first felony offender, *see id.* § 12.55.125(d), the trial court may impose a term of imprisonment up to the statutory maximum sentence of ten years. *See id.* This hypothetical assumes, of course, that the offender does not fall within the category of first felony offenders described in *id.* § 12.55.125(d)(3). *See supra* note 155.

158. 627 P.2d 657 (Alaska Ct. App. 1981) (*per curiam*).

C felony.¹⁵⁹ Since he was a first felony offender, Austin faced a maximum term of imprisonment of five years but was not subject to presumptive sentencing.¹⁶⁰ Austin was sentenced to three years imprisonment and appealed his sentence as excessive on the ground that the presumptive term of imprisonment for a second felony offender convicted of a class C felony was only two years.¹⁶¹ The court of appeals held that Austin's sentence was not excessive. The court stated that

[n]ormally a first offender should receive a more favorable sentence than the presumptive sentence for a second offender. It is clear that this rule should be violated only in an exceptional case. However, it is also clear that the legislature did not intend to say that a first offender could never receive more time to serve than the presumptive sentence for a second offender, since the statute easily could have been written to accomplish that result.¹⁶²

The court of appeals cited several reasons why Austin's situation presented an exceptional case under its new sentencing guideline. Austin's extensive and continuous series of juvenile offenses,¹⁶³ his numerous probation violations,¹⁶⁴ and the aggravated nature of his crime,¹⁶⁵ led the court of appeals to conclude that Austin's three year sentence was appropriate even though it was greater than the presumptive term of imprisonment for a second felony offender convicted of the same felony.¹⁶⁶

The court of appeals made two important clarifications of the *Austin* sentencing guideline in subsequent cases. First, in *Tazruk v. State*,¹⁶⁷ it held that for purposes of comparing the sentence received by a first felony offender with the presumptive sentence for a second felony offender,¹⁶⁸ a court should focus primarily on the period of im-

159. *Id.* at 657. Austin had unlawfully taken a car and caused damages to it in an amount exceeding \$500, thus violating ALASKA STAT. § 11.46.482(a)(4) (1983). 627 P.2d at 657.

160. 627 P.2d at 657. See ALASKA STAT. § 12.55.125(c) (1984).

161. 627 P.2d at 657 & n.2; see ALASKA STAT. § 12.55.125(c)(1) (1984).

162. 627 P.2d at 657-58.

163. *Id.* at 658. The court of appeals observed that "Austin's record is so extensive and involves so many offenses that it is difficult to list them all." *Id.* at 658 n.3.

164. *Id.* at 658.

165. *Id.* The court noted that Austin fled in the stolen car when he was spotted by an officer, crashed into two parked cars, causing considerable damage to all three cars, and then ran away from the collision. *Id.*

166. *Id.*

167. 655 P.2d 788 (Alaska Ct. App. 1982).

168. When it has applied the *Austin* guideline, the court of appeals has compared the actual sentence of the first felony offender to the presumptive term of imprisonment for a second felony offender convicted of the same crime *without* adjusting the presumptive term for mitigating or aggravating factors. See, e.g., *Shaisnikoff v. State*, 690 P.2d 25, 27-28 (Alaska Ct. App. 1984); *Nashoalook v. State*, 663 P.2d 975, 980

prisonment actually imposed on the first felony offender.¹⁶⁹ *Tazruk*, as a first felony offender convicted of a class B felony, had been sentenced to eight years imprisonment but had five years of that sentence suspended.¹⁷⁰ Since the presumptive term for a second felony offender convicted of a class B felony is four years,¹⁷¹ the court of appeals held that *Tazruk's* sentence of three years of actual confinement complied with the requirements of *Austin*.¹⁷²

The second clarification of the *Austin* guideline concerned the standard for determining whether a first felony offender's conduct presented an exceptional case justifying the imposition of a more lengthy sentence than the presumptive sentence for the second felony offender. In *Neakok v. State*,¹⁷³ the court of appeals held that an exceptional case finding "must be justified either by specific aggravating factors under the criminal code, . . . or else by aggravating factors which would . . . justify a repeat offender receiving an enhanced sen-

(Alaska Ct. App. 1983); *Brezenoff v. State*, 658 P.2d 1359, 1362 (Alaska Ct. App. 1983). *But see Hernandez v. State*, 691 P.2d 287, 291 n.1 (Alaska Ct. App. 1984) ("in *Austin v. State*, . . . we held that a first offender should receive a more favorable sentence than a *similarly situated* second offender who was subject to presumptive sentencing." (citation omitted) (emphasis added)).

The court of appeals has conceded that in focusing on the presumptive term of imprisonment for a second felony offender, the *Austin* guideline fails to acknowledge the possibility that the presumptive term might have been reduced because of mitigating factors. See *Langton v. State*, 662 P.2d 954, 962 n.5 (Alaska Ct. App. 1983).

169. 655 P.2d at 789; see also *Pickens v. State*, 675 P.2d 665, 671-72 (Alaska Ct. App. 1984); *Nashoalook*, 663 P.2d at 980.

170. *Tazruk*, 655 P.2d at 789.

171. ALASKA STAT. § 12.55.125(d)(1) (1984).

172. 655 P.2d at 789. In *Brezenoff*, however, the court of appeals restated the *Austin* guideline as clarified in *Tazruk* as follows:

Where the total sentence received by a first offender exceeds the presumptive sentence for a second offender but the period of actual imprisonment is *substantially* less, we will conclude that the total sentence meets the *Austin* requirement of a *substantially* more favorable sentence for the first offender.

658 P.2d at 1362 (emphasis added). Neither *Austin* nor *Tazruk*, however, requires that the term of imprisonment imposed on a first felony offender be *substantially* less than the presumptive sentence for a second felony offender. *Austin*, 627 P.2d at 657-58; *Tazruk*, 655 P.2d at 789. *Austin* merely required that the sentence normally be "more favorable" for the first offender, see *supra* text accompanying note 162, while in *Tazruk* the court held that the sentence for a first felony offender complied with *Austin* because it was "less" than the presumptive term of imprisonment for a second offender. *Tazruk*, 655 P.2d at 789.

The courts have generally not used the "substantially less" language in subsequent applications of *Austin*. See, e.g., *Short v. State*, 676 P.2d 612, 614 (Alaska Ct. App. 1984); *Nashoalook*, 663 P.2d at 980. *But see Shaisnikoff*, 690 P.2d at 28 (unsuspended sentence for a first felony offender "should be substantially more favorable" than presumptive term for second felony offender).

173. 653 P.2d 658 (Alaska Ct. App. 1982).

tence by a three-judge panel.¹⁷⁴

Alaska's appellate courts have had many opportunities to review a sentence for a first felony offender that was more severe than the presumptive sentence for a second felony offender. In some cases, the appellate court explicitly determined whether aggravating factors or extraordinary circumstances were present which rendered the case exceptional under *Neakok* and *Austin*.¹⁷⁵ In other cases, the appellate court simply cited *Austin* and decided whether the case was exceptional without specifically finding that aggravating factors were present or that the case could have been sent to the three-judge panel if presumptive sentencing had applied to that case.¹⁷⁶

The inconsistent application of the *Neakok* exceptional case standard may be explained by the fact that the "[s]entencing of first felony offenders to whom presumptive sentencing does not directly apply must be accomplished, primarily, by a careful balancing of the sentencing goals set out in *State v. Chaney*."¹⁷⁷ In *Chaney*,¹⁷⁸ the court adopted a "clearly mistaken" standard for determining whether an im-

174. *Id.* at 662 (citation omitted). Actually, the court of appeals first applied this standard less than two weeks before *Neakok* was published. *Sears v. State*, 653 P.2d 349, 350 (Alaska Ct. App. 1982). However, in *Sears*, the court of appeals did not state the exceptional case standard with the same clarity as it did two weeks later in *Neakok*.

If the *Neakok* clarification of exceptional cases under the *Austin* guideline were applied to the facts in *Austin*, the particularly aggravated nature of *Austin's* crime, see *supra* note 165, most likely would have established the aggravating factor that "the conduct constituting the offense was among the most serious conduct included in the definition of the offense." ALASKA STAT. § 12.55.155(c)(10) (1984). Additionally, the court of appeals has noted that "[i]mplicit in our decision in *Austin* was the recognition that a particularly bad juvenile or misdemeanor record characterized by offenses similar to the offense currently under consideration might warrant referral to a three-judge panel." *Erhart v. State*, 656 P.2d 1199, 1201 (Alaska Ct. App. 1982).

175. See, e.g., *Shatsnikoff*, 690 P.2d at 27; *Goenett v. State*, 695 P.2d 243, 244-45 (Alaska Ct. App. 1985); *Lausterer v. State*, 693 P.2d 887, 890-92 (Alaska Ct. App. 1985); *Theodore v. State*, 692 P.2d 987, 988 (Alaska Ct. App. 1985); *Smith v. State*, 682 P.2d 1125, 1126-27 (Alaska Ct. App. 1984); *Maul v. State*, 670 P.2d 708, 710-11 (Alaska Ct. App. 1983); *Willard v. State*, 662 P.2d 971, 979-80 (Alaska Ct. App. 1983); *Brezonoff*, 658 P.2d at 1361-63; *Pectook v. State*, 655 P.2d 1308, 1310-11 (Alaska Ct. App. 1982).

176. See, e.g., *Karr v. State*, 686 P.2d 1192, 1195-96 (Alaska 1984); *Jacko v. State*, 689 P.2d 506, 507 (Alaska Ct. App. 1984); *Mathison v. State*, 687 P.2d 930, 931 (Alaska Ct. App. 1984); *Winslow v. State*, 685 P.2d 1273, 1275 (Alaska Ct. App. 1984).

177. *Pectook*, 655 P.2d at 1310; see also *Karr*, 686 P.2d at 1194 ("The standards under which sentences are to be reviewed were established in *State v. Chaney*." (citation omitted)). But see *Maul*, 670 P.2d at 711-12 (in light of "just deserts" theory of punishment adopted by the Criminal Code, "inordinate emphasis must not be placed on predictions of possible future misconduct" in imposing sentence).

178. 477 P.2d 441 (Alaska 1970).

posed sentence was either too excessive or too lenient.¹⁷⁹ The court also articulated sentencing goals to be used in evaluating whether a sentence was clearly mistaken.¹⁸⁰ These goals became known as the *Chaney* criteria. The court stated that:

[u]nder Alaska's Constitution, the principles of reformation and necessity of protecting the public constitute the touchstones of penal administration. Multiple goals are encompassed within these broad constitutional standards. Within the ambit of this constitutional phraseology are found the objectives of rehabilitation of the offender into a noncriminal member of society, isolation of the offender from society to prevent criminal conduct during the period of confinement, deterrence of the offender himself after his release from confinement or other penological treatment, as well as deterrence of other members of the community who might possess tendencies toward criminal conduct similar to that of the offender, and community condemnation of the individual offender, or in other words, reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves.¹⁸¹

While the *Austin* guideline has proven to be a useful device to alert an appellate court to sentences which may be clearly mistaken under the *Chaney* criteria,¹⁸² compliance with the *Austin* guideline does not automatically guarantee that the sentence will be affirmed on appeal.¹⁸³ On the other hand, the court of appeals has never upheld a sentence for a first felony offender that violated the *Austin* guideline as clarified by *Neakok* and *Tuzruk*.¹⁸⁴ Consequently, it is necessary to consider whether the *Austin* guideline is an appropriate standard to highlight sentences that may be excessive under the *Chaney* criteria.

While comparing nonpresumptive sentences imposed on first felony offenders with presumptive sentences for second felony offenders is useful to highlight excessive sentences, the *Austin* guideline fails to take one significant factor into consideration: defendants subject to presumptive sentencing are not eligible for parole while other defend-

179. *Id.* at 443-44.

180. *Id.* at 443.

181. *Id.* at 444 (footnotes omitted).

182. See, e.g., *Kimbrell v. State*, 647 P.2d 618, 622 (Alaska Ct. App. 1982).

183. See, e.g., *Maul*, 670 P.2d at 711 (*Austin* guideline satisfied but sentence nevertheless held to be clearly mistaken and vacated); *Hansen v. State*, 657 P.2d 862, 864 (Alaska Ct. App. 1983) (sentence clearly mistaken despite compliance with *Austin* guideline).

184. In *Erhart*, 656 P.2d at 1201, the court of appeals noted that it had never upheld a term of imprisonment for a first felony offender that exceeded the presumptive term of imprisonment for a second felony offender absent a finding of aggravating factors or extraordinary circumstances. Since *Erhart*, the court of appeals has vacated as excessive every sentence which it has found to be in violation of the *Austin* guideline as clarified by *Neakok*. See, e.g., *Shatsnikoff*, 690 P.2d at 27-28; *Jacko*, 689 P.2d at 507.

ants may generally be paroled after serving one-third of their sentences.¹⁸⁵ Indeed, between 1970 and 1979, approximately two-thirds of felony offenders not sentenced to life terms were released by the board of parole before the expiration of their sentences, including eighty percent of those prisoners sentenced to terms of three years or more. The average prisoner released on parole during that period served slightly more than a third of the sentence imposed by the trial court.¹⁸⁶

The courts' failure to consider parole eligibility in applying the *Austin* guideline is surprising since the court of appeals has acknowledged that "a prison sentence imposed prior to enactment of the [Criminal Code] is by no means equivalent to a sentence presumptively imposed."¹⁸⁷ Particularly in the case of "lengthy" sentences,¹⁸⁸ the court of appeals noted that a sentence imposed presumptively "must be regarded as significantly more severe than [the identical sentence] imposed under prior law, when early parole in cases involving lengthy sentences was the order of the day."¹⁸⁹ Since first felony offenders who are exempt from presumptive sentencing have the same parole eligibility as defendants sentenced under prior law,¹⁹⁰ these observations by the court of appeals appear equally applicable in comparing presumptive sentences with nonpresumptive sentences.

Consider, for example, a four year sentence for the same crime committed under identical circumstances imposed on both a first felony offender not subject to presumptive sentencing and a second felony offender sentenced presumptively. Assume further that no aggravating factors or extraordinary circumstances are present in either case. While the second felony offender is required to serve the entire four year sentence, minus a maximum good conduct credit of one-fourth of the sentence imposed,¹⁹¹ the first felony offender is eligible for release by the parole board after serving sixteen months, or one-third of the four year sentence.¹⁹² Although the court of appeals referred to a lengthy sentence imposed under presumptive sentencing as "significantly more severe" than the same sentence imposed on an

185. See ALASKA STAT. §§ 33.15.180(a), .080 (1982); see also *supra* text accompanying note 60.

186. *Juneby*, 641 P.2d at 845 n.37 (citing ALASKA BOARD OF PAROLE, PAROLE GUIDELINES FOR ALASKA, SUPPLEMENTAL REPORT, TIME SERVED COMPONENT (September 1980)).

187. *Juneby*, 641 P.2d at 845.

188. Though the court of appeals did not specifically define what constitutes a lengthy sentence, it cited parole statistics which equated "long terms of incarceration" with sentences in excess of three years. *Id.* at 845 n.37.

189. *Id.* at 845 (footnote omitted).

190. See ALASKA STAT. § 33.15.180 (1982).

191. See *supra* text accompanying notes 60-61.

192. See ALASKA STAT. § 33.15.080 (1982).

offender who is eligible for parole,¹⁹³ the four year sentence imposed on the first felony offender violates the *Austin* guideline as currently applied because it is not more favorable in length.¹⁹⁴ More significantly, the court of appeals has vacated, as excessive, every sentence which it has found to violate the *Austin* guideline.¹⁹⁵

The consequences of failing to consider parole eligibility in applying the *Austin* guideline were highlighted recently in *Shaisnikoff v. State*.¹⁹⁶ Shaisnikoff was convicted of criminally negligent homicide committed during a drunken bar room fight and was sentenced to five years imprisonment with three years suspended.¹⁹⁷ The presumptive term of imprisonment for a second felony offender convicted of criminally negligent homicide is two years.¹⁹⁸ No aggravating factors or extraordinary circumstances were established at Shaisnikoff's sentencing hearing.¹⁹⁹ The court of appeals held that Shaisnikoff's sentence violated the *Austin* guideline because it was less favorable to him than the presumptive sentence for a second felony offender and because Shaisnikoff's situation did not present an exceptional case.²⁰⁰ The court then found the sentence to be clearly mistaken and ordered that

193. See *supra* text accompanying note 189.

194. This sentence would violate the *Austin* guideline since no aggravating factors or extraordinary circumstances had been established and the term of imprisonment the first felony offender would be required to serve is not more favorable than the presumptive sentence for the second felony offender. See *supra* text accompanying notes 162-76.

The court of appeals has recognized that a sentence imposed on a second felony offender subject to presumptive sentencing is not the equivalent of an identical sentence imposed on a first felony offender exempt from presumptive sentencing. It has not, however, taken this recognition into account in applying the *Austin* guideline. See *DeMan v. State*, 677 P.2d 903 (Alaska Ct. App. 1984). In *DeMan*, the court of appeals noted in applying the *Austin* guideline that the defendant, a first felony offender, received a sentence equal to the presumptive sentence for a second felony offender. *Id.* at 912. In the accompanying footnote, the court of appeals acknowledged that the defendant's sentence is "not the precise equivalent of" the presumptive sentence for a second felony offender since if the defendant had been subject "to presumptive sentencing, he would have been ineligible for parole." *Id.* at 912 n.5. The sentence was upheld because the defendant's situation presented an exceptional case. See also *Gibbs v. State*, 676 P.2d 606, 608 (Alaska Ct. App. 1984) (parole eligibility taken into consideration in determining whether sentence for first felony offender, which complied with *Austin*, was excessive); *Ecker v. State*, 656 P.2d 577, 578 (Alaska Ct. App. 1982) (nonpresumptive sentence is "potentially more lenient" than identical sentence imposed presumptively because of parole eligibility).

195. See *supra* notes 183-84 and accompanying text.

196. 690 P.2d 25 (Alaska Ct. App. 1984).

197. *Id.* at 26.

198. Criminally negligent homicide is a class C felony. ALASKA STAT. § 11.41.130(b) (1983). The presumptive term for a second felony offender convicted of a class C felony appears in ALASKA STAT. § 12.55.125(e)(1) (1984).

199. 690 P.2d at 27.

200. *Id.* at 27-28.

on remand it be reduced to three years imprisonment with two years of that suspended,²⁰¹ thus requiring Shaisnikoff to serve only one year of imprisonment.

To the extent that the goal of the court of appeals is to insure an appropriate relationship between sentences for first felony offenders not subject to presumptive sentencing and presumptive sentences for second felony offenders, decisions such as *Shaisnikoff* are inconsistent with that goal. Not only did the court of appeals reduce Shaisnikoff's initial sentence to one-half the presumptive term for a second felony offender, but it failed to consider that Shaisnikoff would be eligible for parole after serving four months of his sentence. Acknowledging these circumstances, it is difficult to understand why the sentence imposed by the trial court was clearly mistaken and why the sentence imposed by the court of appeals was appropriate. Indeed, the only justification the court of appeals cited for its sentence reduction was that Shaisnikoff's sentence violated the *Austin* guideline.²⁰²

Recognizing the effect of parole eligibility on the actual time served by an offender raises questions concerning the appropriateness of the court of appeals' reliance upon the *Austin* guideline as determining, at least in practice, when a sentence is excessive under *Chaney*.²⁰³ Of course, the courts could consider parole eligibility when applying the *Austin* guideline. This approach, however, would be subject to the criticism that, despite statistical data strongly indicating that eligible offenders are likely to receive an early parole,²⁰⁴ a case-by-case assumption of parole eligibility in applying the *Austin* guideline would render the comparisons speculative.

A more direct approach to ensure an appropriate relationship between sentences imposed on first and second felony offenders is to apply presumptive sentencing to all felony offenders. This uniform approach would eliminate the need for an increasingly complex and sometimes inaccurate comparison of sentence lengths imposed on defendants sentenced under two different sentencing systems. Moreover, applying presumptive sentencing to all felony offenders would allow courts to focus on the *Chaney* criteria in making appropriate adjustments of presumptive terms for aggravating and mitigating factors.

IV. CONCLUSION

The 1978 revision of the state's sentencing laws attempted to eliminate unjustified disparity in sentencing.²⁰⁵ This purpose has been

201. *Id.*

202. *Id.*

203. See *supra* note 183 and accompanying text.

204. See *supra* note 186 and accompanying text.

205. See *supra* text accompanying note 4.

well served by legislative amendment and judicial interpretation of the presumptive sentencing statutes. The legislature has gradually increased the number of crimes and offenders subject to presumptive sentencing²⁰⁶ and has added to the list of the aggravating and mitigating factors that can be considered by a trial court in adjusting a presumptive term of imprisonment.²⁰⁷ These amendments guide judicial sentencing discretion in a greater number of cases and insure that appropriate factors are taken into account during sentencing. At the same time, the expansion of presumptive sentencing reduced the possibility that improper sentencing considerations, such as the race of the defendant²⁰⁸ or the sentencing attitude of a particular judge,²⁰⁹ will affect the sentence imposed.²¹⁰ Appellate interpretations of ambiguous provisions in the presumptive sentencing statutes consistently rec-

206. See *supra* text accompanying notes 153-55.

207. See *supra* text accompanying notes 111-14.

208. See *supra* note 6 and accompanying text.

209. See *supra* text accompanying note 7.

210. *Langton v. State*, 662 P.2d 954 (Alaska Ct. App. 1983), provides a graphic illustration of the extreme sentence variations that can occur when defendants convicted of the same crime, committed under essentially identical circumstances, are not sentenced under the presumptive sentencing system. *Langton* involved three separate sentence appeals which were consolidated for review. *Id.* at 955-56. Each defendant had been convicted of a sexual assault in the first degree on a young child under former ALASKA STAT. § 11.41.410(a)(3) (repealed 1983). *Id.* at 955. At the time the offenses were committed, sexual assault in the first degree was a class A felony. Offenders who had not previously been convicted of a felony were exempt from presumptive sentencing and faced a sentence that could be as high as twenty years imprisonment. *Id.* at 961.

The three *Langton* defendants, *Langton*, *Doe*, and *Joe*, were first felony offenders and therefore not covered by presumptive sentencing. *Id.* at 955. Each was sentenced by a different judge. *Id.* *Langton* was sentenced to ten years imprisonment with four years suspended and appealed the sentence as excessive. *Id.* *Doe* was not required to serve a single day of imprisonment and the state appealed the sentence as too lenient. *Id.* *Joe* was required to serve a sentence of twenty years imprisonment and appealed the sentence as excessive. *Id.*

Langton had pleaded guilty to two counts of sexual assault in the first degree and was sentenced to two concurrent ten-year terms of imprisonment with four years of each term suspended. *Id.* at 955. The court of appeals affirmed *Langton's* sentence, characterizing *Langton's* conduct as "the most serious" conduct included in the definition of the offense, in light of his history of sexual abuse, his disregard of the court order to avoid contact with the victim, and his unwillingness to seek counseling. *Id.* at 956. The court of appeals concluded that the circumstances of the case justified a sentence of at least six years imprisonment. *Id.*

Unlike *Langton's* conduct, *Doe's* conduct appeared to be an isolated event. *Id.* at 957. After pleading guilty to the assault of his sons, *Doe* was sentenced to five years imprisonment, all of which was suspended. *Id.* *Doe* was placed on probation and ordered to seek psychological counseling. *Id.* at 955. The trial court justified this sentence by characterizing the assault as an isolated incident brought on by a stressful marital relationship, noting *Doe's* history as a steady worker and a good provider. *Id.* at 957. The court of appeals disapproved of *Doe's* sentence as being too lenient, but

ognize the legislature's purpose in enacting presumptive sentencing and attempt to apply the statutes to further the legislative goal of eliminating unjustified sentencing disparity.²¹¹

In light of this background, presumptive sentencing may eventually apply to all felony offenders. Indeed, of the fourteen states which have adopted presumptive sentencing systems,²¹² Alaska is unique in exempting from presumptive sentencing first felony offenders who would be subject to presumptive sentencing if they were repeat felony offenders.²¹³ Including all felony offenders under presumptive sen-

lacked the ability to increase the sentence. *Id.* at 959; see also *supra* note 158 (explaining the court of appeals' inability to increase sentences it finds too lenient).

Like Doe's conduct, Joe's sexual assault was also an apparently isolated event. *Id.* at 961. Like Doe, Joe also had a good employment history and, additionally, had a stable relationship with his wife and three children. *Id.* at 961. The judge who sentenced Joe, however, characterized him as a "dangerous offender" and sentenced him to the statutory maximum sentence of twenty years. *Id.* The court of appeals held that his sentence was excessive. *Id.* at 955. Citing the isolated nature of Joe's act, the court of appeals rejected the characterization of Joe as a "dangerous offender." *Id.* at 961. Holding that Joe should be sentenced to no more than ten years imprisonment, the court of appeals remanded the case for resentencing. *Id.*

Judge Singleton's concluding paragraphs in *Langton* concisely summarized the three disparate sentences imposed on each defendant and the unsatisfactory modifications of the sentences that the court of appeals was authorized to effect:

Langton, Doe and Joe were convicted of sexual assaults of children. Of the three, Langton was the worst offender, since he committed many separate assaults over a long period of time. Doe assaulted two children on one occasion and Joe committed a single assault. In all other respects, the offenses are virtually indistinguishable. In a rational system seeking to eliminate disparity and attain reasonable uniformity, Langton should have received the most severe sentence, and Doe and Joe similar and substantially less severe sentences. In actuality, Langton received a much less severe sentence than Joe, and Doe received no period of imprisonment at all. While we have modified two of the sentences, the modified sentences still leave substantial disparity in place. This unsatisfactory result is a necessary concomitant of the substantial trial court discretion which still exists for first-felony offenders where the ultimate decision must rest upon an application of the clearly mistaken standard.

Id. at 962-63 (footnotes omitted) (emphasis added). Subsequent to the sentencing in the *Langton* cases, the legislature applied presumptive sentencing to all offenders convicted of sexual assault in the first degree. See ALASKA STAT. § 12.55.125(i) (1984); *Langton*, 662 P.2d at 956 n.3.

211. See, e.g., *Maldonado v. State*, 676 P.2d 1093, 1094 (Alaska Ct. App. 1984) ("A major purpose in enacting the revised Criminal Code was to eliminate unjustified disparity in sentencing."); *Juneby v. State*, 641 P.2d 823, 830 n.11 (Alaska Ct. App. 1982) ("[I]t is manifest that the legislature's focus on eliminating disparity and achieving uniformity in sentences was calculated to significantly restrict the trial court's traditionally broad sentencing discretion."), *modified*, 665 P.2d 30 (Alaska Ct. App. 1983).

212. See *supra* note 2.

213. See ARIZ. REV. STAT. ANN. § 13-701 (1978); CAL. PENAL CODE § 1170(a)(2) (West. Supp. 1985); COLO. REV. STAT. § 18-1-105(1)(a)(II)-(b) (Supp. 1984); FLA.

tencing will complete the effort begun in 1978 to establish a rational, predictable, and uniform sentencing system in Alaska.

STAT. ANN. § 921.001(4)(a) (West Supp. 1984); ILL. ANN. STAT. ch. 38, § 1005-8-1(a) (Smith-Hurd 1982); IND. CODE ANN. §§ 35-50-2-4 to -7 (Burns 1979 & Supp. 1985); MINN. STAT. ANN. § 24 (West Supp. 1985); N.J. STAT. ANN. § 2C:44-1(f) (West Supp. 1985-1986); N.M. STAT. ANN. § 31-18-15 (1981); N.C. GEN. STAT. § 15A-1340.4 (1983); 42 PA. CONS. STAT. ANN. § 9721 (Purdon 1982); S.C. CODE ANN. § 24-27-30(1) (Law. Co-op. Supp. 1984); WASH. REV. CODE ANN. §§ 9.94A.120, .310 (Supp. 1985).

Chapter 9. "Tightening up" the Harrison Act

Dr. Stanley Yolles, then director of the National Institute of Mental Health, testified against mandatory minimum sentences before the House Select Committee on Crime in the fall of 1969:

This type of law has no place in a system devised to control an illness. It has no place being used for individuals who are addicted to drugs.

This type of law angers us as doctors, because it should not apply to people who are sick. It destroys hope on the part of the person sentenced—hope of help, hope for starting a fresh life. It's totally contradictory to the whole concept of medicine. A prison experience is often psychologically shattering. The young person is exposed to sexual assault. He may for the first time in his life learn criminal ways. ~~Such mandatory sentences destroy the prospects of rehabilitation.~~

... I feel that judges have to be free to deal with violators of drug laws as individuals, not as a class of criminals. In my field, treatment is always tailored to the individual's needs. I feel the same should be true in dealing, under the law, with addicts and drug abusers. Why on earth must we class the street addict, who sells to support his habit, with the big operator who pushes the narcotics wholesale? The former is a sick person who needs medical help and rehabilitation. The latter is a criminal who is living off the misery of the addicts. Many laws on the books don't allow for this distinction.

As a result, what we have in our prisons and Federal hospitals, like Lexington, are many young people serving *irrationally* long sentences, some up to 20 years. In no other field has there been such a punitive approach. And let's not forget this is an illness mainly of young people—the very age group with the highest potential for rehabilitation, yes, and cure.

These laws came about by sometimes well-intentioned people who placed too much confidence in the principle of deterrents. But if mandatory penalties were that effective, what is the rationale for limiting them only to drug abuse offenders? Why not extend them to thieves, burglars, murderers? Even murderers with life sentences can come up for parole after about seven years.⁶

Could this apply in
OUR STATE?

Drug addict

Just why the alcoholic is tolerated as a sick man while the opiate addict is persecuted as a criminal is hard to understand. There is, in the present attitude of society in the United States toward opiate addicts, much the same hysteria, superstition, and plain cruelty as characterized the attitude of our forefathers toward witches. Legislation reflects this cruelty and superstition. Prison sentences up to 40 years are now being imposed and the death sentence has been introduced. Perhaps one should feel thankful that the legislators have not yet reached the point of burning addicts alive. If one insists on relying on terrorism to cope with a problem which is essentially medical one may as well be logical and "go the whole hog."¹⁹

CHANGE TO SCK OFFENDER

pansion for more prison facilities in the future. That's a hazardous waste.

1. The current presumptive sentencing statute as applicable to first offenders is in direct opposition to the Alaska constitutional requirement which commands that penal administration be based upon the principle of reformation.

2. The current presumptive statute discriminates against first-time offenders by eliminating parole eligibility, also denying the opportunity for rehabilitation, if rehabilitation exists.

3. For 20 years the state of Alaska depended on judicial sentencing, this gave the judge the discretion upon sentencing, especially in the case of the first offender, who by the very nature of being first offenders are the prime target of rehabilitation, again, if rehabilitation exists.

4. If our judges were to be elected by the people of Alaska rather than appointed by the governor, I believe we could have a more sound and fair sentencing for offenders who break the law.

I stand behind House Bill 554 because it is a beginning in the right direction of reform of the presumptive sentencing. But if the lawmakers are serious about wanting to relieve overcrowding in our prison system and save the state \$140 million, then, simply abolish the hazardous waste, and that's the current presumptive sentencing statute.

Respectfully,
Frank Turney
Prisoner Advocate

Presumptive sentencing

Feb. 24, 1986
P.O. Box 83997
Fairbanks, AK 99709

To the Editor:

House Bill 554, an act relating to sentencing that would change the presumptive sentencing law, has been introduced by House Majority leader Don Clocksin, D-Anchorage.

Hearings were scheduled for this bill Friday, Feb. 21, at the Legislative Information Office.

A handful of Fairbanks citizens were ready to testify, but instead listened to others testify throughout Alaska. Because of lack of time, Fairbanks will have its chance next in line.

It was somewhat ironic that two hearings were being heard at the same time that day. The other hearing was an overview about hazardous waste. It was ironic because my testimony was all about "hazardous waste," the presumptive sentencing law.

The Department of Corrections and lawmakers have anticipated that it will cost \$140 million for ex-

DAILY NEWS MINN

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