

ALASKA LEGISLATURE COMMITTEE FILES 1985-1988 80/2

4032 JUD MAGISTRATES / CONDUCT - PRESUMPTIVE SENTENCING 908

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

JAMES HOLLOWAY, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
HONORABLE JUDGE S. J. BUCKALEW; )  
HONORABLE JUDGE RALPH E. MOODY; )  
and STATE OF ALASKA, )  
 )  
Defendants. )  
 )

RECEIVED

1983

Clerk of the Trial Courts  
3rd Judicial District

No. 3AN-77-8145 Civ.

STATEMENT OF GENUINE ISSUES OF MATERIAL FACT

The following issues of fact are genuine and should be litigated in this action:

1. Did Holloway waive his right to any hearing?
2. Has Holloway, in fact, been stigmatized by his dismissal?
3. Has Holloway been barred from any other public employment in the State of Alaska?
4. Has Holloway's good name, reputation, honor or integrity been impeached by reason of his dismissal?
5. Has Holloway's dismissal affected his future employment prospects?

DATED this 30th day of August, 1983, at Anchorage, Alaska.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 30th day of August, 1983  
a true and correct copy of Stetler  
was served by mail on the  
following attorneys: Stetler and

By Franklin J. Gussakov

NORMAN C. GORSUCH  
ATTORNEY GENERAL

By: Madeleine R. Levy  
Assistant Attorney General

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Clerk of the Trial Courts  
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ORDER

The Court, having considered plaintiff's motion for partial summary judgment and defendants' opposition thereto, along with any reply, finds that there are genuine issues of material fact and that plaintiff is not entitled to judgment as a matter of law.

Furthermore, the Court finds that, as a matter of law, Holloway was not entitled to a pre-termination hearing and that his dismissal was valid and not in violation of due process.

The plaintiff's motion for partial summary judgment is, therefore, denied and defendants' cross-motion for summary judgment is hereby granted.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 20<sup>th</sup> day of August 1983 a true and correct copy of stated was served by mail on the following attorneys: Kullant  
By John M. Quinn

\_\_\_\_\_  
Superior Court Judge

\_\_\_\_\_  
Date

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RECEIVED  
Department of Law  
JUN 22 1983  
Office of the Attorney General  
Anchorage Branch  
Anchorage, Alaska

No. 3AN-77-8145 CIV

MOTION FOR PARTIAL SUMMARY JUDGMENT


Plaintiff respectfully moves this court for partial summary judgment as follows:

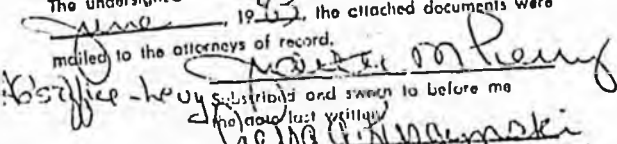
1. A judgment declaring that his termination as a magistrate was null and void in the absence of a hearing comporting with due process requirements; and
2. An order requiring that defendants afford him a hearing with respect to said termination.

This motion is based on the annexed memorandum and the pleadings and affidavits and other documents on file in this case.

DATED this 20th day of June, 1983, at Anchorage, Alaska.

HEDLAND, FLEISCHER & FRIEDMAN  
Attorneys for Plaintiff

By   
John S. Hedland

The undersigned hereby swears that on the 20 day of June, 1983, the attached documents were mailed to the attorneys of record.  
  
Notary Public  
My Commission Expires 07-22/84

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Plaintiff, )  
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No. 3AN-77-8145 CIV

MEMORANDUM IN SUPPORT OF MOTION FOR  
PARTIAL SUMMARY JUDGMENT

I. Background.

Article IV, Section 4, of the Alaska Constitution provides that:

Judges of other courts shall be selected . . . for terms . . . prescribed by law.  
. . .

A.S. 22.15.170(c) provides as follows:

Each magistrate serves at the pleasure of the presiding judge of the superior court in the judicial district for which appointed.

In earlier proceedings in this case, Judge Rowland initially held that plaintiff was a "judge" within the meaning of the constitutional provision, that service at the pleasure of a presiding judge did not constitute a term prescribed by law, and that A.S. 22.15.170(c) was unconstitutional. The Supreme Court upheld Judge Rowland's determination that plaintiff was a "judge" but held, in a 3-2 decision, that service at the pleasure of the presiding Superior Court Judge was a term prescribed by law. It therefore upheld the facial constitutionality of A.S. 22.15.170(c).

Plaintiff argued that service at the pleasure of a presiding judge did not comport with the constitutional command that a term be prescribed by law because, among other things, it

1 would interfere with the independence of the judiciary. In  
2 dealing with the questions of whether service at the pleasure  
3 constituted a term prescribed by law, and the judicial independ-  
4 ence question, the majority opinion of the Supreme Court made it  
5 clear that, although it was upholding the constitutionality of  
6 the statute on its face, it was doing so because of an implicit  
7 restriction on the presiding judge's "pleasure" that in effect  
8 limited his discretion to dismiss a magistrate to cases of abuse  
9 by the magistrate rendering him unfit to serve. In other words,  
10 it did not reduce a magistrate to the status of a political  
11 appointee serving "at the pleasure" of a superior, who is subject  
12 to dismissal on the basis of whim or caprice, for a good reason, a  
13 bad reason, or no reason whatsoever.

14           Only by such a construction could the antithetical notions  
15 of service at the pleasure and legislative prescription of a term  
16 be harmonized.

17           The court stated as follows:

18           Providing that magistrates serve "at the  
19 pleasure of the presiding judge of the  
20 superior court" is clearly designed to  
21 achieve an on-going guaranty of accounta-  
22 bility. . . . It is apparent that the broad  
23 power vested in the presiding superior court  
24 judge to dismiss magistrates is intended  
25 to provide an unencumbered means of quickly  
26 remedying any situation in which judicial  
27 unfitness is impairing the administration  
28 of justice in rural Alaska. With respect  
29 then to the accountability demanded in the  
30 requirement that the legislature designate  
31 the 'terms' of judges, service 'at the  
32 pleasure of' constitutes a 'term.'

33           Buckalew v. Holloway, 604 P.2d 240, 244-45 (Alaska 1979). In a  
34 footnote, the court also stated as follows:

          We reject the appellee's suggestion that  
          since 'service at the pleasure of' the  
          superior court does not require a peri-  
          odic accounting, it may result in a  
          lifetime appointment without review of  
          a magistrate's performance. The pos-  
          sibility that the presiding superior  
          court judge will simply ignore the super-

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34 MEMORANDUM

1 visory duty implicitly imposed by A.S.  
2 22.15.170(c) is too remote to invalidate  
3 the scheme per se. (Second emphasis  
4 added)

5 604 P.2d at 245, n. 24. Thus, the court made it clear that in  
6 upholding a statute, it was doing no more than upholding it on  
7 its face, i.e., per se, not with respect to every exercise of a  
8 presiding judge's "pleasure." Likewise, the court made it clear  
9 that, not only was the intent of the statute to provide a check  
10 against judicial unfitness, there was an implicit (although not  
11 express) obligation under the statute that the presiding judge  
12 exercise supervisory responsibilities to assure judicial fitness  
13 of magistrates to further the statute's intent. If the statute  
14 implies a duty in the presiding judge to exercise his power of  
15 dismissal to insure judicial fitness, it just as surely implies  
16 an obligation on his part not to exercise it to remove a magis-  
17 trate for reasons that are insubstantial or do not relate to in-  
18 judicial fitness.

18 The court went on to state as follows:

19 We recognize of course that a position  
20 of authority may be abused; however,  
21 the mere potential for abuse does not  
22 in this case render the statutory  
23 mechanism per se unconstitutional.  
24 Magistrates dismissed pursuant to  
25 A.S. 22.15.170(c) are not necessarily  
26 without legal recourse. Abuses in  
27 particular cases may still be subject  
28 to the dictates of other constitutional  
29 commands, such as due process, and in  
30 this case to the rule making and super-  
31 visory powers of this board. We  
32 presume that these issues will be  
33 explored at trial.

34 604 P.2d at 246 (footnote omitted).

Plaintiff respectfully submits that in upholding the  
statute, the court effectively construed it to impose an implied  
duty on the part of the presiding judge to exercise his power of  
dismissal in a manner that would remedy judicial unfitness, and  
to prohibit its exercise in situations where judicial unfitness

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MEMORANDUM

1 does not warrant it. The reference to legal recourse against  
2 abuse of the power of dismissal would otherwise make no sense;  
3 there is no such thing as an "abuse of pleasure."

4 The statute in question, as construed by the Supreme  
5 Court in the prior opinion in this case, clearly created in Judge  
6 Holloway a legitimate expectation of continued employment for so  
7 long as his conduct did not amount to judicial unfitness render-  
8 ing him subject to dismissal by the presiding judge. Moreover,  
9 the Supreme Court's clear holding that the statutory power of a  
10 presiding judge to dismiss a magistrate was intended to be used,  
11 and impliedly restricted to situations, where judicial unfitness  
12 demanded its exercise, means that stigma attaches, ipso facto, to  
13 his dismissal.

14 II. By summarily dismissing Holloway without hearing,  
15 defendants deprived him of property and liberty  
without due process of law.

16 Both the State and Federal constitutions provide that  
17 "no person shall be deprived of life, liberty, or property,  
18 without due process of law." U. S. Constitution, Amendment XIV;  
19 Alaska Constitution, Article I, Section 7. Increasingly, both  
20 State and Federal courts have recognized that due process rights  
21 attach to various dismissals from governmental employment. As  
22 the Alaska Supreme Court stated in Nichols v. Eckert, 504 P.2d  
23 1359, 1363 (Alaska 1973),

24 Although courts in the past have fre-  
25 quently held that public employees have  
26 no absolute right to a hearing on dis-  
27 charge, because government employment  
28 is a privilege and not a property right,  
29 courts recently have become more in-  
30 clined to consider the causes of dis-  
31 charge and the methods and procedures  
32 by which it is effected, especially  
33 where the discharge affects reputation  
34 and the opportunity for employment  
thereafter.

31 As is further discussed below, it cannot seriously be questioned  
32 that Mr. Holloway's reputation and opportunity for later employ-

1 ment as a magistrate or similar position were adversely affected  
2 by the unusual and extraordinary court administration action in  
3 summarily removing him from his office and duties as magistrate  
4 in Dillingham.

5 Moreover, as the U. S. Supreme Court noted in Board  
6 of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d  
7 548 (1972),

8 . . . the Court has fully and finally  
9 rejected the wooden distinction between  
10 "rights" and "privileges" that once  
11 seemed to govern the applicability of  
12 procedural due process rights.

13 Instead, the Court will look to the nature of the interest at  
14 stake to determine whether it triggers a due process protection  
15 of liberty or property, or both.

16 A. Holloway was deprived of a property interest  
17 without due process.

18 An individual has a "property" interest in his position  
19 of employment where he has a "'legitimate expectation' of con-  
20 tinued employment". Breeden v. City of Nome, 628 P.2d 924, 926  
21 (Alaska 1981). Such expectations are ". . . created and their  
22 dimensions are defined by existing rules or understandings that  
23 stem from an independent source such as state law -- rules or  
24 understandings that secure certain benefits and that support  
25 claims of entitlement to those benefits." (Emphasis added.)  
26 Breeden, supra at 926, citing Board of Regents v. Roth, 408 U.S.  
27 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548, 561 (1972). The  
28 Breeden case concerned the summary firing of a city manager who,  
29 under statute, served "at the pleasure" of his employer. This is  
30 similar to the statute (A.S. 22.15.170(c)) under which magistrate  
31 Holloway was terminated. While the Supreme Court held that such  
32 a statute, in itself, afforded no constitutionally protected  
33 "property" interest in continued employment to the city manager  
34 in Breeden, this did not end the Court's inquiry. It found an

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34 MEMORANDUM

1 independent source of a legitimate expectation of continued  
2 employment in Breeden's contract with the city, which provided  
3 for thirty days' notice of termination. Id., 925.

4 In the case at bar, Holloway had a "legitimate expect-  
5 tation" of continued employment independent and distinct from the  
6 "service at the pleasure" language of the statute. As recognized  
7 by the Supreme Court in Buckalew v. Holloway, 604 P.2d 240, 243,  
8 a magistrate in Alaska is no less than a "judge" as referred to  
9 in the Constitution. The Court further recognized that judicial  
10 independence was a "paramount concern" to the drafters of the  
11 Alaska Constitution (Id., 245), and acknowledged that there could  
12 not ". . . be any doubt that a judge who serves at another's  
13 pleasure does not enjoy complete independence." Id., 245.  
14 Nevertheless, the Court held that the "serves at the pleasure of  
15 the presiding judge" statute (A.S. 22.15.170(c)) was not viola-  
16 tive of the constitutionally intended independent judiciary,  
17 because abuses of such dismissal power ". . . may still be sub-  
18 ject to the dictates of other constitutional commands, such as  
19 due process, . . . ." Id., 246.

20 Holloway had a legitimate expectation that he would  
21 continue to function as a judge, free from outside influences and  
22 from abuses of the summary dismissal statute; the Buckalew deci-  
23 sion acknowledged this. He had an expectation that, at the very  
24 least, he would be entitled to a hearing prior to an effective  
25 dismissal, to ascertain whether or not the dismissal in fact  
26 resulted from such influences as would be abhorrent to concepts  
27 of judicial independence, or from other abuses of the statutory  
28 dismissal authority. Using the case at bar as an excellent  
29 example, where charges are leveled against a judge, which charges  
30 form the basis for his summary removal, concepts of judicial  
31 independence and protection against abusive removal require that  
32 the judge be apprised of the source of the charges and an oppor-

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34 PAGE 6  
MEMORANDUM

1 tunity to present evidence discounting them as well as demon-  
2 strating that they were motivated by discontented litigants  
3 unhappy with the judge's official actions. A judge's expectation  
4 that he will not be discharged under circumstances abusive to his  
5 own and the citizenry's expectation of judicial independence is  
6 synonymous with a "property" interest in continued employment  
7 pending a proper removal process.

8           The parameters of such a property interest is defined  
9 by the interests of protecting an independent judiciary from  
10 abusive removal. This requires, at a minimum, an opportunity for  
11 a hearing, prior to removal, to ascertain (1) the precise nature  
12 of the charges upon which the removal was based; (2) the identi-  
13 ties and motivations of the sources of the charges; (3) the  
14 extent to which the charges are true or false; (4) the extent to  
15 which the actions upon which the dismissal is based bear any  
16 relationship to competency or integrity in the performance of  
17 official duties; and (5) the extent to which the activities  
18 forming the basis for removal concern the exercise of consti-  
19 tutionally protected rights.

20           The Breeden case clearly holds that if there is anything  
21 upon which dismissal of a government employee must be conditioned,  
22 he has a property interest entitling him to a hearing to deter-  
23 mine whether or not such conditions for dismissal have been met.  
24 The statute under which Holloway was dismissed does not grant  
25 totally unfettered authority to the presiding Superior Court  
26 judge. To the extent such authority is tempered by the dictates  
27 of the constitutional concept of an independent judiciary,  
28 Holloway was entitled to a hearing to determine whether such  
29 limits upon authority had been exceeded.

30           B. Holloway was deprived of a liberty interest.

31           The circumstances of Magistrate Holloway's dismissal  
32 also resulted in an infringement of his interest in liberty, such

33 PAGE 7  
34 MEMORANDUM

1 as to trigger his right to a hearing. In Board of Regents v.  
2 Roth, supra, the U. S. Supreme Court held that a nontenured  
3 teacher had no right to a due process hearing prior to a uni-  
4 versity's decision not to rehire him. Holding that such an  
5 individual had no property right in continued employment, the  
6 Court was careful to state that the University's actions, if  
7 coupled with injury to the individual's reputation, would have  
8 required a due process hearing:

9           The State, in declining to rehire the  
10           respondent, did not make any charge  
11           against him that might seriously  
12           damage his standing and associations  
13           in his community. It did not base the  
14           nonrenewal of his contract on a charge,  
15           for example, that he had been guilty  
16           of dishonesty, or immorality. Had it  
17           done so, this would be a different case.  
18           For "where a person's good name, repu-  
19           tation, honor, or integrity is at stake  
20           because of what the government is doing  
21           to him, notice and an opportunity to be  
22           heard are essential." (Citations  
23           omitted.) In such a case, due process  
24           would accord him an opportunity to re-  
25           fute the charge before University  
26           officials. In the present case, how-  
27           ever, there is no suggestion whatever  
28           that the respondent's "good name, re-  
29           putation, honor or integrity" is at  
30           stake.

31           Similarly, there is no suggestion that  
32           the State, in declining to re-employ the  
33           respondent, imposed on him a stigma or  
34           other disability that foreclosed his  
          freedom to take advantage of other  
          employment opportunities. (Emphasis  
          added.)

Board of Regents v. Roth, supra at 573. Had such stigmatiz-  
ing or reputational damage been present, the Court indicated  
that it would have constituted a deprivation of the indivi-  
dual's due process interest in "liberty", which

          . . . denotes not merely freedom from  
bodily restraint but also the right of  
the individual to contract, to engage  
in any of the common occupations of  
life, to acquire useful knowledge, to  
marry, establish a home and bring up  
children, to worship God according to

33 PAGE 8  
MEMORANDUM

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the dictates of his own conscience,  
and generally to enjoy those privileges  
long recognized as essential to the  
orderly pursuit of happiness by free  
men.

Board of Regents v. Roth, supra at 408, citing Meyer v. Nebraska,  
262 U. S. 390, 399.

This concept was adopted by the Supreme Court of  
Alaska in Nichols v. Eckert, supra, where nontenured teachers  
were dismissed on grounds of incompetency. The Court's deter-  
mination that such teachers were entitled to a hearing prior to  
dismissal was in part based upon its determination that they had  
a property interest in their present teaching posts. However,  
the language of the opinion reveals that it was also based upon  
the deprivation of their "liberty" resulting from the damage to  
their reputations and opportunity for re-employment which was  
likely to result:

Without an opportunity to be heard and  
to present their cases, they could be  
dismissed without good cause and with  
a serious charge of incompetency levied  
against them, a charge which is per-  
manently on their records and a hindrance  
to re-employment. In any event, the dis-  
missal of a teacher on grounds of incom-  
petency is a serious matter. The accused  
teacher is desperately in need of a fair  
and impartial forum in which the issue  
may be settled.

Nichols, supra, 1363. Later in the opinion, the Court stated

A dismissal for cause has an adverse  
effect upon appellants because it harms  
their professional reputations.

Id., 1364.

The U. S. Supreme Court more recently imposed a due  
process hearing requirement where high school students were  
suspended from school for periods of up to ten days based on  
charges of misconduct. Goss v. Lopez, 419 U.S. 565, 95 S.Ct.  
729, 42 L.Ed.2d 725 (1975). The Court noted that, if the charges  
against the students were sustained and recorded, they could

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MEMORANDUM

1 seriously damage their standing with fellow pupils and teachers  
2 as well as interfere with later opportunities for higher edu-  
3 cation and employment; this was sufficient to trigger a right to  
4 due process prior to the suspension. Goss, supra, 575-5. In  
5 Paul v. Davis, 424 U.S. 693 (1975), the U. S. Supreme Court held  
6 that an individual who had not lost employment but whose reputa-  
7 tion had been damaged by a police department's publishing his  
8 photograph and name as a known "shoplifter" was not entitled to a  
9 due process hearing, but reiterated the doctrine that, if the  
10 damage to reputation arises out of a termination of government  
11 employment, the requirements of due process would apply. At page  
12 708 of the opinion, the Court cited its earlier opinion in Anti-  
13 Fascist Committee v. McGrath, 341 U.S. 123, 168:

14           Where a person's good name, reputation,  
15           honor or integrity is at stake because  
16           of what the government is doing to him,  
          notice and an opportunity to be heard  
          are essential.

17 (Emphasis in original opinion.) The Paul opinion continued to  
18 concentrate on the "because of what the government is doing to  
19 him" language to find that due process rights are triggered when  
20 the damage to reputation of an individual was created in the  
21 context of a dismissal from employment or other alteration of  
22 legal status. Paul, supra, 708-9.

23           The U. S. Supreme Court, in a 1975 opinion, held that  
24 the "liberty" interests of a public employee were not deprived  
25 without due process where he was terminated without public  
26 disclosure of the reasons for the discharge. Bishop v. Wood, 426  
27 U.S. 341, 348 (1976). While the reasons for terminating Magis-  
28 trate Holloway were not publicly disclosed at the time of his  
29 dismissal, the very fact of his dismissal, itself an extraordinary  
30 and unusual procedure, has damaged his reputation and opportuni-  
31 ties for other employment, especially employment as a magistrate.  
32 A record of summary dismissal from the office of magistrate by

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34 MEMORANDUM

1 the presiding superior court judge carries with it inferences and  
2 conclusions which no prospective employer of Mr. Holloway could  
3 possibly ignore. To hold that such a dismissal would not be  
4 damaging to Holloway's good name, reputation or employment  
5 opportunities would be to engage in the purest fiction.

6 This was evidently recognized by the California Court  
7 of Appeals in Lubey v. City and County of San Francisco, 159  
8 Cal.Rptr. 440 (Cal.App. 1979), where two police officers were  
9 summarily discharged on the basis of unsworn charges of mis-  
10 conduct made against each of them by a citizen. Some of the  
11 charges were never made known to the officers, even after they  
12 were dismissed. The Court cited Paul v. Davis, supra, and  
13 Board of Regents v. Roth, supra for the proposition that dis-  
14 missal of a probationary employee on charges which stigmatize his  
15 reputation, seriously impair his opportunity to earn a living, or  
16 which might seriously damage his standing and associations in his  
17 community triggered a right to due process because of deprivation of  
18 his "liberty interest". Lubey, supra at 443. The City argued  
19 that such interest was not triggered because it had not published  
20 the reasons for the dismissal. The Court rejected its argument:

21 We are unpersuaded by the City's arguments  
22 that the police personnel files were con-  
23 fidential, that Officers Lubey and Hood  
24 have by their action now brought upon them-  
25 selves the stigmatizing notariety of which  
26 they complain, . . . . It is unrealistic  
27 to assume that a citizen's charges of mis-  
28 conduct against police officer, investigated  
29 by the police department, found true by the  
30 police chief, and resulting in termination  
31 the reasons for which had been communicated  
32 to the civil service commission have never-  
33 theless somehow retained their confiden-  
34 tiality. And we must also realistically  
assume that in the officers' future appli-  
cations for employment, inquiry will be  
made of their prior job experience, and then  
into the reason for their termination as  
policemen.

We conclude therefore that, however de-  
scribed, the "termination" or "dismissal"

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34 MEMORANDUM

1 of Probationary Officers Lubey and Hood  
2 did not comport with Fourteenth Amendment  
requirements.

3 Lusey, supra at 444.

4 It is at least as unrealistic as in Officer Lubey's  
5 circumstances to assume that the Court System's dismissal of  
6 Holloway would not besmirch his record and haunt him in future  
7 career opportunities. In determining whether or not to hire Mr.  
8 Holloway for any responsible position, no prospective employer  
9 would be satisfied with anything less than a determination as to  
10 why he was dismissed.

11 In Nichols v. Eckert, supra at 1366, three justices of  
12 the Alaska Supreme Court joined in a concurring opinion which  
13 appeared to recognize that the mid-year dismissal of a non-  
14 tenured teacher, whether or not accompanied by publicly announced  
15 charges, would result in injuries to reputation and employment  
16 opportunities:

17 The suspension or discharge of a non-  
18 tenured teacher prior to the expiration  
19 of the term of his or her contract is a  
20 very serious matter and may cause sub-  
21 stantial injury. Specifically, such  
22 suspension or discharge may cause econ-  
23 omic hardship, create a stigma of  
24 incompetence and blemish the teacher's  
25 professional reputation, decrease the  
26 possibility of other educational employ-  
27 ment opportunities, deny the teacher the  
28 opportunity to pursue a chosen profes-  
29 sional activity, and disrupt an existing  
30 educational relationship between teachers  
31 and students. As the Eighth Circuit  
recently observed in Cooley v. Board of  
Education of Forest City School District,  
given the ensuing economic  
hardship of a summary depri-  
vation of the source of one's  
livelihood, and in view of  
the awesome and potentially  
stigmatizing effect of mid-  
year termination, such a case  
as this assuredly presents  
one of the clearest instances  
where the rule of procedural  
Due Process, properly applied,

32 PAGE 12  
33 MEMORANDUM

34

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must operate to interdict injurious and reckless governmental treatment.

In view of the potentially serious injury which would result from an unjustifiable, arbitrary discharge or suspension of a non-tenured teacher, we would employ higher standards of procedural due process and would require the holding of a hearing prior to any suspension or discharge. (Footnotes omitted.)

If the Lubey opinion or Nichols v. Eckert concurring opinion constitute an extension of constitutional due process rights by state courts beyond that indicated as necessary by the U. S. Supreme Court in the Bishop case, such an extension was permissible and fully warranted.

In Shagloak v. State, 597 P.2d 142, 144 (Alaska 1979), the Alaska Supreme Court extended Alaska constitutional due process rights beyond those recognized by the U. S. Supreme Court, in the context of criminal sentencing. The Court stated:

A state supreme court is not limited by the decisions of the United States Supreme Court or by the Federal Constitution when interpreting the provisions of the state constitution, since the latter may have broader safeguards than the minimum Federal standards. (Citations omitted.)

Shagloak, supra, at 144, n. 14. If Holloway's circumstances are not deemed to be factually distinguishable from those existing in Bishop v. Wood, supra, then this Court should recognize that the due process clause of the Alaska Constitution does not permit the use of fictionalized rationalizations in order to find no deprivation of liberty and resulting denial of due process. Holloway's dismissal, in and of itself, resulted in damages to his reputation and opportunities for re-employment as a magistrate which were at least as great as those suffered by the teachers in Nichols v. Eckert, supra. Accordingly, he was entitled to a hearing prior to dismissal to determine whether or not the charges were true.

PAGE 13  
MEMORANDUM

1 III. Holloway is entitled to reimbursement for lost wages  
2 because of his wrongful termination without a hearing.

3 As stated in Mullane v. Central Hanover Bank and  
4 Trust Company, 339 U.S. 306, 313, 70 S.Ct. 652, 656-7, 94 L.Ed.  
5 865, 873 (1950) and in Aguchak v. Montgomery Ward Company, Inc.,  
6 520 P.2d 1352, 1356 (Alaska 1974),

7 . . . deprivation of life, liberty or pro-  
8 perty by adjudication [must] be preceded  
9 by notice and opportunity for hearing ap-  
10 propriate to the nature of the case.  
11 (Emphasis added.)

12 See also Etheredge v. Bradley, 502 P.2d 146, 151-3 (Alaska  
13 1972). And, as later stated in Fuentes v. Shevin, 407 U.S. 67,  
14 81, 92 S.Ct. 1983, 32 L.Ed.2d 556,

15 If the right to notice and a hearing is  
16 to serve its full purpose, then, it is  
17 clear that it must be granted at a time  
18 when the deprivation can still be pre-  
19 vented. At a later hearing, an indivi-  
20 dual's possessions can be returned to  
21 him if they were unfairly or mistakenly  
22 taken in the first place. Damages may  
23 even be awarded to him for the wrongful  
24 deprivation. But no later hearing and  
25 no damage award can undo the fact that  
26 the arbitrary taking that was subject to  
27 the right of procedural due process has  
28 already occurred.

29 This principle should apply with equal magnitude to deprivations  
30 of property or liberty. As stated in Lynch v. House Finance  
31 Corp., 405 U.S. 538, 552, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972),  
32 due process distinctions between liberties and property rights  
33 are false. Whether Holloway's summary dismissal deprived him of  
34 liberty or property or both, he was entitled to a pre-termination  
hearing.

In Nichols v. Eckert, supra, at 1363, the Alaska  
Supreme Court favorably cited Tracey v. School District No. 22,  
243 P.2d 932 (Wyo. 1952), for the proposition that dismissal of a  
teacher without a hearing or notice was a nullity. However, the  
opinion of the unanimous majority, written by Justice Connor, did  
not find a need to reach the question of whether the failure to

1 have the hearing prior to dismissal would, in itself, have  
2 required a reversal. Nichols, supra at 1364. In the concurring  
3 opinion joined in by three Justices, however, Justice Erwin  
4 stated:

5 While we generally agree with the holding  
6 reached in Justice Connor's opinion for  
7 the Court, we would go further and re-  
8 quire that except in certain extraordin-  
9 ary situations, the hearing necessary to  
10 satisfy the requirements of the due pro-  
11 cess clause of the Alaska Constitution  
12 must be held prior to the mid-term  
13 suspension or discharge of a non-tenured  
14 teacher.

15 There may be certain exceptional instances  
16 in which the conduct of a teacher would  
17 present a serious and imminent threat to  
18 the physical or psychological well-being  
19 of the students. In such cases, the  
20 immediate removal of the teacher from the  
21 classroom would be justified. The require-  
22 ments of due process would be met by a  
23 procedure which provided for the suspension  
24 of the teacher with pay pending the prompt  
25 convening of a full hearing. Absent such  
26 extraordinary circumstances, however, a  
27 hearing must be afforded a non-tenured  
28 teacher before suspension or discharge.  
29 (Emphasis added.)

30 Nichols v. Eckert, supra at 1366.

31 In Lubey v. City and County of San Francisco,  
32 supra, at 445, the Court ordered reinstatement of the police  
33 officers who had been denied due process in their dismissal,  
34 and awarded damages in the amount of lost benefits and net  
loss of salary from the date of the improper termination to  
the date of their reinstatement or until they were terminated  
after a proper due process hearing.

Similarly, in Board of Regents v. Roth, supra, the  
U. S. Supreme Court stated:

Before a person is deprived of a protected  
interest, he must be afforded opportunity  
for some kind of a hearing, "except for  
extraordinary situations where some valid  
governmental interest is at stake that  
justifies postponing the hearing until  
after the event." Boddie v. Connecticut,

1 401 U.S. 371, 379. While "many contro-  
2 versies have raged about . . . the Due  
3 Process Clause," . . . it is fundamental  
4 that except in emergency situations (and  
5 this is not one) due process requires  
6 that when a State seeks to terminate [a  
7 protected] interest . . . , it must afford  
8 notice and opportunity for hearing appro-  
9 priate for the nature of the case before  
10 the termination becomes effective." Bell  
11 v. Burson, 402 U.S. 535, 542. For the  
12 rare and extraordinary situations in which  
13 we have held that deprivation of a pro-  
14 tected interest need not be preceded by  
15 opportunity for some kind of hearing, see,  
16 e.g., Central Union Trust Co. v. Garvan,  
17 254 U.S. 554, 566; Phillips v. Commissioner,  
18 283 U.S. 589, 597; Ewing v. Mytinger v.  
19 Casselberry, Inc., 339 U.S. 594. (Emphasis  
20 in original.)

21 Board of Regents v. Roth, supra at 570, n. 7. Implicit in this  
22 language is a determination that, absent extraordinary circum-  
23 stances, a dismissal does not become effective, and is a nullity,  
24 until accomplished in accordance requisite due process proceed-  
25 ings.

26 In a subsequent decision, the Supreme Court muddied the  
27 waters somewhat as to whether a post-termination hearing would be  
28 acceptable under Federal due process requirements. In Arnett  
29 v. Kennedy, 416 U.S. 134 (1974), a government employee was fired  
30 for making public statements to the effect that his immediate  
31 supervisor had attempted to give a bribe. Under the applicable  
32 civil service regulations, the employee, Kennedy, was entitled to  
33 only informal proceedings prior to termination; but the regula-  
34 tions provided for very elaborate post-termination hearing as  
well as the right to reinstatement with backpay should the employee  
prevail. Kennedy challenged these procedures, arguing that he  
was entitled to a full hearing prior to termination. By a 5-4  
decision, the Court rejected Kennedy's challenge, though there  
was no majority opinion. Writing for a three-justice plurality,  
Justice Rehnquist stated that, where Congress had prescribed and  
paid close attention to the procedures that would be available

1 when enacting the legislation that created the job tenure, the  
2 substantive right could not be divorced from the procedures  
3 provided for its enforcement:

4 . . . where the grant of a substantive  
5 right is inextricably intertwined with  
6 the limitations on the procedures which  
7 are to be employed in determining that  
8 right, a litigant in the position of  
9 appellee must take the bitter with the  
10 sweet.

11 Arnett, 153-4. In short, the Court was willing to defer to a  
12 Congressional definition of the due process right where Congress  
13 had obviously paid close attention to it, and where the employee  
14 took the job with knowledge of the precise due process procedures  
15 available in a termination. Thus, Kennedy was entitled only to a  
16 post-termination hearing, with an award of backpay if he pre-  
17 vailed.

18 In an opinion concurring in part written on behalf of  
19 two justices, Justice Powell rejected this abdication to the  
20 legislative branch to determine the sufficiency of constitutional  
21 due process procedures. However, in Justice Powell's view, the  
22 post-termination hearing procedure set forth in the regulations  
23 was consistent with constitutional due process as independently  
24 viewed by Justice Powell, because the government's interest in  
25 expeditious removal of an unsatisfactory employee was substantial  
26 and outweighed Kennedy's interest in continuation of his employ-  
27 ment pending an evidentiary hearing. Arnett, supra, 167-9.  
28 However, in making this balancing test, Justice Powell put much  
29 stock in the fact that the civil service regulations provided for  
30 an award of backpay if the complainant prevailed on the merits of  
31 his claim. Id. at 169.

32 The remaining four justices would have required a pre-  
33 termination hearing.

34 Arnett obviously supplies no precedent for a deter-  
mination that Holloway was not entitled to a pre-termination

1 hearing. No legislatively-prescribed "due process" procedures  
2 exist for dismissal of magistrates, in Alaska, as they did for  
3 government employees in Arnett; thus, the basis for the Arnett  
4 plurality opinion is lacking in this case. Moreover, there is no  
5 provision for automatic award of backpay should Holloway prevail  
6 at a hearing on the merits of his contentions. Thus, a "balanc-  
7 ing test" would show that the government's hardships in continu-  
8 ing to employ Holloway (he could have been suspended or assigned  
9 to no duties with full pay pending a hearing) does not outweigh  
10 the hardship to Holloway in being fully deprived of employment  
11 and compensation guarantee to a hearing, without even a statutory  
12 or regulatory right to an award of backpay should he prevail in a  
13 subsequent hearing.<sup>1/</sup>

14 An award of backpay until Holloway is afforded due  
15 process and properly terminated (if this is the ultimate deter-  
16 mination) is appropriate because (1) Holloway is entitled to such  
17 compensation until he is properly terminated from his position  
18 and (2) an award conditioned upon Holloway's ultimately pre-  
19 vailing on the merits does not serve to discourage public employ-  
20 ers from disregarding constitutional rights to a pre-termination  
21 hearing. If an employer can summarily dismiss an employee and  
22 possibly escape liability for payment of wages prior to a termi-  
23 nation hearing, he may be inclined to do so, regardless of the  
24 dictates of the Constitution.

---

27 <sup>1/</sup> Certainly this Court would have the power to award  
28 backpay upon Holloway's prevailing at a subsequent  
29 hearing; however, the point made here is that such an  
30 award should not be conditioned upon such an outcome in  
31 that the dismissal was a nullity in that it was not  
32 preceded by constitutionally-mandated due process.  
33 See Owen v. City of Independence, 445 U.S. 622, 632,  
34 n. 12 (1979).

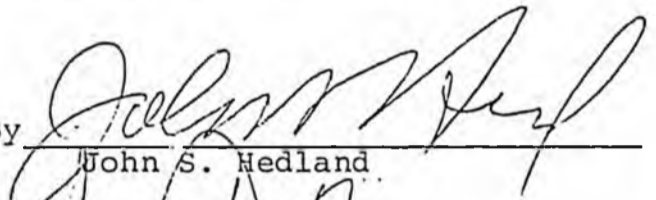
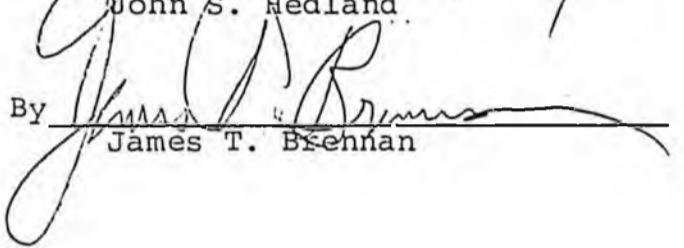
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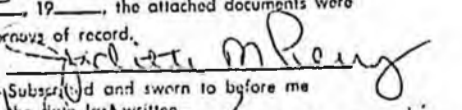
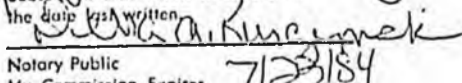
IV. Conclusion.

For the above reasons, the plaintiff's motion for partial summary judgment should be granted.

DATED at Anchorage, Alaska, this 20th day of June, 1983.

HEDLAND, FLEISCHER & FRIEDMAN  
Attorneys for Plaintiff

By   
John S. Hedland  
By   
James T. Brennan

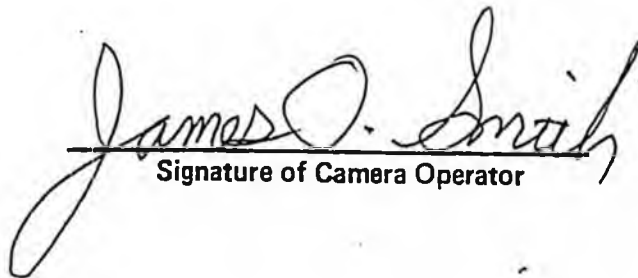
The undersigned hereby swears that on the 20 day of JUNE, 1983, the attached documents were mailed to the attorneys of record.  
  
Subscribed and sworn to before me the date last written.  
  
Notary Public  
My Commission Expires 7/23/84

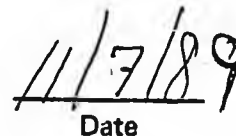


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Signature of Camera Operator

  
Date

PENDING  
LEGISLATION:  
INTERNAL  
AUDITOR,  
COURT  
SYSTEM

14-0532  
2/1/85  
Ford ✓

Hold

BY THE JUDICIARY COMMITTEE  
(For the Chief Justice of  
the Alaska Supreme Court)

1 IN THE SENATE

2 SENATE BILL NO.

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to appointment, qualifications and  
7 duties of an internal auditor within the Alaska Court  
8 System."

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

10 \* Section 1. AS 22.20 is amended by adding a new section to read:

11 Sec. 22.20.038. APPOINTMENT, QUALIFICATIONS AND DUTIES OF IN-  
12 TERNAL AUDITOR. (a) The administrative director shall appoint an  
13 internal auditor to provide the administrative director with objective  
14 information to assist in determining whether Alaska Court System  
15 operations are adequately controlled and whether the required high  
16 degree of public accountability is maintained.

17 (b) The internal auditor shall be a certified public accountant  
18 of this state, or of another state having requirements equivalent to  
19 those of this state, with at least three years of practice in the  
20 profession, or the equivalent, before the appointment.

21 (c) The internal auditor shall

22 (1) review and appraise the soundness, adequacy and appli-  
23 cation of accounting, financial and operating controls;

24 (2) ascertain the extent of compliance with established  
25 policies, plans, and procedures;

26 (3) ascertain the extent to which court system assets are  
27 accounted for and safeguarded from losses of all kinds; and

28 (4) ascertain the reliability of accounting and other data  
29 developed within the Alaska Court System.

1 (d) The internal auditor shall have full, free, and unrestricted  
2 access to all public records, all activities of the Alaska Court  
3 System, all Alaska Court System property, all Alaska Court System  
4 personnel, and all policies, plans and procedures, and records per-  
5 taining to expenditures financed by Alaska Court System funds. This  
6 section does not authorize the public disclosure of material that is  
7 confidential or privileged under federal, state or local law, court  
8 rule or order, or materials the public disclosure of which constitutes  
9 an unwarranted invasion of personal privacy.

10 (e) The internal auditor's conclusions and recommendations shall  
11 be reported promptly in writing to the administrative director.  
12 Copies of reports of the internal auditor shall be available for  
13 public inspection at the office of the internal auditor during regular  
14 business hours.

15 (f) The internal auditor shall keep a complete file of all audit  
16 reports and other reports or releases issued by the auditor, and a  
17 complete file of audit work papers and other related supportive mate-  
18 rial.  
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# WORK ORDER REQUEST FORM

114 - 0133

KEYWORDS: courts  
audits and auditors

ASSIGNED TO Ford

REQUEST FOR: BILL  RESOLUTION  RESEARCH  OTHER

SUBJECT Auditor for the court system

REQUESTED FOR Senate Judiciary BY Rover Lewis EXT. \_\_\_\_\_

\* DELIVER TO Sen. Rodey TAKEN BY Levy

INSTRUCTIONS, EXPLANATIONS Prepare bill relating to an internal auditor of the court system, per attached.

OBTAIN

SPECIAL DRAFTING INSTRUCTIONS ATTACHED

AUTHORIZED TO CONFER WITH \_\_\_\_\_

RETURN \_\_\_\_\_

TO REQUESTER

APPROVED: WGB Director, Legal Services

REVIEWED \_\_\_\_\_

IN 01/31/85 DUE \_\_\_\_\_

TYPED - Draft \_\_\_\_\_ DATE \_\_\_\_\_

Final \_\_\_\_\_ DATE \_\_\_\_\_

PROOFED \_\_\_\_\_ DELIVERED \_\_\_\_\_

SPECIAL INSTRUCTIONS TO TYPIST/PROOFREADER

DRAFT

FINAL

STATE OF ALASKA 1985 LEGISLATIVE SESSION  
FISCAL NOTE

Revision Date: \_\_\_\_\_

**REQUEST**

Bill/Resolution No.: \_\_\_\_\_  
 Title: An Act Creating an  
Internal Auditor  
 Sponsor: \_\_\_\_\_  
 Requestor: \_\_\_\_\_  
 Date of Request: \_\_\_\_\_

**FISCAL DETAIL**

Agency Affected: Alaska Court System  
 Program Category Affected: \_\_\_\_\_  
Administration of Justice  
 BRU, Program or Subprogram(s) Affected: \_\_\_\_\_  
Appellate Courts, Trial Courts,  
Administration

**EXPENDITURES/REVENUES: (Thousands of Dollars)**

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
<b>OPERATING</b>						
100 PERSONAL SERVICES		85.4	90.5	95.9	101.7	107.8
200 TRAVEL		7.5	8.0	8.5	9.0	9.5
300 CONTRACTUAL		3.5	3.7	3.9	4.1	4.3
400 SUPPLIES		2.0	2.1	2.2	2.3	2.4
500 EQUIPMENT		7.2				
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
<b>TOTAL OPERATING</b>		105.6	104.3	110.5	117.1	124.0

<b>CAPITAL</b>						
----------------	--	--	--	--	--	--

<b>REVENUE</b>						
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**FUNDING: (Thousands of Dollars)**

GENERAL FUND		105.6	104.3	110.5	117.1	124.0
FEDERAL FUNDS						
OTHER						
<b>TOTAL</b>		105.6	104.3	110.5	117.1	124.0

**POSITIONS:**

FULL-TIME		2.0	2.0	2.0	2.0	2.0
PART-TIME						
TEMPORARY						

**SOURCE OF FUNDS TO OFFSET FISCAL IMPACT OF BILL:**

**ANALYSIS:** Attach a separate page for analysis

Prepared By: Robert G. Fisher, Fiscal Officer Phone: 264-0561  
 Division: Alaska Court System Date: 1/15/85  
 Approved by Commissioner: [Signature] Date: 1/15/85  
 Agency: Alaska Court System

Distribution (by Agency preparing fiscal note):

- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget.
- Impacted Agency(ies)

12/1/83

ALASKA COURT SYSTEM  
FISCAL NOTE ANALYSIS

JUDICIAL INTERNAL AUDITOR

PERSONNEL:	SALARY	BENEFITS	TOTAL COST
INTERNAL AUDITOR (Range 20A)	\$40,932	\$11,790	\$52,722
ASSISTANT (Range 12B)	24,516	8,116	32,632
			-----
Total Personnel Costs			85,354
TRAVEL			7,500
CONTRACTUAL			3,500
SUPPLIES			2,000
EQUIPMENT (one-time items)			7,200
			-----
TOTAL FY 86 COST			\$105,554
			=====

Subsequent fiscal years adjusted to reflect 6% inflation.



# RECORDS CERTIFICATION



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*James O. Smith*  
Signature of Camera Operator

*11/7/89*  
Date

PRESUMPTIVE  
SENTENCING

"presumptive  
file"

Rec ID    name  
title  
agency  
address  
city state zip  
salutation  
phone

1            Daniel W. Hickey  
Chief Prosecutor  
Department of Law  
Pouch KC  
Juneau, AK 99811  
Mr. Hickey  
465-3428

2            Roger Endell  
Commissioner  
Department of Corrections  
Pouch T  
Juneau, Alaska 99811  
Mr. Endell  
465-3376

3            Robert Sundberg  
Commissioner  
Department of Public Safety  
Pouch N  
Juneau, Alaska 99811  
Mr. Sundberg  
465-4322

4            Francis L. Bremson  
Executive Director  
Alaska Judicial Council  
1031 W. 4th Ave., Suite 301  
Anchorage, Alaska 99501  
Mr. Bremson  
279-2526

5            The Honorable Rodger W. Pegues

Pouch U  
Juneau, AK 99811  
Judge Pegues  
465-3422

Rec ID    name  
title  
agency  
address  
city state zip  
salutation  
phone

6            Ms. Sandra Borbridge  
Special Assistant  
Office of the Governor  
Pouch A  
Juneau, AK 99811  
Ms. Borbridge  
465-3500

7            Brant McGee  
Director  
Office of Public Advocacy  
900 W. 5th Ave., Suite 525  
Anchorage, AK 99501  
Mr. McGee  
274-1684

8            Dana Fabe  
Public Defender  
Department of Administration  
900 W. 5th Ave., Suite 200  
Anchorage, AK 99501  
Ms. Fabe  
279-7541

9            The Honorable Alex Bryner  
Chief Judge  
Court of Appeals  
303 "K" Street  
Anchorage, Alaska 99501  
Judge Bryner  
264-0751

# Presumptive Sentencing

Worksession

2/13/85

1:30 Buttrouch BILL FILE LOG

BILL # \_\_\_\_\_

1/30 Telephone calls to "presumptive file."

1/30 Approval from (H) Judiciary on  
"presumptive file" list.

1/30 Discussion w/ Janice Fisher re: worksession

1/30 Roger conversation w/ John Havelock  
for possible questions

2/1 Letter mailed to "presumptive file"

2/1 Pat requests prison release.

2/1 Request addition of Alex Burner

2/13 at hearing received Dept of Law  
Briefing Paper on Presumptive  
Sentencing

John Havelock (H) 337-8301  
276-1116 mornings

# Alaska Institute for Research and Public Service

A not for profit corporation organized under Alaska law

3210 Baxter Rd.  
Anchorage, Alaska 99504  
Telephone (907) 337-8305

February 7, 1985

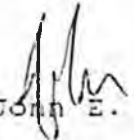
Roger Lewis, Staff Counsel  
Senate Judiciary Committee  
State of Alaska  
Pouch V  
Juneau, Alaska 99811

RE: Outline of Presumptive Sentencing Issues

Dear Roger:

I hope the enclosed outline will be of some use to you.

Sincerely,

  
John E. Havelock

JH/lh

Rlewis7

## PRESUMPTIVE SENTENCING

### ISSUES

The state is facing a growing prison population but has limited prison space. New space is very expensive. The operating costs of prisons are very high. High levels of physical security, 24 hour institutional surveillance and care come at a high price. The state's oil revenue base is shrinking. These factors call for a close scrutiny of the question: "Are we putting the right people into the right kind of facility for the right period of time?"

### HOW THE PRISON POPULATION IS CREATED

Out of the great mass of anti-social actors, those selected for imprisonment and their length of residence in the facility are a product of the exercise of legislatively guided discretion. This discretion is exercised separately, but with substantial coordination, by police, prosecutors, public defense, pretrial services, courts and corrections.

### DISCRETIONARY FUNCTIONS: GENERALLY

Each component of the justice system exercises its own influence on the size and composition of the jail population. For example, police influence jail population by variations in charging and arresting policies, or by using citations in lieu of arrests and by the influence they bring to bear in informal communications with prosecutors, jail personnel, (who may be influential at bail hearings) and others. Police efficiency, including pro-active policies (sting operations, undercover work,

etc.) and variations in informal policies such as "crackdowns" will influence prison population also.

Prosecutor's policies with respect to bail and O/R recommendations, charging and intake, prosecutorial diversion, charge bargaining and sentence bargaining and trial practices influence the population size in a major way.

The public defender case load, skill levels, and perceptions of fairness and (like other components) allocation of resources among classes of offender influence the outcome.

Corrections policy choice of institutional styles (usually indicated as security level institutions), halfway houses, work release programs, the use of probation and parole, probation and parole revocation policies, good time policies and (with the governor) executive commutation influence the population.

#### RESOURCES AND CONSTITUTIONAL LIMITS

At any particular time, changes in policies in one component may have an alternative impact on the tendency of another and, absent policy adjustment, an increase in the resources given a component will increase the prison population, except of course resources given to the public defender, where presumably the the opposite effect would occur.

Apart from the varying legislative guidelines given to each agency, there are constitutional controls applicable to each which is one reason why the public defender's office must be funded at some minimum level and why prison crowding has its limits. These constitutional controls are administered primarily by the courts, as a part of the exercise of appellate and rule making authority of the appeals courts, which also impact the

size and characteristics of prison populations.

#### POINTS OF VIEW

The personnel in each component typically have a particular point of view which arises from the function and emphasis given to the component and agency. Personnel in each component look at the function and performance of other components with varying degrees of criticism or skepticism. Ironically, it is said that the accused offender has the only whole perspective on the system.

#### JUDICIAL DISCRETION

In part because of its high visibility, judicial discretion has received the highest degree of legislative oversight. There are swings over the years in legislative control over judicial discretion which relate to the political tension among the ways people look at various types of crime, its consequences to the accused and offenders.

Presumptive sentencing is but one aspect of post-conviction practices and policies which determines how long each person stays in jail at what cost. Keep in mind how presumptive sentencing fits in with other judicial powers to suspend sentences, suspend imposition of sentences, apply concurrent or consecutive sentences, impose probation, treatment and service alternatives, and the good time, work release, and parole policies of corrections and the styles of detention which are available.

## PRESUMPTIVE SENTENCING

Presumptive sentencing is a statutory scheme which establishes a fixed term of imprisonment as a sentence for a particular category of offenses, subject to a limited judicial power to limit that term depending upon finding after conviction of either "aggravating" or "mitigating" circumstances as established by the legislature. The presumptive sentence is determined by the class or category of the offense ("unclassified", A, B, or C felony, A or B misdemeanor) and whether the offense is a first, second or third conviction (what constitutes a "prior conviction" is a variable which will produce differing sentence consequences also).

Notice that the presumptive sentence scheme tracks the process by which a judge would pick a sentence were it within the Judges discretion but takes no account of unique factors which might influence the judge.

## HISTORY AND PHILOSOPHICAL ORIGINS OF PRESUMPTIVE SENTENCING IN ALASKA

No doubt the push for presumptive sentencing arose in part from the public demand for longer sentences and the perception that the Judges were not giving tough enough sentences. Demands for tougher sentencing are as old as sentencing itself and do not seem to depend upon any particular level of sentence. There are wide differences among the States in the sentences imposed for various crimes but the call for tougher sentencing is about as vociferous in "tough" jurisdiction as it is "lenient" ones, measured by the percentage of population in jail or typical sentence patterns. There is no objective way of determining

what a "just" sentence is, measured only by the offense.

Ironically, There is informal evidence that the Alaska Judges response to this outcry was quicker than the legislature's so that the prison population may contain a "bubble" of persons sentenced just before presumptive sentencing came in, created by an aroused judicial exercise of discretion to increase sentences. Presumptive sentencing may have reduced the typical sentence particularly for some offenses, during this time period.

Beyond this outcry, Alaskan opinion reflected a rising national perception that sentences were imposed unequally according to the outlook of individual Judges, a perception supported by the rise of statistical science and its application to the criminal justice system, including applications in Alaska.

The call for "equality" in sentencing was tied also to the idea of "just deserts": that the sentence be imposed considering only the behavior of the offender, looking less at the offender herself, as sentencing had previously done, less at prospects for rehabilitation, etc., since the past practice tended favor the socially and economically better off offender.

#### CRITIQUE OF PRESUMPTIVE SENTENCING

The primary challenge to presumptive sentencing is the accusation that is a mechanistic model that does not fit the complexity of the underlying behavior. Although we categorized offenses according to specific elements of offense, the elements are not all that exact from a common sense point of view. For example, the average person is likely to look quite differently at a homicide committed by a person who has been victimized by the deceased (as in the quote the "Burning Bed" T.V. dramatization) yet the law treats it as a "all or nothing"

proposition, in which the "all" is made the equivalent of homicides arising in radically different social contexts. What is true for homicide is also true for most other offenses. Life is far more complex than the pigeon holes of the law.

#### ARGUMENT FOR INCREASED JUDICIAL DISCRETION

The argument for judicial discretion is that the categories of offense and fixed sentences are necessarily too grossly generalized. It takes an experienced human being to weigh in the variations of the style of the crime, the human dynamics of the situation, the consequences for the several parties of different outcomes, and the interests of society, to produce a just result.

The recent changes in Alaskan law were not based on a direct disagreement with this line of argument. By providing a greater degree of detail in the sentence measurement, "to make the punishment fit the crime" with mitigating and aggravating factors, Alaska's "presumptive sentencing" attempts to establish a more detail framework for the exercise of judicial discretion.

The focus of this frame work is still strongly influenced by the mood of the country favoring the "just deserts" model, giving relatively little weight to the diagnosis of the offender and the offenders social setting.

In practice, the court's mitigate or aggravate a sentence less frequently than the observer might suppose from reading the long lists of factors which may be taken into consideration for those purposes.

#### POINTS OF POSSIBLE CHANGE IN THE SENTENCING SYSTEM

Giving more rein to judicial discretion does not have an

immediately predictable impact on prison population unless the grant of increased discretion is all in one direction - to lower but not raise the range of sentences from the standard set in the existing system. If discretion is increased, the Judges may continue according to the pattern set now or give longer sentences on the average, or shorter, or some longer and shorter so that the net effect balances out. The effects of expanding discretion alone on prison population are not predictable.

Areas where the legislature could produce change include:

1. Widening the range of presumptive sentence for a class of offenses.
2. Increase the percentage change which the Judge may use in varying from the presumptive sentence;
3. Introduce new mitigating or aggravating factors either generally or for particular offenses.

It has been suggested that in establishing such factors originally, the draftsman did not anticipate the boom in family crime and sex offenses of the 1980's which may suggest a closer examination of the values served in recognizing particular factors in mitigation and aggravation.

4. Change the scope of presumptive sentences to include fewer or more crimes in the "first offense" category as being subject to presumptive sentencing;
5. Change the presumptive sentence up or down in any category or in any category for second or subsequent offense;
6. Reclassify an offense;

7. Further subdivide defined crimes and give lower classifications to the lesser of the newly created crimes;
8. Make Parole eligibility, earlier or later for any class of crime
9. Raise or lower the good time allowance (now 25%)
10. Give greater or lesser discretion with respect to consecutive or concurrent sentences (a particular point of complaint with some judges)
11. Increase power to suspend sentence or its imposition or to use probation or treatment alternative or house arrest or similar conditional releases in the presumptive setting;
12. Abandon presumptive sentencing by going back to sentences like, "a term of year determined by the court not less than one or more than twenty."

#### WHERE ARE WE GOING

The current pattern of increases in prison population is a results of the joint impact of many legislative judicial and executive policies that themselves are inevitably likely to change in the future as they have in the past. Several of these policies - which may include the adoption of presumptive sentencing or some specific element in it, have brought about a rapidly rising prison population. If the policies stabilize, at some level, the population of the prisons will also stabilize (as percentage of the states total population). Any time a policy changes, there is a "backlog", so to speak, which causes the prison population to move as this new policy becomes routinized

over a number of years. The existing increase in the last prison population will level off but, at the moment, there is little certainty regarding the percentage of the state population level where that will occur.

There is no abstract notion of what the real "right" level of prison population should be. It is all relative to the beholder's values or could be measured relative to other states or countries or other offenders. It is not necessarily bad or good that a prison population is rising or lowering. Alaska has one of the highest rates of incarceration of all the states and America has the highest rate of the democratic world. But it may be a factor of this country's great wealth and cultural violence and this state's place in that, or in this state's greater efficiency in identifying crime and capturing criminals which brings about this result. Comparative rates are only an indicator of where our practices lie in relation to norms that have no absolute footing. What is real, is limitation of capacity and the political will to build it.



Superior Court  
State of Alaska  
FIRST JUDICIAL DISTRICT  
COURT AND OFFICE BUILDING  
POUCH U  
JUNEAU, ALASKA  
99811

CHAMBERS OF  
RODGER W. PEGUES, JUDGE

February 4, 1985

Patrick M. Rodey, Chairman  
Senate Judiciary Committee  
Alaska State Legislature  
Pouch V  
Juneau, Alaska 99811

Re: Presumptive Sentencing

Dear Senator ~~Rodey~~ *Rodey*:

Thank you for your invitation to attend the joint Judiciary Committees' work session on presumptive sentencing on February 13, 1985. Unfortunately, I will be away on a longplanned vacation at that time.

I can say for the record that presumptive sentencing appears to be meeting its goals and that I have not found sentencing to presumptive terms to be inconsistent with the basic sentencing considerations set for in AS 12.55.005, and indeed, have found the presumptive-sentencing provisions to be a more systematic means of achieving statutory sentencing goals.

While some fine tuning may be in order, I would hope that we can have considerably more experience with presumptive sentencing before any major reworking is attempted. As a wise old bureaucrat once told me, almost any system can be made to work, if it's left alone long enough for folks to get the hang of it.

Very truly yours,

Rodger W. Pegues  
Superior Court Judge

RWP/seb

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* 0 - 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.

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 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    (19)    28
	7    (12)    21	14    (19)    28	21    (28)    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    (6)    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.



Official Business

# Alaska State Legislature

## Senate

### Committee on Judiciary

Fouch V  
State Capitol  
Juneau, Alaska 99811

FOR IMMEDIATE RELEASE  
2/11/85

FURTHER INFORMATION:  
465-3717

The House and Senate Judiciary Committees have scheduled a joint work session on Alaska's mandatory sentencing law. The joint work session is scheduled for 1:30 p.m., Wednesday, February 13 in the Butrovich. The purpose of the joint work session is to provide lawmakers the broadest possible perspective so that future adjustments to the law, if required, will be the most appropriate and rational possible. Those invited to testify include:

Roger Endell, Commissioner, Department of Corrections

Robert Sundberg, Commissioner, Department of Public Safety

Dan Hickey, Chief Prosecutor, Department of Law

Francis Bremson, Executive Director, Alaska Judicial Council

Sandra Borbridge, Office of the Governor

Dana Fabe, Public Defender

Brant McGee, Office of Public Advocacy

The Honorable Alex Bryner, Chief Judge, Court of Appeals

"presumptive hearing"  
DRAFT

February 1, 1985

¶name¶  
¶If Not Empty,title¶¶title¶  
¶End If¶¶If Not Empty,agency¶¶agency¶  
¶End If¶¶address¶  
¶city\_state\_zip¶

Dear ¶salutation¶:

Presumptive sentencing will be the topic of discussion at a joint House/Senate Judiciary Committee work session to be held February 13, 1985, at 1:30 p.m. in Room 205 of the Capitol Building.

You are invited to attend the work session, and to provide information and insight to members of the Judiciary Committees on the issue of presumptive sentencing as it relates to your agency.

If you have any further questions, please contact Roger Lewis, Senate Judiciary Committee aide, at 465-3717.

Sincerely,

Patrick M. Rodey  
Chairman  
Senate Judiciary Committee



Official Business

# Alaska State Legislature

## Senate

### Committee on Judiciary

Pouch V  
State Capitol  
Juneau, Alaska 99811

February 1, 1985

The Honorable Rodger W. Pegues  
Pouch U  
Juneau, AK 99811

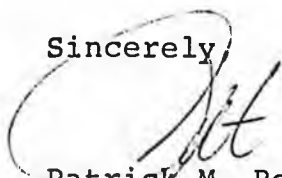
Dear Judge Pegues: <sup>ROU</sup>

Presumptive sentencing will be the topic of discussion at a joint House/Senate Judiciary Committee work session to be held February 13, 1985, at 1:30 p.m. in Room 205 of the Capitol Building.

You are invited to attend the work session, and to provide information and insight to members of the Judiciary Committees on the issue of presumptive sentencing as it relates to your agency.

If you have any further questions, please contact Roger Lewis, Senate Judiciary Committee aide, at 465-3717.

Sincerely,

  
Patrick M. Rodey  
Chairman  
Senate Judiciary Committee



Official Business

# Alaska State Legislature

## Senate

### Committee on Judiciary

Pouch V  
State Capitol  
Juneau, Alaska 99811

February 1, 1985

Ms. Sandra Borbridge  
Special Assistant  
Office of the Governor  
Pouch A  
Juneau, AK 99811

Dear Ms. Borbridge:

Presumptive sentencing will be the topic of discussion at a joint House/Senate Judiciary Committee work session to be held February 13, 1985, at 1:30 p.m. in Room 205 of the Capitol Building.

You are invited to attend the work session, and to provide information and insight to members of the Judiciary Committees on the issue of presumptive sentencing as it relates to your agency.

If you have any further questions, please contact Roger Lewis, Senate Judiciary Committee aide, at 465-3717.

Sincerely,

A handwritten signature in cursive script, appearing to read "Pat".

Patrick M. Rodey  
Chairman  
Senate Judiciary Committee



Official Business

# Alaska State Legislature

## Senate

### Committee on Judiciary

Pouch V  
State Capitol  
Juneau, Alaska 99811

February 1, 1985

Dana Fabe  
Public Defender  
Department of Administration  
900 W. 5th Ave., Suite 200  
Anchorage, AK 99501

Dear Ms. Fabe:

Presumptive sentencing will be the topic of discussion at a joint House/Senate Judiciary Committee work session to be held February 13, 1985, at 1:30 p.m. in Room 205 of the Capitol Building.

You are invited to attend the work session, and to provide information and insight to members of the Judiciary Committees on the issue of presumptive sentencing as it relates to your agency.

If you have any further questions, please contact Roger Lewis, Senate Judiciary Committee aide, at 465-3717.

Sincerely,

Patrick M. Rodey  
Chairman  
Senate Judiciary Committee



Official Business

# Alaska State Legislature

## Senate

### Committee on Judiciary

Pouch V  
State Capitol  
Juneau, Alaska 99811

February 1, 1985

Brant McGee  
Director  
Office of Public Advocacy  
900 W. 5th Ave., Suite 525  
Anchorage, AK 99501

Dear Mr. McGee:

Presumptive sentencing will be the topic of discussion at a joint House/Senate Judiciary Committee work session to be held February 13, 1985, at 1:30 p.m. in Room 205 of the Capitol Building.

You are invited to attend the work session, and to provide information and insight to members of the Judiciary Committees on the issue of presumptive sentencing as it relates to your agency.

If you have any further questions, please contact Roger Lewis, Senate Judiciary Committee aide, at 465-3717.

Sincerely,

A handwritten signature in black ink, appearing to read "PAT".

Patrick M. Rodey  
Chairman  
Senate Judiciary Committee



Official Business

# Alaska State Legislature

## Senate

### Committee on Judiciary

Pouch V  
State Capitol  
Juneau, Alaska 99811

February 1, 1985

Roger Endell  
Commissioner  
Department of Corrections  
Pouch T  
Juneau, Alaska 99811

Dear Mr. Endell: *RODGER*

Presumptive sentencing will be the topic of discussion at a joint House/Senate Judiciary Committee work session to be held February 13, 1985, at 1:30 p.m. in Room 205 of the Capitol Building.

You are invited to attend the work session, and to provide information and insight to members of the Judiciary Committees on the issue of presumptive sentencing as it relates to your agency.

If you have any further questions, please contact Roger Lewis, Senate Judiciary Committee aide, at 465-3717.

Sincerely,

A handwritten signature in cursive script that reads "Patrick".

Patrick M. Rodey  
Chairman  
Senate Judiciary Committee



Official Business

# Alaska State Legislature

## Senate

### Committee on Judiciary

Pouch V  
State Capitol  
Juneau, Alaska 99811

February 1, 1985

Robert Sundberg  
Commissioner  
Department of Public Safety  
Pouch N  
Juneau, Alaska 99811

Dear Mr. Sundberg:

Presumptive sentencing will be the topic of discussion at a joint House/Senate Judiciary Committee work session to be held February 13, 1985, at 1:30 p.m. in Room 205 of the Capitol Building.

You are invited to attend the work session, and to provide information and insight to members of the Judiciary Committees on the issue of presumptive sentencing as it relates to your agency.

If you have any further questions, please contact Roger Lewis, Senate Judiciary Committee aide, at 465-3717.

Sincerely,

A handwritten signature in cursive script, appearing to read "Pat".

Patrick M. Rodey  
Chairman  
Senate Judiciary Committee



Official Business

# Alaska State Legislature

## Senate

### Committee on Judiciary

Pouch V  
State Capitol  
Juneau, Alaska 99811

February 1, 1985

Francis L. Bremson  
Executive Director  
Alaska Judicial Council  
1031 W. 4th Ave., Suite 301  
Anchorage, Alaska 99501


Dear Mr. Bremson:

Presumptive sentencing will be the topic of discussion at a joint House/Senate Judiciary Committee work session to be held February 13, 1985, at 1:30 p.m. in Room 205 of the Capitol Building.

You are invited to attend the work session, and to provide information and insight to members of the Judiciary Committees on the issue of presumptive sentencing as it relates to your agency.

If you have any further questions, please contact Roger Lewis, Senate Judiciary Committee aide, at 465-3717.

Sincerely,

  
Patrick M. Rodey  
Chairman  
Senate Judiciary Committee



Official Business

# Alaska State Legislature

## Senate

### Committee on Judiciary

Pouch V  
State Capitol  
Juneau, Alaska 99811

February 1, 1985

Daniel W. Hickey  
Chief Prosecutor  
Department of Law  
Pouch KC  
Juneau, AK 99811

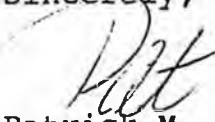
Dear Mr. Hickey: <sup>DA??</sup>

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You are invited to attend the work session, and to provide information and insight to members of the Judiciary Committees on the issue of presumptive sentencing as it relates to your agency.

If you have any further questions, please contact Roger Lewis, Senate Judiciary Committee aide, at 465-3717.

Sincerely,

  
Patrick M. Rodey  
Chairman  
Senate Judiciary Committee



Official Business

# Alaska State Legislature

Senate

Committee on Judiciary

Pouch V  
State Capitol  
Juneau, Alaska 99811

February 4, 1985

The Honorable Alex Bryner  
Chief Judge  
Court of Appeals  
303 "K" Street  
Anchorage, Alaska 99501

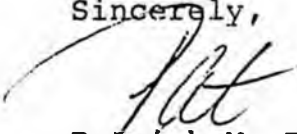
Dear Judge <sup>ALEX</sup>Bryner:

Presumptive sentencing will be the topic of discussion at a joint House/Senate Judiciary Committee work session to be held February 13, 1985, at 1:30 p.m. in Room 205 of the Capitol Building.

You are invited to attend the work session, and to provide information and insight to members of the Judiciary Committees on the issue of presumptive sentencing as it relates to your agency.

If you have any further questions, please contact Roger Lewis, Senate Judiciary Committee aide, at 465-3717.

Sincerely,

  
Patrick M. Rodey  
Chairman  
Senate Judiciary Committee

# Alaska's prisoner problem

FAIRBANKS — Roger Endell has a problem. Most Alaskans hardly sit up and take notice when a state commissioner has a problem — even when it's the commissioner of corrections.

But Roger Endell believes Alaskans had better listen to his complaints. If we don't, we may soon find the streets are the repositories of some criminals our courts thought should be in prison.

Endell compares the situation in the state's prisons to a bathtub. The level of water in the tub can be controlled in two ways — either by controlling the water flowing in or the water flowing out.

Like that metaphorical bathtub, Endell's prisons have a limited capacity. And the prison population keeps bubbling up around the top of the limit.

When the number of prisoners exceeds the number of beds for 25 days, Endell must release offenders to bring down the numbers. That's his overflow valve.

The problem, as Endell told members of the Farthest North Press Club last month, is that the spigot sending criminals to prison is open full blast. It's so wide open that Alaska's prisons take in 300 to 350 more prisoners each year than they release.

"The prison population is growing so rapidly it will overtake us," Endell said.

He is quick to point out that offenders who are released are not felony criminals. Three times in the past two years, Endell said, prison gates have had to swing open to set convicted criminals free. He stressed that fortunately no violent crimes had resulted.

One way to solve Roger Endell's problem is to build a bigger bathtub. The Department of Corrections is doing just that. Endell expects prison capacity to increase by 1,500 beds in the next five years. If prison population growth stays to the lower end of predicted increases, a growth of 300 a year over the next five years will just be contained in the new 1,500 beds.

But if growth is more like 350 a year, in five years Alaska will have to worry about dealing with the release of



dean  
gottehrer

250 criminals spilling out over the top of the prison bathtub.

Building a bigger bathtub is expensive — especially when the state's oil income is dropping. High-security prisons cost \$130,000 to \$150,000 per bed, and while that's the high rent tub, the state needs those prisons for dangerous felons. Another way to control the flow is to tighten the tub's spigot.

One of the reasons the spigot opened so wide was that the legislature passed a new criminal code that took effect in 1980. Prison population before then had been relatively stable. In 1980, the numbers started to shoot up.

The difference in Endell's mind is mandatory sentencing. Before the new criminal code, for example, Endell said the prisons housed about 50 sexual offenders. Today that number has jumped to 470, reflecting the effectiveness of a mandatory sentence for sexual offenses.

The second leg of Endell's three-legged solution to prison problems is to examine presumptive sentencing. While he knows he won't win any popularity contests for suggesting it, Endell says the legislature should lop a year or two off presumptive sentences. That would close the spigot into the tub a bit. Alaska ranks third nationally after Nevada and the District of Columbia in its incarceration rate. It jumped into third place after mandatory sentencing took effect.

The third leg is to develop more options to prison. The one Endell mentioned is a program of diversionary work in the community. One of its goals is for prisoners to repay victims.

The cost of such programs is significantly lower than

jailing a criminal. The state spends \$85 a day to keep someone behind bars, \$45 a day in a halfway house and just \$3 a day to supervise someone on probation or parole.

Since Endell's visit to Fairbanks, I've read about an intensive probation program Georgia instituted to deal with its overcrowded prisons so dollars would not have to continue to be taken from school construction to build more prisons.

Intensive probation allows judges to put drug abusers, shoplifters, thieves, forgers, felony drunk drivers — anyone who might receive a five-year prison sentence — back on the street under tight supervision. In Georgia that means curfew, at least five unannounced visits of the probation officer each week, at home or work, and spot testing for drugs or alcohol use. The probation officer can easily return a probationer to prison.

In Georgia, intense probation costs 20 percent of jail. If that holds true here, we might expect intense probation to cost \$17 a day in Alaska. The interesting twist is that all state probationers in Georgia pay fees that completely support the program. As well as paying a fee, probationers are required to make restitution to victims of their crimes, pay fines and do at least 132 hours of community service work.

Roger Endell doesn't really have a problem. The state of Alaska does. Endell knows that if the legislature doesn't appropriate more money, lower the presumptive sentences or provide the means to divert prisoners to halfway houses or intensive probation, his course of action is clear.

Once the prisoner population passes prison capacities for 25 days, Endell merely has to open the doors and release enough prisoners to bring the levels back down.

He doesn't have a difficult choice to make. You and I and the state government down in Juneau do.

□ Dean M. Gottehrer teaches at the University of Alaska-Fairbanks in the Department of Journalism and Broadcasting.

11/17/85

# FAIRBANKS

## Child abuse bill omits problem of sentencing

By DAN JOLING  
News-Miner Bureau

2-11-85  
JUNEAU—Gov. Bill Sheffield's child abuse bill, part two of a two-tier approach to protecting Alaska's children, may be leaving out one aspect of the problem, according to testimony here last week.

Sheffield introduced House Bill 88 to tighten current statutes. He has also proposed 59 new social workers, law staff or clerical workers to address the problem in the fiscal year 1986 budget, including nine emergency hires last summer.

According to testimony offered to the House Health, Education and Social Services Committee, HB 88 does not address presumptive sentencing. Presumptive sentencing has begun to gain legislative attention for its effect on families involved with sexual crimes, plus its effect on an overloaded prison system.

State Public Defender Dana Fabe of Anchorage told legislators last week that presumptive sentencing laws force many defendants to pursue their full range of alternatives, including jury trials, because of automatic eight-year sentences for serious sexual offenses against children.

She said many would plead guilty, sparing children from testifying, if mitigating circumstances could be considered.

If passed in the form proposed by

the governor, HB 88 would:

- Increase the categories of people required to report suspected child abuse to authorities. Doctors, teachers, school administrators, peace officers, and employees of licensed day care centers are now required to report child abuse, either when they observe child victims or take reports from offending adults.

HB 88 expands the list to include clergy when acting as counselors and other church counselors. It specifies that employees and volunteers of both private and public schools are required to tell authorities if they suspect a child has been abused. The penalty for not reporting remains a class B misdemeanor.

Assistant Attorney General Gayle Horetsky said the purpose is to expand the number of people reporting, not violate the sanctity of the confessional.

The law distinguishes between communication made to clergy in their role "in the furtherance of a religious practice" and not for counseling purposes.

- Require reporting of suspected "mental injury" as well as neglect and abuse. Mental injury is defined as "an injury to the intellectual or psychological capacity of a child as evidenced by an observable and substantial impairment in the child's ability to function within a normal range of performance and behavior, with due regard to the child's cul-

ture."

- Allow adults, such as police, to repeat before grand juries the testimony they've taken from children without making the children appear themselves.

The hearsay evidence provision is designed to spare child victims the trauma of retelling their stories numerous times.

- Require people who process film to report to police if they process film that depicts a minor engaged in prohibited sex activity. A similar provision in another state resulted in Alaska police being alerted to an adult who had forced a minor into participating in pornography.

- Add a provision to allow the attorney general to petition the court to stop a person who has abused a child from having contact with other children.

Public Defender Fabe said if the Legislature includes the hearsay provision, it should be as narrow as possible, used to protect only the youngest children, those under 10 years old.

She said testifying is not necessarily traumatic to children. If a trend to protect victims at the expense of defendants' rights is established, grand jury proceedings could evolve into sessions of police reading reports to the jurors.

Because of stiff presumptive sentences, she said, she cannot now in good faith counsel clients to waive grand jury hearings and jury trials.



**ROGER ENDELL**  
*High costs, few beds*

# Budget woes add to growing jail problem

71-31-85

By DAN JOLING  
News-Miner Bureau

JUNEAU—In the late 1970s, Alaskans demanded and got tougher criminal laws. In 1985, legislators must decide whether Alaskans can afford that luxury.

The pinners of a diminishing budget and demand for more bed space are squeezing Alaska's prison system. The pressure may magnify, depending on a controversial class-action lawsuit seeking higher standards for prisoner care.

In a Senate Health, Education and Social Services Committee meeting Tuesday, Department of Corrections Commissioner Roger

Endell told legislators:

- Alaska added 300 prisoners more than the number released in both 1983 and 1984.

- Alaska, which just surpassed Wyoming in population, has more than 1,000 felons in jail compared to Wyoming's 700.

- Alaska's incarceration rate of 263 persons per 100,000 population ranks 7th among states.

- Alaska added 800 new prison beds the last two years. To keep up, the Corrections Department wants to add 600 more.

- The adult corrections operating budget hit \$57.8 in fiscal year 1984. For fiscal year 1986, the re-

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**"Where the judge's discretion has been limited, we're feeling the crunch."**—

*Department of Corrections  
Commissioner Roger Endell*

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quire it is for \$79.4 million.

The Corrections Department is already feeling the economic pinch.

State officials originally planned for more than 600 beds at a new Seward maximum security prison.

Legislators balked, and last session appropriated \$19 million for a 820-bed facility.

Endell said \$22 million is needed to finish it. However, because of diminished revenue projections, Sheffield has recommended only

\$10 million more. That will make it a 128-bed facility, at a cost of \$100,000 per bed.

That may not be enough to meet Alaska's future need, especially if the verdict in the prisoner class action suit requires less congestion in the jails.

Thirty-five states are under court order in the administration of their prison systems. Alaska may become No. 36 next month.

That's when Anchorage Superior Court Judge Douglas Serdahely is expected to render his decision in the Cleary case, a 1981 class-action suit filed over alleged overcrowding, understaffing and the lack of

rehabilitation programs. The judge's decision will tell the state whether it meets constitutional requirements to balance protection of the public with rehabilitation requirements.

"My guess would be that he would try to set caps, or capacity for facilities," Endell said.

That means that when prisoners exceed beds, the court may order prisoners released.

Endell indicated his problems of rapidly increasing costs and shortage of beds is caused in part by the stricter laws that went into effect (See PRISONS, page 3)

# Has law destroyed her family?

## Mother opposes husband's incest conviction

By DOUG O'HARRA

Daily News reporter

KNIK — Twice a week, L.D. piles her three children into a battered old car for a 100-mile round trip to an Anchorage jail.

Her husband, W.D., has begun a 21-year prison sentence for sexually abusing their 4-year-old daughter when the child was 2½ years old.

The trip for L.D. is a grim family reunion, a last chance

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□ Editor's note: The family in this story did not request anonymity. They believe their neighbors are already familiar with their circumstances due to hometown news reports. The Daily News, however, has withheld the names of the husband and wife to protect the identity of their daughter beyond the family's hometown.

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to involve her husband with their children.

"People say to me: 'Now that you're single . . . I hate it.'" she says as she drives to the Cook Inlet Pre-trial

Facility. "I'm not single. We are still a family."

Since her husband's arrest last spring, L.D. has lived a

See Page A-10, MOTHER

## Mother opposes incest conviction of her husband, says sentence has destroyed her family

Continued from Page A-1

life powered by bitterness and a belief she has been wrongly sentenced to a term of single-motherhood.

From the moment she discovered her husband having sexual contact with her daughter in June 1983, she tried to solve the problem without bringing in authorities.

During the year that followed, L.D. says, she and her husband were able to deal with his problem without it ever happening again — only to have him suddenly arrested.

"We were just starting to get our family together," she says. But the arrest and conviction is "just making the problems worse. If you can't see that there are worse problems than before, then somebody's got to be blind."

To L.D., the prosecution of her husband was the act of a rigid and impersonal system — a system, she says, that traumatized a child who had not been harmed, and shattered a family just as it had begun to heal.

As a result, L.D. has mounted a vigorous attack on the laws that sent her husband to jail. She and her husband have written a petition asking that incest and sexual assault be separated under the law. She intends, she says, to get thousands of signatures.

During the summer, L.D. pleaded her case in letters to then-Palmer District Attorney Michael White and Superior Court Judge James Hanson. She stormed the offices of a local Valley newspaper, lost her temper with social workers, denounced the system to whomever would listen.

But Michael White and others who deal with sexually abused children say L.D. has simply placed herself and her husband above the safety of their children.

"(L.D.) is very concerned, as she said several times to police officers and everyone else, about losing the paycheck," White says.

"It is not at all unknown for a mother, when faced with choosing between the welfare of the children and the interests of the father, to choose the father," says Gayle Horstki, an assistant attorney general specializing in sexual abuse law.

"Our concern more than anything is to protect that child from further assaults, and if the mother doesn't like it, that's too bad. The mother didn't protect the child in the first place."

Under questioning, W.D. confessed to having sexual contact with his daughter three times in the

his family.

"He was always here for work and he always did his job," Merrigan said.

W.D. is a bearded, lean man with intense eyes. He is slow to speak, inarticulate, his voice resigned. He says he felt at home working at the salvage yard, alone with the equipment and away from people.

"I'm not really an outgoing person. I like to keep to myself and I always have," he said last summer. "I like to be able to feel the pain of working."

The couple had a child in 1980, another in 1982. They invested their 1982 permanent fund dividend checks in an acre of land 12 miles south of Wasilla off Knik Road. W.D. erected a 16-by-32 Army tent, framed and insulated it.

While working on the tent in the spring of 1983, W.D. was alone with his daughter, then 24. He had sexual contact with her, including oral sex. It happened twice more in the next weeks, ending forever, the couple says, when L.D. walked in on them.

"I know it would never happen again," she says. "I am assured of that."

But psychologists and prosecutors disagree. They say the chances are slim anyone could stop such behavior permanently without intense professional treatment.

"It is possible, but it is a remote possibility that it would be a one-time thing," says Dr. Dennis Greene, an Anchorage psychologist who specializes in sexual abuse problems.

"The stronger the denial, the more you're probably at risk because it's not a matter of willpower. It's a matter of controlling your thought life."

W.D. says he tried to distance himself from his family after the incidents.

"I've been trying to stay away from her, trying to stay away from my family," he told police after his arrest. "I try to think of her as a boy. As a son and not a daughter."

When asked last summer why it happened, W.D. took a long time to answer.

"I wouldn't be able to explain it," he said finally, a tortured look in his eyes. "I can't find the words to explain it."

In a pattern found in a large percentage of adults who sexually molest children, W.D. had himself been molested as child, along with his brother.

That brother now is serving several life sentences in Louisiana for sexually molesting children, according



Until early this winter, L.D. lived in a tent with her two children.

Anchorage Daily News/Fran Duran

law. In sexually molesting his daughter that spring, W.D. committed three unclassified felonies and three other felonies — punishable in his case (because of his previous burglary conviction) by three 15-year and three two-year prison terms.

Under Alaska law, any sexual penetration of a child by an adult — whether it was rape by a stranger or in-home incest — takes the same automatic penalty.

Whether W.D. actually harmed the

know whether I had told (my daughter) the right thing," she says.

The neighbor contacted the police. W.D. was arrested in June after a short investigation. During interviews, he made a full confession and was held in lieu of \$50,000 cash-only bond. He never made bail.

From that point, things got progressively worse for L.D., then pregnant with her third child. Beginning with the arrest, she says, her family was assaulted by newspaper articles and media reports that she believes described W.D. as a "monster."

"Everybody that knows him, that knows us, knew what happened," she says. "I didn't know it was going to be published, and there you are. There's no privacy."

Meanwhile, without the support of her husband, L.D. struggled to buy food and keep her car running.

She owns, through inheritance, a 111-acre homestead near Homer that lacks access but is appraised at nearly \$350,000. She is negotiating to sell it to the state, but no money has been appropriated to buy it.

Because she has the property, L.D. is ineligible for most kinds of public assistance. She has very little cash.

Her car broke down. She got another one, but damaged it in a minor accident on an icy road. A third car needs work. Her bills are stacking up. Valley Hospital in Palmer even filed a small-claims action over the bill for the birth of her second child.

Throughout the fall and early winter, she lived in the cluttered Army tent with holes in the roof and the sparse light thrown by two oil lamps and a Coleman lantern.

As time passed, word of her situation prompted local churches and individuals to donate food to her family.

At the same time, in a project started before W.D. was arrested, local residents and business owners also contributed time and labor to build a small frame house on the couple's land.

"I really appreciate what they've done," L.D. says. But "it makes it really sad that we're going to have a house and he's not going to be there to share it."

Over the summer, as L.D. scraped by and wrote letters to the prosecutor pleading with him to drop the case, W.D. became morose as he awaited trial at the Cook Inlet Pre-trial Facility.

In a July interview, he talked at length about a vision that he had been cut off by God. Police said he was a suicide risk.

Under questioning, W.D. confessed to having sexual contact with his daughter three times in the spring of 1980. Nevertheless, the couple insists that the incidents were isolated acts, never to be repeated.

"They're saying they don't want it to happen again, and in a year, it never happened again," L.D. says. "So why are they locking him up for 20 years when we've proven we can all live here together for a year without it happening?"

That cuts to the heart of a crucial question: Does the mandatory sentencing of W.D. needlessly destroy his family, or is it the only way to protect his children from future assaults?

The question comes as the number of sexual offenses against children has exploded into a statewide epidemic.

The number of prosecutions involving sexual offenses against minors in Alaska has jumped 560 percent in four years, from 52 during 1979-80 to 343 during 1983-84, according to Department of Law statistics. Horetski believes the number will exceed 400 this year.

"There seems to be two factors feeding it," she says. "One, that there is more of it going on, and two, people are more likely to report it."

The increase comes despite a steady toughening of penalties by adding mandatory minimum sentences — called presumptives — and vigilant prosecution of offenders.

Presumptive sentencing meant W.D. faced 51 years in prison upon conviction this fall of three counts of first-degree sexual assault and three counts of sexual abuse of a minor.

It was only White's decision to drop two of the assault charges at the last minute that gave W.D. a 21-year sentence and avoided a mandatory review of the sentence by a three-judge panel.

L.D., now 35, and W.D., now 28, met in Alaska in the late 70s while W.D. was still in the Army. After his discharge, he was arrested for burglarizing a house and served a six-month sentence.

W.D. then attended the vocational center in Seward for a course in mechanics. The couple married and moved to the Matanuska-Susitna Valley, where W.D. got a job with Knik Towing & Wrecking.

According to L.D., they "squatted" for a while, then moved into a trailer in the salvage yard.

"Basically, we lived on damn near nothing," W.D. said during an interview last summer. "We ain't got the money to pay the rent."

"Things were never real good for them," said Frank Merrigan, W.D.'s supervisor at the yard. "There was never any real future for them."

W.D. worked at the yard for four years as a parts man, go-fer and mechanic. In his testimony at W.D.'s sentencing, yard owner David Webster said he was "a good hard worker" who always tried to provide for

his brother. That brother now is serving several life sentences in Louisiana for sexually molesting children, according to W.D.'s attorney, Richard Collins.

Whatever the reasons behind her husband's actions, L.D. insists that her child was not harmed. That has become her cry against the prosecution of her husband, and a stand she took shortly after W.D. was arrested last June and continues now, months after his sentencing.

"She (her daughter) didn't know it was wrong until we sat down and talked about it," L.D. says. "I just tried to explain it without putting any guilt on it."

The child was only harmed, she says, when the state removed her husband from the home and twice interviewed the girl — once by police and once before a grand jury.

"She was OK before they started dragging her through all this garbage, but she isn't now," L.D. says.

Whether that's true is difficult to know, according to mental health experts.

"It would really be different in each case," says Phillip Kaufman, an Anchorage psychotherapist with the Human Relations Center.

The child could be "scarred for life" or little traumatized, depending on the exact circumstances, he says.

But it is possible a child that young could have suffered the acts without psychological damage, Greene says.

"The younger the child, the less devastating the effect of sexual abuse," he says. With a 24-year-old, trauma could be non-existent, he says.

Nonetheless, the effect on the child would worsen if acts were repeated, if physical assault were involved, or if the father's reaction were guilt-laden, Greene says.

Both White and Horetski acknowledge that by prosecuting the case, the child could have been harmed further.

"I'm not saying the court process is helpful to her," White says. "It's a necessary evil to protect her."

"It's really easy for someone to say: 'My child is traumatized by the legal justice system,'" Horetski says.

"I have no doubt in my mind at all that it's less trauma to a child to go through the legal system than be subject to further assaults."

In any case, White believes L.D. did nothing to mitigate additional harm to the child. White says she has brought her daughter to court proceedings when it wasn't necessary, and openly accused the child of putting her father in jail.

L.D., on the other hand, insists she has always told the girl it wasn't her fault. She says behavior changes and regression occurred only after W.D. was arrested.

In a legal sense, the argument is academic. Even if the child had suffered no harm, it would make no difference for W.D. under Alaska

whether it was rape or a franker or in-home incest — talked about in automatic penalty.

Whether W.D. actually harmed the girl, whether he sought counseling, whether he would have ever had sexual contact with the child again does not matter.

That rigidity, where the law treats different kinds of actions with the same penalties, is unacceptable, according to Richard Collins, W.D.'s attorney.

"The theory of punishment (historically) has gone from to hurt, to hold, to help," he says. Following that idea, the incarceration of W.D. should be aimed at his rehabilitation.

"Let's assume that after 6 years of being in prison and going through therapy, W.D. has corrected his problem. But he's still got 15 years to go."

Valley businessman Robert Pontius, a longtime friend of the couple also is dismayed about the presumptive sentencing.

"If all the system is trying to do is match up the law with the crime, then all you need is a computer," he says. "Presumptive sentencing doesn't allow for justice and it doesn't allow for mercy."

Presumptive sentencing eliminates some degree of judicial flexibility, agrees Judge Hanson, who supported the idea but now thinks it may be wrong in some situations:

"Am I frustrated in many, many cases because the sentence is more than I would be giving?" he asks. "The answer is yes."

"I think in the case of the first-time offender, society would be better served if we could tailor the penalty to the individual."

That idea is supported by counselors and other professionals.

"The length of the sentence should be tailored to the length of the treatment for that person rather than just a blanket eight-year sentence," says Ray Clements, executive director of Parents United, a non-profit group that works with families coping with incest.

Greene also favors court-supervised treatment of offenders.

Not surprisingly, L.D. thinks it should go even further.

"I think the law should be changed so people can get counseling if they think they need it without fear of going to jail," she says.

In her petition, she states that "incest should be regarded as an illness" and that "there should be a maximum two-year sentence and mandatory counseling."

"I don't think I want the sexual assault laws changed but I do want the incest laws changed because they're dealing with families," she says. "There is nothing the same between incest and sexual assault except maybe the act itself."

But the strict penalties were created to protect the public against light sentencing and to stop sexual assaults and sexual abuse of children,

the perception under Alaska law of a child being sexually assaulted outside the family (incest) has angered and dismayed L.D. since her husband's arrest.

L.D. is a slender, sharp-featured woman. She grew up in Homer and attended two years of college in Idaho, where she studied photography. She is harsh and assertive during interviews. Her friends describe her as having "a lot of guts." Her letters to White, the prosecutor, are grammatical and neat, written in precise, upright strokes.

In discussing the case, she later matter-of-factly, crying when talking about her daughter and the hopeless frustration at being denied a chance to save her family.

"I do love him and he loves me and he loves his kids," she says. "I wanted to work it out. I believe in families. I believe in marriage. I believe that there isn't anything you can't solve by sitting down and talking about it."

But after she discovered the incest, her husband became withdrawn and would not talk to her about it.

"For a long time after it happened, he had a hard time trying to have a good relationship with (our daughter) because he felt real bad about it," she says. "The only time we were able to sit down and talk about it was the night before I was arrested."

W.D. admitted that it was a long time before he could come to grips with what had happened.

"It took me a long time to be able to get close to my family," he said last summer. "It took me over a year to be able to love them again, to be close to them."

L.D. says the family grew apart after the incident and began to utterly break down. Finally, she decided to seek counseling through Parents United, which specializes in incest.

The group was glad to help. But under Alaska law it and other such groups must report to police immediately if they have cause to believe a child has been sexually assaulted.

"It's kind of a Catch-22 situation for a person who wants help and turns to any authority for that help," says Clements, the executive director of Parents United. "That authority is required by law to report the abuse."

For L.D., the law became a trap: she couldn't get counseling without sending her husband to jail.

She rejected Parents United and refused to talk to a police officer who was sent to talk to her. For lack of evidence, the investigation was dropped.

As winter passed into spring, life in the family began to improve, L.D. says. W.D. began to interact with his children and she began to have hope.

During that period, L.D. told a neighbor about the assaults and what she had done about them.

"I asked because I wanted to

In a July interview, he asked at length about a vision that he had been cut off by God. Police said he was a suicide risk.

Combining that with the fact that he was able to corroborate his confession with further evidence, he and his attorney took the case to trial in September. Using testimony by L.D. and a neighbor, White was able to support the confession without having the victim testify. A jury found him guilty of all charges.

A psychological report on W.D., compiled for sentencing, painted a picture of severe emotional problems — a picture L.D. angrily denounces at his sentencing. W.D. lectured the courtroom on the apocalypse and likened Anchorage and Fairbanks to Sodom and Gomorrah.

L.L. listened from the front bench of the courtroom, where she sat with her children, nursing the couple's 5-day-old baby.

The treatment of the couple, say White and others, was an effort by the system to balance the safety of the child with the needs of the family and the accused.

"Somebody has an obligation to help those who can't help themselves," White says. "If you're going to have to err one way or another, it seems to me the best way to err is for the safety of children, to stop the cycle of sexual abuse right then and there."

New legislation to help insulate child victims from the justice system is now being written. Horetski says a proposal in the last session of the legislature would have allowed hearsay evidence rather than direct testimony by victims to be admitted before grand juries.

As for presumptive sentences Horetski says public sentiment and political reality likely will keep them in place.

According to L.D., that reality is ethically wrong.

"I do think (sexual abuse is) wrong," she says. "But I feel like I should be up to the family to press charges, and I think that counseling should be made available without having to have it reported or have it press charges."

From the ordeal, L.D. has savaged some hope for the future. He house furnished, she wants to earn living by babysitting there.

She also hopes people will fight the system that she feels doomed her husband. If she can sell her land, she wants to mount a petition drive to persuade legislators to change the laws. She has already met with some Mat-Su legislators to plead her cause.

But for L.D., whose three children will be grown when their father is released from prison, the overall lesson has been plain.

"Don't trust anybody," she says. "Don't go to social services. Don't go to the police. Don't go to anybody."

# Prosecutors don't want child rape law softened

Associated Press

Attorney General Hal Brown's statements that he may seek legislation to reduce jail terms for first-time child sex offenders have infuriated prosecutors in the Anchorage district attorney's office.

Brown said Friday he may seek a new law to change the eight-year sentence now required for first-degree sexual assault of a child. The charge requires penetration.

"There are degrees of seriousness within the offense," Brown said. "I am a firm believer in the general principle that the penalty should be tailored to fit the offense and the person."

Brown assumed the state's top law enforcement job after a stint as a prosecutor followed by a decade as a defense attorney. He used the word "hysteria" to describe the mentality of some police and prosecutors handling child sex crimes.

But Anchorage District Attorney Victor Krumm said he disagrees with his boss.

"Anyone who penetrates any child deserves to go to jail for eight years or more," he said. Prior to state's adoption of mandatory sentencing for some crimes, such people frequently received suspended sentences, he said.

"We are resolute," said

Krumm. "We are determined. We are not hysterical. The one thing we know about people who rape children is that they are recidivists. They rape many children many times."

Defense attorneys and some state social workers have argued that sex offenders, particularly in cases of incest involving the father, have a treatable sickness that cannot be effectively treated by locking offenders up for long terms in prison.

About 20 percent of the cases now handled by Krumm's office are child sex abuse cases, most of them incest.

The average victim is between 7 and 10 years of age,

Krumm said. "What that eight-year sentence does is give her time to grow up to an age where she can defend herself," he said.

Under the state's presumptive sentencing law, the eight-year jail term is automatic in the average case, but a judge can reduce the sentence to four years if he finds mitigating factors or increase the term if the case includes aggravating factors.

Brown said changes in the law could include simply reducing the eight years now required, or broadening the number of mitigating factors that judges are allowed to consider when deciding whether to give a first-offender a lesser term.

Dan Hickey, the state prosecutor leaving his job at end of the month after being fired by Brown, said he strongly opposes abolishing the presumptive sentence.

However, Hickey said, he in the past proposed creating a new category for first-offenders charged with digital penetration only, which would carry a year mandated sentence.

"I'm talking about nuance, further refinement of the term, not scrapping the presumptive sentence," said Hickey, who authored the presumptive sentencing law.

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