

ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672

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● HOUSE JUDICIARY ●

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The method for selecting jurors shall be established by the Administrative Board. The Coordinator shall be responsible for maintaining a list of available jurors.

Jurors are bound to maintain the confidentiality of the defendant and all court proceedings.

#### Article V: Referral Procedure

Section 1. After a preliminary investigation, the Referring Authority may refer a case to the Anchorage Youth Court. The Referring Authority will meet with the defendant and his/her custodial parent or guardian and explain the purpose of Anchorage Youth Court and its procedures, including sentencing. After an opportunity to confer with counsel, the defendant will be given the choice of proceeding to Anchorage Youth Court or being handled through regular channels, which may include a formal court hearing and a record.

Section 2. If the defendant and his/her custodial parent or guardian agrees to proceed with Anchorage Youth Court, they will sign a voluntary agreement, with the understanding their case will be held open for one hundred twenty (120) days to complete the process. This voluntary agreement will also state that failure to comply with Anchorage Youth Court and other established conditions, once agreed to, may result in having their case handled in formal court proceedings.

Section 3. Anchorage Youth Court proceedings will begin with the referral from the Referring Authority. The Coordinator will receive a copy of the signed voluntary agreement to participate in Anchorage Youth Court, available arrest reports and other related documents. If the case is not accepted by Anchorage Youth Court, the case will be returned to the Referring Authority, together with all documents relating to the case.

#### Article VI: Anchorage Youth Court Procedure

Section 1. Proceedings in Anchorage Youth Court shall be conducted as far as practicable in substantial conformity with rules and statutes governing adult proceedings in the Alaska court system. The rules and statutes shall be applied and modified as necessary to promote the prompt and just resolution of cases and legal education.

Section 2. At all times, Anchorage Youth Court proceedings will be conducted to ensure that the defendants' rights guaranteed by the Alaska and United States constitutions are protected, including but not limited to the following:

1. the right to be represented by an Anchorage Youth Court attorney;
2. the right to trial by jury;
3. the right to call and cross-examine witnesses;
4. the right against self-incrimination; and
5. the right to appeal.

At all times, Anchorage Youth Court proceedings will be conducted to ensure confidentiality.

current membership records and attendance records, and assist the Anchorage Youth Court Bar Association President. The Secretary shall publish the minutes of all Anchorage Youth Court Bar Association Meetings and keep Anchorage Youth Court Bar Association members informed of the time and date of upcoming meetings.

Section 9. Treasurer. Any member who is at least 16 years old or is at least a junior in high school is eligible to hold the position of Treasurer. Duties of the Treasurer are, but not limited to; control of student funds, maintain and keep current records, provide treasurer's reports at all Anchorage Youth Court Bar Association meetings.

Section 10. Judges. All judges must be enrolled in grades 10, 11, or 12, and must have served at least two times as prosecuting attorney and at least two times as defense attorney, unless candidates with these qualifications are not available. In case the above qualifications cannot be met, the nominee must have been involved in at least one case. Three Associate Judge positions must be filled by students with fall enrollment in grades 10 or 11.

To qualify for the position of Chief Judge or Assistant Chief Judge, a person must have been an Associate Judge at least once.

The Assistant Chief Judge shall serve in the absence of or at the request of the Chief Judge, and in that event shall serve in place of and with the same power and authority as the Chief Judge.

Section 11. Clerk. Any member in grade 7-12 may be elected to the position of Clerk. Under the supervision of the coordinator, the Clerk shall set the Anchorage Youth Court calendar, and send out timely court notices to the Referring Authority and defendants as required. The Clerk of the Anchorage Youth Court shall be responsible for tape-recording all court proceedings, maintaining the tape library of the Anchorage Youth Court, keeping the records of all the Anchorage Youth Court proceedings, maintaining defendant files, and generally assisting the Chief Judge. The Clerk may appoint such assistants, not to exceed three (3), as the Clerk deems necessary.

Section 12. Baliff. Any member in grade 7-12 may be appointed to the position of Baliff. Baliff shall be appointed by the Bar President on a case-by-case basis. The Baliff shall swear-in witnesses, assist in setting up the courtroom, and assist the Chief Judge in maintaining order and decorum in the courtroom.

Section 13. Attorneys. Any member in grade 9-12 may be appointed as an Attorney. Under special circumstances and/or exceptional evaluations, and after consultation with the Chief Judge, the Coordinator may approve the appointment of an Attorney who is in grade 7 or 8.

The selection of attorneys to serve on cases that are referred to the Anchorage Youth Court shall be made by the Bar Association President on a rotating, case-by-case basis. Attorneys shall zealously represent their client to the best of their ability in accordance with the Alaska State Court and American Bar Association rules.

Section 14. Jurors. All youth in grades 7 through 12 and enrolled in a public or private school in the Municipality of Anchorage are eligible to serve as jurors, including any Anchorage Youth Court member.

Section 3. The Chief Judge or his appointee shall preside over all courtroom proceedings of the Anchorage Youth Court, with the assistance of two associate judges.

Section 4. If after an Anchorage Youth Court court proceeding, the defendant pleads guilty or is found guilty at trial, the judges will determine an appropriate sentence at a sentencing hearing to be held within five (5) days of the verdict or plea. Sentencing shall be in accordance with the informal sentencing guidelines established by the Referring Authority and the Anchorage Youth Court Judges.

Section 5. The Chief Judge shall submit to the Coordinator the findings, recommendations, and sentence of the Anchorage Youth Court. The Coordinator shall submit the findings, recommendations, and sentence to the Referring Authority before final disposition of the case.

Section 6. If the defendant chooses to exercise his right to appeal either a verdict or a sentence, he shall submit a written statement, including reasons for appeal, to the Chief Judge within three (3) days of the sentence. The Chief Judge shall appoint a three-member appeals panel.

There are seven grounds for appeal:

1. verdict not in conformity with Alaska Constitution, statutes or rules;
2. verdict not supported by the evidence;
3. sentence not supported by the evidence;
4. improper legal procedure;
5. inadequate legal representation;
6. new evidence discovered which substantially affects the case; and
7. plea not voluntarily given.

If the appeals panel finds for the defendant, the case shall be remanded for a new trial.

Section 7. The Coordinator shall oversee the defendant's compliance with the Anchorage Youth Court sentencing order (s) and provide status reports to the Referring Authority as required.

#### Article VII: Voting and Adoption of Rules

Section 1. All members of the Anchorage Youth Court may vote concerning Anchorage Youth Court matters.

Section 2. All matters put to a vote shall be decided by a simple majority of those present unless otherwise specified in this constitution.

Section 3. The Anchorage Youth Court Bar Association may pass rules deemed necessary to its proper functioning, as long as such rules do not conflict with this constitution or the bylaws.

## Article VII: Amendments and Ratification

Section 1. In order to ratify and amend this constitution, a constitution committee shall publicize the proposed constitution or the proposed revisions or amendments and provide notice of the voting date and place in a reasonable manner best calculated to reach the largest number of qualified voters as defined below.

Section 2. A qualified voter, for the purpose of ratification and amendment of this constitution, shall be any active member of Anchorage Youth Court Bar Association.

Section 3. The constitutional committee shall have the responsibility of preparing and distributing ballots for voting. Each qualified voter may cast one secret, written ballot for each proposal. The constitution committee will be responsible for counting and tallying of all ballots.

Section 4. A majority of all persons in grades 7 through 12 voting on the proposal (s) shall be required for ratification and amendment.

Section 5. The constitution committee shall promptly announce the outcome of the vote.

\* Amendments passed March and April, 1991 in bold type.

# Alaska State Legislature

Legislative Research Agency



P. O. Box Y  
Juneau, AK 99811-3100  
Phone: (907) 586-3891  
Fax: (907) 587-3351

October 25, 1990

## MEMORANDUM

TO: Senator Jay Kerttula

FROM: Maureen Weeks <sup>MW</sup>  
Legislative Analyst

RE: Teen Courts in Alaska and Other States  
Research Request 90.364

You asked for information about teen courts (courts in which young defendants charged with minor offenses appear before juries of their contemporaries). This memorandum begins with information about teen courts in general and continues with brief descriptions of teen courts in Anchorage, Alaska; Hillsborough County, Florida; Denver, Colorado; Odessa, Texas; and Pasco County, Florida. For comparison, selected characteristics of the five model courts are presented in the attached table.

### Background

Most youthful, first-time offenders who commit misdemeanors do not go to court, do not appear before a jury and are not sentenced by a judge. Instead, they receive a letter warning them not to offend again and they may be ordered to attend several hours of class for shoplifters or substance abusers. Teen courts are an effort to change this. They replace the "slap on the wrist" of a letter with the intimidating formality of a court appearance. Furthermore, they ask young people to appear before juries composed of other young people--tribunals which juvenile justice experts say tend to be harder on young offenders than adult jurors would be. By giving young, first-time offenders a glimpse of "real life" before judge and jury, these courts function as juvenile diversion, early intervention programs. Their purpose is to stop the progress from misdemeanor to felony by asking young offenders to take responsibility for their acts and accept sanctions determined by their peers.

Teen courts are composed of student volunteers who act as jurors and sometimes lawyers, clerks and bailiffs. Most are conducted by volunteer adult judges. Cases are generally screened. Defendants may be referred by the police, school officials, judges and, sometimes, private businesses. Most cases involve petty crimes. Teen courts are not recognized as courts of original or appellate jurisdiction.

*Teen Courts in Alaska + Other States - Legislative Research*

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Although the five courts we have chosen as models for discussion in this memorandum differ in many ways, all offer teen-age defendants the right to trial by their peers--defined in these courts as trial by one's contemporaries. Three carry this principle further by also using young people as prosecutors, defense lawyers, clerks and bailiffs. One (the Anchorage Youth Court) expands the concept to its fullest by allowing students to preside as judges.

All five teen courts hold their proceedings in local courtrooms to impress upon defendants that the session is "real." How court is conducted varies, however. For example, while the East Pasco Juvenile Court stresses the authenticity of the hearing by seating teens as jurors in regular juvenile court proceedings (presided over by a sitting judge and argued by actual prosecutors and public defenders), the Anchorage Youth Court asks teen-age defendants to accept verdicts and fulfill sentences determined solely by what many young people consider the most formidable of forums--other teen-agers.

The role of the jury also varies with the court. Three of the five courts we studied accept only defendants who are willing to admit guilt. In these courts, the teen-age jury hears arguments before determining an appropriate sentence. Two teen courts, however, allow not-guilty pleas. In one (East Pasco County Juvenile Court), young jurors recommend a verdict and, where appropriate, a sentence to the sitting juvenile court judge. In another (Anchorage Youth Court), young people are allowed much more authority. Here, after listening to arguments by youthful prosecutors and defense lawyers, teen juries determine a verdict and teen judges pronounce sentence.

Teen courts differ from each other in other ways. The Odessa Teen Court, begun in 1983 and the oldest of the courts we studied, emphasizes family responsibility by requiring parents of teen-age defendants to attend parent training workshops. The Denver Teen Court, which opens next month, is designed to replace school suspension and expulsion (which many students perceive as rewards) with community service and restitution. The Hillsborough County Teen Court stresses a variety of sentencing options by allowing student jurors to impose modified house arrest and restrict a defendant's driving privileges.

The advantages of teen courts are several. First, they place young, first-time misdemeanants before a court, a forum they take seriously. Second, they allow young people to be tried and sentenced by juries of their peers. Third, they allow defendants to pay their debts to society without incurring criminal records. Fourth, sentences by youth courts encourage a sense of responsibility by stressing redress to the community. Fifth, teen courts allow young people--defendants and court officials--to learn court proceedings first hand. And sixth, teen courts reduce the volume of cases brought before regular juvenile courts.

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## Teen Courts

### Anchorage Youth Court

Contact: Blythe Marston  
Chair, Youth Court Advisory Committee  
Bogle & Gates  
907-276-4557 or

Sharon Leon, Coordinator  
Anchorage Youth Court  
274-5986 (between 1 p.m. and 5 p.m.)

The court is composed of middle school and high school students (ages 12 to 18) who volunteer as judges, jurors, bailiffs, clerks, prosecutors and defense attorneys. To be eligible to sit on the court, students must attend an eight-to-ten week class and pass a Youth Court Bar Examination. About 100 students are members of the bar, with another 200 in preparation classes where they are taught constitutional law, criminal law and procedure, ethics and advocacy. Legal advisors prepare student prosecutors and defense lawyers before their cases go to trial.

Judges are elected by members of the Youth Bar Association. They must have argued twice as prosecutors and twice as defense attorneys. The chief judge and assistant chief judge must have served at least once as associate judge.

Defendants, who are also between the ages of 12 and 18, are usually first offenders charged with petty crimes. They have been referred through the juvenile probation department, but they may be referred by other organizations, such as a store alleging shoplifting. Defendants and their parents must agree to allow the Youth Court to hear the case. Court proceedings insure them the right to be represented by a lawyer, the right to trial by jury, the right to cross-examine witnesses, the right against self-incrimination and the right to appeal.

At arraignment, defendants may plead guilty or not guilty. Student jurors and judges hear arguments before they determine the verdict and set the sentence.

Offenses include petty crimes, but the Youth Court has also heard felonies and civil suits.

Sentences include community service and restitution. A defendant who wishes to appeal a verdict or sentence must submit the appeal within three days of the sentence. Once a sentence is served satisfactorily, the record is expunged.

Miscellaneous: This court is the most developed of teen courts we studied. It is the only court in which students serve as judges, the only court in which student lawyers argue cases for defendants who have pleaded not guilty, and the

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only court which requires students to pass a bar examination before qualifying to sit on the court.

The court has heard between 30 and 40 cases in the three years it has existed. (Juvenile probation officers have begun to refer cases increasingly frequently, according to Ms. Marston.) Trials are conducted at the Anchorage Courthouse in the evening.

The court is administered by two groups. A 16-member administrative board of lawyers, judges, police officers and students meets quarterly to oversee funding. This board is composed equally of adults and students. In addition, the Anchorage Youth Court Bar Association, composed of students who have passed the bar examination, meets weekly. The court was originally funded solely by the Anchorage Bar Association. Recently, funds have been appropriated from the Interest On Lawyers' Trust Association (IOLTA) funds. Private individuals also contribute to the court.

We will send under separate cover an Anchorage Youth Court video tape of the case of *State v. Pat O'Shea*, in which the defendant is accused of "minor assault" the night of March 23, 1989, after an evening of dancing at the Flaming Turban. The tape shows a three-judge panel presiding with youthful lawyers arguing before an attentive jury in procedures modeled after state court proceedings.

Hillsborough County, Florida

Contact: Bob Sleczkowski,  
Director, Juvenile Services,  
Thirteenth Judicial Circuit, Florida  
813-272-5110

The court is composed of students from area high schools who volunteer to serve as prosecutors and defense attorneys, as well as bailiffs, court clerks and jurors. They must complete a three-hour orientation and training before they are allowed to participate on the court.

The judge is a volunteer from the Young Lawyers Association.

Defendants, who are between 13 and 17 years old, participate voluntarily in teen court. No defendant appears before court officials from his or her own high school. Defendants are referred by the police through the state's attorney. First-time misdemeanants who do not qualify for teen court hearings may go to juvenile arbitration.

Defendants are required by statute to plead guilty. Jurors hear arguments and decide the sentence.

Offenses heard in teen court include school offenses (e.g. battery, trespassing) and alcohol offenses.

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Sentences last for five weeks. They include community service, modified house arrest, driver's license restriction, attendance at Alcoholics Anonymous meetings, written apologies, essays and jury duty. Sentences must be served exactly as determined by the teen court. After five weeks, the director of juvenile services rehearses the case and, if the sentence is completed satisfactorily, the record is expunged.

Miscellaneous: The Hillsborough County teen court was established in March 1990. It meets Tuesday and Thursday nights in a county courtroom. Four cases are heard each night. Nineteen area high schools participate in teen court on a rotating basis (each school sends a teen court once every six weeks). Adult staff includes the teen court coordinator, counselor, a secretary and director of juvenile services for the Thirteenth Judicial Circuit.

Denver, Colorado

Contact: Jan Church  
Chair, Teen Court Advisory Board  
1700 Lincoln, Suite 4100  
Denver, Colorado 80203  
303-861-7000

The court is composed of students who volunteer to serve as jurors and prosecutors and defense attorneys.

The judge is a volunteer retired judge.

Defendants are students in trouble in middle school and high school who have committed acts for which they would be suspended or expelled from school (but not serious enough to warrant a criminal charge). They participate in teen court voluntarily, although court organizers ask school principals to "strongly encourage" young people to choose teen court over traditional punishments which keep them out of school.

To appear in court, a teen must sign a contract admitting guilt. Jurors hear arguments and set the sentence.

Offenses heard by teen court include stealing, fighting, trespassing and possessing alcohol on campus.

Sentences include community service, apology to the victim and restitution. Those who do not comply with the teen court sanction are referred to the school or the police department.

Miscellaneous: The purpose of this program is to replace traditional negative school punishment, such as suspension and expulsion, with sanctions which keep the student in school and encourage him or her to serve the community. It is an attempt to intervene before students commit more serious offenses for which

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they will be charged. Teen court, sponsored by the Denver Bar Association, holds its first hearing in November 1990. This court replaces a teen court begun in the 1970s and disbanded in the mid-1980s.

Odessa, Texas

Contact: Natalie Rothstein  
201 N. Grant  
Odessa, Texas 79761  
415-333-3641

The court is composed of teen-agers who volunteer to act as jurors, bailiffs, clerks, prosecutors and defense lawyers. A master jury trained in interview and assessment skills hears traffic cases; other juries hear miscellaneous cases. Student court officials are trained during pre-trial and post-trial meetings with the judge and the teen court director.

The judge is a volunteer retired district court judge.

Defendants are referred by police, local courts, the justice of the peace courts and the schools. They participate in teen court voluntarily. No defendant may go through the teen court twice.

To qualify for teen court, defendants must plead guilty. Jurors hear arguments before determining the sentence.

Offenses heard in teen court include traffic offenses and Class C and B misdemeanors, including some drug possession cases.

Sentences include community service and jury duty. Alcohol or drug offenders must take a chemical abuse workshop. The parents of all offenders must take a parenting workshop. If the sentence is satisfactorily completed, the record is labeled "dismissed through Teen Court."

**Miscellaneous:** The Odessa Teen Court was established in November 1983. It meets every Tuesday night in the county courthouse, with seven juries hearing 21 trials. One "master jury" hears 15 traffic cases each night, while six other juries hear other cases. Parent participation is mandatory. Parents must be present at the initial interview with the teen court director, as well as at the trial. In addition, parents must attend three-hour parenting workshops, taught by the court director and by her husband, a professor at the University of Texas. The director says this parent training is vital to the program's success. The program is sponsored by the Junior League of Odessa. Two-thirds of the program's funding is from the city council and one-third is from the schools.

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Pasco County, Florida

Contact: Judge Lynn Tepper  
East Pasco Juvenile Court  
813-996-7341

The court is composed of students from the local high school (Zephyrhills High School). Jurors, selected from the school's law studies class, sit as the jury in actual cases heard by the East Pasco Juvenile Court. Jurors are trained by the law studies teacher, who discusses jury instructions in class, and by the sitting judge, who appears before the class once each semester to discuss the state's juvenile justice system. The judge also asks the state's attorney, the public defender and a pre-trial case worker to speak to the class. During court, jurors sit in the jury box. The trial proceeds as with a non-jury trial, except that all objections by lawyers must be made and argued on the floor where the jurors can hear them. Bench conferences, voir dire and objection to particular jurors are not allowed.

The judge is Circuit Court Judge Lynn Tepper (replacing Judge Maynard F. Swanson, Jr., who began the program).

Defendants are juveniles whose cases are on the regular docket; cases are not screened.

Defendants may plead guilty or not guilty. Jurors recommend the verdict by majority vote and, if the verdict is guilty, jurors also recommend sentencing. (Judge Swanson says his verdict differed from the jury's only once; he attributes that anomaly to his mistake in not properly instructing the jury.)

Offenses include any offense on the juvenile court docket.

Miscellaneous: This is the only court we studied in which jurors serve under a sitting judge. It has received national publicity on both the NBC Today Show and NBC Nightly News.

We attach an article describing the Pasco County Teen Court ("Pasco Juvenile Justice Program Wins National Fame," *Florida Star News*, May 15, 1990); a description of the Hillsborough County Teen Court ("Teen Court," provided by Bob Sleczkowski, director of juvenile services in Tampa, Florida); and an article describing the Odessa Teen Court (Robert Rothstein, "Teen Court: A Way to Combat Teen-age Crime and Chemical Abuse," *Juvenile & Family Court Journal*, 1987, p. 1-4). In addition, we attach several documents from the Anchorage Youth Court. The documents include step-by-step instructions in how to set up similar courts in other areas ("Anchorage Youth Court: Trial by Peers") and the Anchorage Youth Court Constitution.

I hope this information is useful. If you have any questions, or want additional information, please contact this agency.

HB

211

HOUSE COMMITTEE REPORT

(7)

Date Referred: April 2, 1993

FURTHER REFERRALS:

Date of Committee Action: 4-12-93

The JUDICIARY Committee considered:

HB 211

HOUSE BILL NO. 211

MUNICIPAL INVENTORY TAX EXEMPTION:EXPORTS

"An Act relating to the municipal tax exemption for inventories intended for export."

RECOMMENDATIONS:

be replaced with \_\_\_\_\_ [ ] the same title  
[ ] a new title

[ ] have attached amendments(s)

do pass

[ ] do not pass

[ ] no recommendations

[ ] individual recommendations

[ ] additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact \_\_\_\_\_

[ ] fiscal note(s) \_\_\_\_\_

[ ] zero fiscal note \_\_\_\_\_

zero fiscal note(s) DC+RA (3-25-93)

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>[Signature]</i>	✓				
<i>[Signature]</i>	✓				
<i>[Signature]</i>	✓				
<i>[Signature]</i>	✓				

*[Signature]*  
CHAIRMAN'S SIGNATURE

Revision Date: \_\_\_\_\_ Dept. Affected: Community & Regional Affairs  
 Title: An Act relating to the Municipal BRU: \_\_\_\_\_  
tax exemption for inventories intended for exp Component: \_\_\_\_\_  
 Sponsor: Representative Toohy  
 Requestor: Representative Toohy COMPONENT SERIAL NO. \_\_\_\_\_

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

CAPITAL						
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REVENUE FUND SOURCE:						
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FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

Estimate of current (FY93) impact \$ none

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Remond Henderson *Remond Henderson* Phone: 465-4708

Division: Administrative Services Date: 3/25/93

Approved by Commissioner: *Eq. Dept.* Date: 3/25/93

Agency: Community & Regional Affairs

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For further dis \_\_\_\_\_ e Office



Official Business

# Alaska State Legislature

## HOUSE OF REPRESENTATIVES

REPRESENTATIVE CYNTHIA D. TOOHEY

DISTRICT 13

State Capitol  
Juneau, AK 99801-1182

### MEMORANDUM

TO: Representative Brian Porter, Chair  
House Judiciary Committee

FROM: Representative Cynthia Toohey *CT*

DATE: March 24, 1993

RE: Request for hearing for HB211, "An Act relating to the  
municipal tax exemption for inventories intended for  
export."

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I respectfully request that, *pending referral*, you schedule the above-referenced bill for hearing at your earliest convenience.

HB211 would give municipalities, *at their option*, the ability to exempt goods being held for shipment out-of-state from inventory property taxes.

Thank you for your consideration of this request.

REQUEST TO SCHEDULE



Official Business

# Alaska State Legislature

## HOUSE OF REPRESENTATIVES

REPRESENTATIVE CYNTHIA D. TOOHEY

DISTRICT 13

State Capitol  
Juneau, AK 99801-1182

### SPONSOR STATEMENT HOUSE BILL 211

To be a viable international distribution center, it is crucial that high value products that are being held for out-of-state shipment not be subject to local property taxes on inventory. Attempting to tax such inventory is virtually certain to prevent municipalities in the state that are (or have the potential to become) transportation hubs from competing for international distribution business. Yet, state statute now requires municipalities to levy some taxes on goods being held for out-of-state shipment.

The existence of foreign trade zones in certain parts of the state provide some partial protection from local inventory taxes. However, there are significant limitations. First, the goods have to be inside an FTZ and must be involved in FTZ activity. This is sometimes costly and unnecessary for simple distribution operations.

Secondly, the goods exempted from taxes within an FTZ are generally those that are being held for shipment outside the U.S. In some cases, goods being stored for distribution may have originated inside the U.S. and be destined for markets inside the U.S. Indeed, the U.S. is the largest single market in the world, and Alaska's proximity to it and the large amount of airlift we have to serve it are important elements of our marketing programs that seek to attract international distribution business.

House Bill 211 would remove the glitch in the state statute governing local business inventory taxes which could prevent a transportation hub from becoming an international warehousing and distribution center. It amends statute to allow municipalities, at their option, the ability to exempt goods being held for shipment out-of-state from inventory property taxes. Once state government allows municipalities this taxation flexibility, it will be the responsibility of each local government to adopt its own ordinance to activate and govern the exemption.

STATE OF ALASKA  
DEPARTMENT OF COMMUNITY  
& REGIONAL AFFAIRS

POSITION PAPER

Bill no.: HB 211  
Sponsor: Rep. Toohey

DCRA FN: Zero (attached)  
Position: Support

Title: An Act relating to the municipal tax exemption for inventories intended for export

This legislation amends AS 29.45.050(n) by deleting a specific limitation to the inventory tax exemption provided for in this subsection. The language that would be deleted limits the value of the exempted inventory property taxes based on the level of other property taxes which provide for school funding. Only those inventory property taxes which exceed the level of other property taxes for schools may be exempted. In other words, property taxes raised for school funding must not be effected by implementation of an inventory property tax exemption.

The department supports the principle of maximizing the flexibility of local governments to generate local revenues in the manner which local residents determine to be most appropriate. The department also supports measures which provide local governments flexibility in providing incentives for local economic development. Deleting the exception language from AS 29.45.050(n) as proposed in this bill is consistent with these principles. Therefore, the department supports this bill. The department does recommend, however, that consideration be given to amending the bill to also delete similar exception language under AS 29.45.050(m) for purposes of consistency in municipal taxation practices.

Edg. Blatchford

Edgar Blatchford  
Commissioner

MARCH 30 - 93 /

Date

File No: HB 211

3/25/93

2:00 pm

POSITION STATEMENT

# Municipality of Anchorage



P.O. BOX 196650  
ANCHORAGE, ALASKA 99519-6650  
TELEPHONE: (907) 343-4431  
FAX: (907) 272-1991

*Tom Fink, Mayor*

OFFICE OF THE MAYOR

March 16, 1993

Representative Cynthia Toohey  
Alaska State Legislature  
State Capitol  
Juneau, Alaska 99801

Re: HB 211, An Act Relating to the Municipal Tax Exemption for Inventories Intended for Export

Dear Representative Toohey:

As I indicated during my appearance before the Anchorage Caucus, the Administration of the Municipality of Anchorage supports HB 211, an Act relating to the municipal tax exemption for inventories intended for export.

I would like to see the legislation remain as a local option, with an ordinance providing for different levels of exemption for different classifications of inventories. This option would allow our community to decide for itself what form of taxation or non-taxation best meets our needs.

Sincerely,

Tom Fink  
Mayor



217 Second Street, Suite 200 ■ Juneau, Alaska 99801 ■ Tel (907) 586-1325, Fax (907) 463-5480

DATE: March 24, 1993  
TO: Representative Cynthia Toohey  
FROM: Kent E. Swisher, Executive Director  
SUBJ: HB 211, Municipal Tax Exemption for Inventories

This measure would expand local governments' ability to structure local taxes so as to encourage the development of warehousing and international distribution facilities. The municipalities may exercise this power at their option.

The League's Policy Statement provides, in part, that "The League supports state policies and legislation to provide maximum local authority for economic development activities and methods to accomplish those activities."

HB 211 seems to be within the scope of that position and AML would support the bill on the basis of it being an additional element of flexibility for local governments in this important area.

# SOUTHEAST CONFERENCE

Tel. (907) 463-3445

FAX (907) 463-5670

124 West 5th Street

Juneau, Alaska 99801

April 13, 1993

The Honorable Cynthia Toohey  
House of Representatives  
Alaska State Legislature  
Room 104  
Capitol Bldg.  
Juneau, Alaska 99801-1182

Dear Representative Toohey:

Due to meetings in Anchorage I will be unable to attend the House Judiciary Committee meeting scheduled for April 14.

The Southeast Conference supports HB211, scheduled for hearing at that committee meeting. I am hopeful that, if you have the opportunity, you will convey our support for this legislation before the committee.

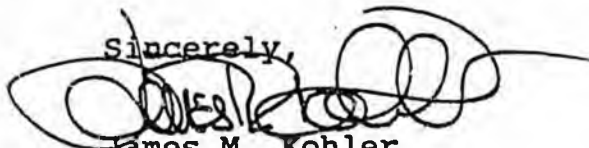
HB211 grows from a specific need in the Anchorage area to provide that local government with an option to modify particular sections of its local property tax code for the purpose of encouraging export transshipment businesses to take advantage of its expanding airport and marine cargo facilities.

Without a relaxation of state code, Anchorage and other municipalities will not have the flexibility to bring their local tax codes in line with other transshipment communities around the country and world. Without that flexibility, Anchorage and other Alaska municipalities cannot enter into, let alone hope to be competitive in, the transshipment of international products and cargo.

While Anchorage may be the initial benefactor of this legislation, I am convinced that other communities, from Unalaska to Fairbanks to Prince of Wales Island, will benefit as well before the decade is out.

Thank you for your support of HB211 and please contact me if I can be of any assistance explaining the merits of this legislation to your colleagues.

Sincerely,



James M. Kohler  
Executive Director

from receiving those payments or any payments in lieu of taxes authorized under federal law.

(m) A municipality may by ordinance partially or totally exempt all or some types of economic development property from taxation for up to five years. The municipality may provide for renewal of the exemption under conditions established in the ordinance. However, under a renewal, a municipality that is a school district may only exempt all or a portion of the amount of taxes that exceeds the amount levied on other property for the school district. A municipality may by ordinance permit deferral of payment of taxes on all or some types of economic development property for up to five years. The municipality may provide for renewal of the deferral under conditions established in the ordinance. A municipality may adopt an ordinance under this subsection only if, before it is adopted, copies of the proposed ordinance made available at a public hearing on it contain written notice that the ordinance, if adopted, may be repealed by the voters through referendum. An ordinance adopted under this subsection must include specific eligibility requirements and require a written application for each exemption or deferral. In this subsection "economic development property" means real or personal property, including developed property conveyed under 43 U.S.C. 1601 — 1629e (Alaska Native Claims Settlement Act), that

(1) has not previously been taxed as real or personal property by the municipality;

(2) is used in a trade or business in a way that

(A) creates employment in the municipality;

(B) generates sales outside of the municipality of goods or services produced in the municipality; or

(C) materially reduces the importation of goods or services from outside the municipality; and

(3) has not been used in the same trade or business in another municipality for at least six months before the application for deferral or exemption is filed; this paragraph does not apply if the property was used in the same trade or business in an area that has been annexed to the municipality within six months before the application for deferral or exemption is filed; this paragraph does not apply to inventories.

(n) A municipality may by ordinance classify as to type inventories intended for export outside the state and partially or totally exempt all or some types of those inventories from taxation. A municipality that is a school district may, under this subsection, only exempt all or a portion of the amount of taxes that exceeds the amount levied on other property for the school district. A municipality may adopt an ordinance under this subsection only if, before it is adopted, copies of the proposed ordinance made available at a public hearing on it contain written notice that the ordinance, if adopted, may be repealed by

the voters through referendum. The ordinance may provide for different levels of exemption for different classifications of inventories. An ordinance adopted under this subsection must include specific eligibility requirements and require a written application for each exemption. (§ 12 ch 74 SLA 1985; am § 1 ch 103 SLA 1985; am § 5 ch 70 SLA 1986; am § 1 ch 151 SLA 1988; am § 2 ch 73 SLA 1989; am § 1 ch 98 SLA 1989; am § 15 ch 93 SLA 1991; am § 107 ch 4 FSSLA 1992)

*Revisor's notes.* — Subsection (h) of this section was enacted as AS 29.53.025(h). Renumbered in 1985. Chapter 103, SLA 1985 also enacted, in § 2, AS 29.63.066, which provides an exemption identical to that set out in (h) of this section from taxes levied under former AS 29.63, repealed by § 88, ch. 74, SLA 1985. The provisions of former AS 29.63 were substantially incorporated in AS 29.46, and the addition of subsection (h) to AS 29.45.050 makes it unnecessary to codify § 2, ch. 103, SLA 1985 to achieve the legislature's purpose.

*Effect of amendments.* — The 1988 amendment, effective January 1, 1989, added subsection (l).

The first 1989 amendment, effective May 31, 1989, in subsection (e), deleted

"However" from the beginning of the third sentence and added the present last sentence.

The second 1989 amendment, effective September 10, 1989, added subsections (m) and (n).

The 1991 amendment, effective September 30, 1991, inserted "including a person who was disabled in the line of duty while serving in the Alaska Territorial Guard" in paragraph (i)(2).

The 1992 amendment, effective July 1, 1992, rewrote subsection (i).

*Legislative history reports.* — For legislative letter of intent in connection with the enactment of (m) and (n) of this section by ch. 98, SLA 1989 (SCS CSHB 272(Fin) am S), see 1989 Senate Journal 1865.

#### NOTES TO DECISIONS

*City may not exempt property without express authority.* — The authority of a municipal corporation to allow exemptions of particular property from taxation, unless expressly conferred by law, has very generally been denied. Valentine

v. City of Juneau, 36 F.2d 904 (9th Cir. 1929), decided under former, similar law.

Cited in City of Valdez v. State, Dep't of Community & Regional Affairs, 793 P.2d 532 (Alaska 1990).

**Sec. 29.45.060. Farm or agricultural land.** (a) Farm use land included in a farm unit and not dedicated or being used for nonfarm purposes shall be assessed on the basis of full and true value for farm use and may not be assessed as if subdivided or used for some other nonfarm purpose. The assessor shall maintain records valuing the land for both full and true value and farm use value. If the land is sold, leased, or otherwise disposed of for uses incompatible with farm use or converted to a use incompatible with farm use by the owner, the owner is liable to pay an amount equal to the additional tax at the current mill levy together with eight percent interest for the preceding seven years, as though the land had not been assessed for farm use purposes. Payment by the owner shall be made to the state to the extent of its reimbursement for revenue loss under (d) of this section for the preceding seven years. The balance of the payment shall be made to the municipality.

# HOUSE COMMITTEE REPORT

(7)

Date Referred: March 10, 1993

FURTHER REFERRALS:

Judiciary

Date of Committee Action: 4-1-93

The COMMUNITY AND REGIONAL AFFAIRS Committee considered: .

HB 211

HOUSE BILL NO. 211

MUNICIPAL INVENTORY TAX EXEMPTION

"An Act relating to the municipal tax exemption for inventories intended for export."

RECOMMENDATIONS: [ ] the same title  
 be replaced with \_\_\_\_\_ [ ] a new title

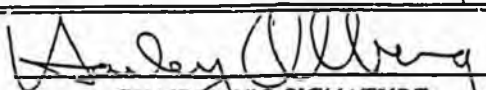
[ ] have attached amendments(s)  
 do pass  
 [ ] do not pass  
 [ ] no recommendations  
 [ ] individual recommendations  
 [ ] additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) \_\_\_\_\_  
 [ ] fiscal impact \_\_\_\_\_  
 zero fiscal note C + RA

APPROVES PREVIOUS: (Dept/Date) \_\_\_\_\_  
 [ ] fiscal note(s) \_\_\_\_\_  
 [ ] zero fiscal note(s) \_\_\_\_\_

SIGNING <u>DO PASS</u>	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Don Sanders</i>	✓	<i>Car Bende</i>			✓
<i>Bob Rain</i>	✓	<i>Ed Willis</i>			✓
<i>[Signature]</i>					
<i>[Signature]</i>	✓				
<i>Anders Olberg</i>	✓				
<i>W. K. Williams</i>	✓				

  
 CHAIRMAN'S SIGNATURE  
 C+RA comm. RPT.

HB

212

# FISCAL NOTE

**STATE OF ALASKA**  
**1993 LEGISLATIVE SESSION**

**BILL NO.** HB 212

Revision Date:	Dept. Affected: <u>Corrections</u>
Title: <u>"An Act relating to a factor in</u>	BRU: <u>Institutions</u>
<u>aggravation of a presumptive term..</u>	Component: <u>Institutions</u>
Sponsor: <u>Representative MacLean</u>	<u>1860</u>
Requestor: <u>House Judiciary</u>	COMPONENT SERIAL NO. <u>1860</u>

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY94	FY95	FY96	FY97	FY98	FY99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE FUND SOURCE:						
----------------------	--	--	--	--	--	--

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	-0-	-0-	-0-	-0-	-0-	-0-
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
<b>TOTAL</b>	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: \$ 0

**ANALYSIS:** (Attach a separate page if necessary)

Please see the attached page.

Prepared by: <u>Dana LaTour</u>	Phone: <u>465-3376</u>
Division: <u>Commissioner's Office</u>	Date: <u>3-31-93</u>
Approved by Commissioner: <u>Lloyd G. Rupp</u>	Date: <u>3-31-93</u>
Agency: <u>Corrections</u>	

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## HB 212

"An Act relating to a factor in aggravation of the presumptive term of a criminal sentence, and prohibiting the referral of a sentence based on application of that factor to a three-judge panel as an extraordinary circumstance.

### Fiscal Note Analysis

This legislation adds as an aggravating factor to be considered by the sentencing court if the offense was sexual abuse of a minor, and the offender was residing in the same household as the victim, or if the offender occupied a position of authority in relation to the victim.

After reviewing the sentence lengths given to offenders of these crimes and discussing it with representatives of the Department of Law, it appears that judges generally give longer sentences to offenders convicted of these crimes than are given to offenders committing crimes in similar felony groups.

For example, the average sentence length for a first time offender of a class B felony is one year. By comparison, a first time offender convicted of sexual abuse of a minor in the 2nd degree is about 2 years.

Since it appears that offenders may already receive longer than average sentences for sex crimes against minors, and since consideration of an aggravating factor may not necessarily result in a longer sentence, the Department of Corrections has prepared a zero fiscal note.

FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. HB 212

Revision Date: March 22, 1993  
 Title: "An Act relating to a factor in aggravation of the presumptive term of a criminal sentence..."  
 Sponsor: Representative MacLean  
 Requestor: Representative MacLean

Department Affected: Department of Law  
 BRU: Prosecution  
 Component: All  
 COMPONENT SERIAL NO. 0085 through 0090

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE FUND SOURCE:						
----------------------	--	--	--	--	--	--

FUNDING:

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

*Richard I. Peques*

Prepared by: Richard I. Peques, Director  
 Division: Administrative Services Division

Phone: 465-3672  
 Date: March 22, 1993

Approved by Commissioner: Charles E. Cole, Attorney General  
 Agency: Department of Law

Date: March 22, 1993

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FISCAL NOTE

BIL' NO. HB 212

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

ANALYSIS (Continued):

This bill amends AS 12.55.155(c) to provide that when the offense was sexual abuse of a minor in any degree and the victim at the time of the offense resided in the same household as the offender, or when the offender occupied a position of authority in relation to the victim, the sentencing court shall consider these factors and may aggravate the presumptive term set out in AS 12.55.125. The bill also amends AS 12.55.165(b) to provide that a court may not refer a case to a three judge panel based on the defendant's potential for rehabilitation if the court finds that either of these same factors is present. These sentencing provisions occur after the conviction of a defendant and, therefore, there should not be a fiscal impact for the Department of Law.

# FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. HB 212

Revision Date: \_\_\_\_\_ Dept. Affected: Administration  
 Title: "An Act relating to a factor in aggravation of the BRU: Public Defender  
presumptive . . ." Component: Public Defender  
 Sponsor: Representative MacLean  
 Requestor: House Judiciary COMPONENT SERIAL NO. 1631

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
<b>TOTAL OPERATING</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>

<b>CAPITAL</b>	0	0	0	0	0	0
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<b>REVENUE FUND SOURCE:</b>	0	0	0	0	0	0
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**FUNDING:**

1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 CF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
Other	0	0	0	0	0	0
<b>TOTAL</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>

**POSITIONS**

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year (FY93) impact: \$ none

ANALYSIS: (attach a separate page if necessary.)

Prepared By: John Salemi, Public Defender Phone: 274-1684  
 Division: Public Defender Agency Date: \_\_\_\_\_

Approved by Commissioner: Nancy Bear Usara *NBCC* Date: 3/19/93  
 Agency: Department of Administration *SA*

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FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. HB 212

Revision Date: \_\_\_\_\_  
Title: "An Act relating to a factor in aggravation  
of the presumptive . . ."  
Sponsor: Representative MacLean  
Requestor: House Judiciary

Department Affected: Administration  
BRU: Office of Public Advocacy  
Component: Office of Public Advocacy  
COMPONENT SERIAL NO. 43

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0

CAPITAL	0	0	0	0	0	0
---------	---	---	---	---	---	---

REVENUE FUND SOURCE:	0	0	0	0	0	0
----------------------	---	---	---	---	---	---

FUNDING:

1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

Estimate of current year (FY93) impact: None

ANALYSIS: (Attach a separate page if necessary.)

Prepared by: Brant McGee, Public Advocate  
Division: Office of Public Advocacy

Phone: 274-1384  
Date: \_\_\_\_\_

Approved by Commissioner: Nancy Bear Usera  
Agency: Administration

Date: 3/19/93

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(7)

Date Referred: March 10, 1993

FURTHER REFERRALS:

Finance

Date of Committee Action: 4-2-93

The JUDICIARY Committee considered:

HB 212

HOUSE BILL NO. 212

SENTENCING:AGGRAVATING FACTORS

"An Act relating to a factor in aggravation of the presumptive term of a criminal sentence, and prohibiting the referral of a sentence based on application of that factor to a three-judge sentencing panel as an extraordinary circumstance."

RECOMMENDATIONS:

be replaced with

CS HB 212 (JUD)

the same title

a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of Intent

ATTACHES NEW FISCAL NOTE(S): (Dept)

APPROVES PREVIOUS: (Dept/Date)

fiscal impact \_\_\_\_\_

fiscal note(s) \_\_\_\_\_

5  zero fiscal note LAW, COURT ADMIN (2), CORRECTIONS,

zero fiscal note(s) \_\_\_\_\_

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Jeanette James</i>	<input checked="" type="checkbox"/>	<i>Jim Donnell</i>		<input checked="" type="checkbox"/>	
<i>Pete Hunt</i>	<input checked="" type="checkbox"/>				
<i>Paul Perry</i>	<input checked="" type="checkbox"/>				
<i>Bryan D. Porter</i>	<input checked="" type="checkbox"/>				
<i>Gail Phillips</i>	<input checked="" type="checkbox"/>				

*Bryan D. Porter*  
CHAIRMAN'S SIGNATURE

1 pecuniary gain and the risk of prosecution and punishment for the conduct is slight;  
2 (17) the offense was one of a continuing series of criminal offenses  
3 committed in furtherance of illegal business activities from which the defendant derives  
4 a major portion of the defendant's income;

5 (18) the offense was a ~~crime~~ felony  
6 (A) specified in AS 11.41 and was committed against a spouse,  
7 a former spouse, or a member of the social unit comprised of those living  
8 together in the same dwelling as the defendant;

9 (B) specified in AS 11.41.410 - 11.41.460 and was committed  
10 against a minor, and the defendant has engaged in the same or similar conduct  
11 involving the same or another victim who was a minor; or

12 (C) specified in AS 11.41.410 - 11.41.425 or 11.41.455, and the  
13 defendant has previously engaged in conduct covered by one of those sections  
14 involving the same or another victim; or

15 (D) specified in AS 11.41.434, 11.41.436, 11.41.438, or  
16 11.41.440 and the

17 ~~(i) victim at the time of the offense resided in the~~  
18 ~~same household as the offender; or~~

19 ~~(ii)~~ offender occupied a position of authority in  
20 relation to the victim; in this subparagraph, "position of authority"  
21 has the meaning given in AS 11.41.470;

22 (19) the defendant's prior criminal history includes an adjudication as  
23 a delinquent for conduct that would have been a felony if committed by an adult;

24 (20) the defendant was on furlough under AS 33.30 or on parole or  
25 probation for another felony charge or conviction that would be considered a prior  
26 felony conviction under AS 12.55.145(a)(2);

27 (21) the defendant has a criminal history of repeated instances of  
28 conduct violative of criminal laws, whether punishable as felonies or misdemeanors,  
29 similar in nature to the offense for which the defendant is being sentenced under this  
30 section;

31 (22) the defendant knowingly directed the conduct constituting the

# HOUSE COMMITTEE REPORT

(7)

Date Referred: March 10, 1993

FURTHER REFERRALS:

Finance

Date of Committee Action: 4-2-93

The JUDICIARY Committee considered:

HB 212

HOUSE BILL NO. 212

SENTENCING: AGGRAVATING FACTORS

"An Act relating to a factor in aggravation of the presumptive term of a criminal sentence, and prohibiting the referral of a sentence based on application of that factor to a three-judge sentencing panel as an extraordinary circumstance."

**RECOMMENDATIONS:**

be replaced with \_\_\_\_\_

CS HB 212 (JUD)

the same title

a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of Intent

ATTACHES NEW FISCAL NOTE(S): \_\_\_\_\_ (Dept)

APPROVES PREVIOUS: \_\_\_\_\_ (Dept/Date)

fiscal impact \_\_\_\_\_

fiscal note(s) \_\_\_\_\_

5  zero fiscal note LAW, COURT ADMIN (?), CORRECTIONS,

zero fiscal note(s) \_\_\_\_\_

SIGNING <u>DO</u> PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Janette James</i>	<input checked="" type="checkbox"/>	<i>Jim Woodland</i>		<input checked="" type="checkbox"/>	
<i>Pete Hoff</i>	<input checked="" type="checkbox"/>				
<i>Paul Perry</i>	<input checked="" type="checkbox"/>				
<i>Bryan Porter</i>	<input checked="" type="checkbox"/>				
<i>Gail Phillip</i>	<input checked="" type="checkbox"/>				

*Bryan Porter*

CHAIRMAN'S SIGNATURE

Rep. Brian Porter, Chairman

# House Judiciary Committee

Date: April 2, 1993  
Place: Capitol Room 120

HB 217 Native Corporation Dividends to Minors  
HJR 27 Desecration of U. S. Flag  
HB 231 Aggravating/Mitigating Factors/Sex Crimes

Subject of Meeting: HB 54 Telephone Consumer Protection; HB 212 Sentencing: Aggravating Factors

HB 214 Disclosure of a Minor's Record by Parent

Please Print Name	Representing	Business/Personal Mailing Address	Zip	(H) Phone	(W) Phone	Do you Want to Testify?	Which Subject/ Which Bill?
✓ Randall Hines	DHSS	Box 110630	99811	-	465-3187	(Y) N	HB 217
✓ MARCIA McKENZIE	CDVSA	Box 111200	99811		465-4356	(Y) N	HB 54
✓ Susan Fouka	Ombudsman	Box 113000	99811		5581	(Y) N	HB 214
✓ Kay Brown	bill sponsor					(Y) N	HB 54
✓ Margaret Knuth	Law - Oregon	113000			4049	(Y) N	HB 212 HB 231
Janine Reep	Law - Civil	"			3603	to answer you N	HB 214
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	

# ALASKA STATE LEGISLATURE

Representative Eileen Panigeo MacLean  
Co-Chair House Finance Committee  
P.O. Box 830  
Barrow, Alaska 99723  
(907) 852-7111

WHILE IN JUNEAU  
State Capitol, Room 507  
Juneau, Alaska 99801-1182  
465-4833  
465-4525  
463-3241 FAX

## HOUSE OF REPRESENTATIVES

District 37

North Slope  
Borough

Anaktuvuk Pass  
Atkasuk  
Barrow  
Kaktovik  
Nulqsut  
Point Hope  
Point Lay  
Wainwright

Northwest Arctic  
Borough

Ambler  
Buckland  
Deering  
Kiana  
Kivalina  
Kobuk  
Kotzebue  
Noatak  
Noorvik  
Selawik  
Shungnak

Seward Peninsula

Brevig Mission  
Diomedes  
Shishmaref  
Teller  
Wales

TO: Representative Brian Porter, Chair  
House Judiciary Committee

FROM: Representative Eileen MacLean *Eileen*

DATE: April 1, 1993

RE: House Bill 212

This memo requests a hearing for House Bill 212 in the House Judiciary Committee.

This bill accomplishes two ends. It adds an element of the crime of sexual abuse against a minor to the list of aggravating factors in our statutes. It also prevents this kind of crime from being referred to the three judge panel for consideration of an altered sentence.

The crime being addressed in this legislation is found in Alaska Statutes 11.41.434, 11.41.436, 11.41.438 and 11.41.440. These are the sexual abuse of a minor statutes, first through fourth degree. The bill addresses a particular element of these crimes- when the offender resides in the same household or occupies a position of authority in relation to the victim. Of note, as a drafting matter, it is not appropriate to have AS 11.41.440 included in this legislation as it is a misdemeanor offense not subject to presumptive terms. I recommend the bill be amended to omit reference to this crime.

The following scale demonstrates the presumptive terms for the first through third degree offenses:

Sex Abuse of Minor statutory sentence (in years)

	1°	2°	3°
1st offense	8	1-4 (benchmark)	none
2nd offense	15	4	2
3rd offense	25	6	3

Sexual abuse of a minor is an offensive societal crime in itself, but more so when the adult is in a position of authority to the child. In my view, the importance of condemning this kind of behavior by way of limiting statutory direction to the judicial branch is important. The strictest of sentencing circumstances should be applied here.

The bill also prevents referral of these cases to the three judge sentencing panel. This removes the possibility of the court giving more lenient sentences to those accused of these crimes.

Enclosed with this memorandum are statutes that cover this kind of crime, the list of aggravators and mitigators, statutes that refer to the three judge panel and a copy of the State v Jackson case. Also enclosed is a resolution from the North Slope Borough School District. Although that resolution requests making this kind of crime a first degree felony, I felt a better way to meet the request was to add the crime to the aggravating factors.

Fiscal notes have been requested from the Departments of Law, Administration (Public Defender Agency and Office of Public Advocacy) Corrections and the Alaska Court System.

Thank you for your consideration.

# DIVISION OF LEGAL SERVICES

## LEGISLATIVE AFFAIRS AGENCY STATE OF ALASKA

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130 Seward Street, Suite 409  
Juneau, Alaska 99801-2105

### MEMORANDUM

March 30, 1993

**SUBJECT:** Purpose and use of three-judge criminal sentencing panels

**TO:** Representative Eileen MacLean  
ATTN: Rena Bukovich

**FROM:** Jack Chenoweth  
Legislative Counsel

This memo is by way of response to your request of last week for a brief explanation of the purpose and use to be made of the three-judge criminal sentencing panel. Use of the panel is authorized by AS 12.55.175.

As I understand, under the former criminal code--in place in this state until 1980--sentencing authority was vested principally in the trial judge who would impose a criminal sentence generally within very broad statutory limits. The revised criminal code put into place a more detailed sentencing framework that set down tougher, more regular guidelines for imposing criminal sentences. Under the revised code, with the exception of particularly serious crimes, the sentencing judge continues to enjoy considerable discretion in sentencing first felony offenders. However, as to subsequent or repeat felony offenders, the statutes establish a series of presumptive sentences that the sentencing judge must follow, within constraints.

One set of constraints applicable to presumptive sentences goes to the finding and application of certain factors. The sentencing judge may increase a presumptive sentence because of the presence of so-called aggravating factors or reduce a presumptive sentence because of the presence of mitigating factors.

The second set of constraints under the revised Criminal Code is the referral of a sentence to a three-judge sentencing panel. That referral may be made if, under AS 12.55.165, the judge determines that manifest injustice would result from following the strict presumptive sentencing scheme. <sup>1/</sup> The sentencing panel apparently has

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<sup>1/</sup> AS 12.55.165(a), captioned "Extraordinary Circumstances," provides:

(continued...)

two choices. If, after consideration of the record and opportunity for argument, the three-judge panel agrees with the sentencing court that a departure from strict application of the adjusted presumptive sentence is necessary, the panel may impose a different sentence. If the three-judge sentencing panel does not agree that a departure is necessary, it is to return the matter to the sentencing judge so that he or she may carry through and impose a sentence. So, in Heathcock v. State, 670 P.2d 1155 (Alaska App. 1983), the Court of Appeals observed:

. . . [A] departure from the presumptive sentencing scheme will not turn on the evaluation of one judge. Rather, a departure from the presumptive sentencing scheme under the provisions of AS 12.55.165 and AS 12.55.175 will involve the decision of four judges. First, the original trial judge makes the decision to refer the matter to the three-judge panel. Then the three-judge panel, if it agrees with the evaluation of the trial judge, imposes sentence.

670 P.2d at 1158.

In 1992, the Seventeenth Legislature started to take away from the authority of the trial court judge to make referrals to the three-judge panel. Those limitations have been set out in AS 12.55.165(b) and are in the nature of cross-references to aggravating factors that do not warrant referral of a criminal sentence to a three-judge panel.<sup>2/</sup> By my reading of this new provision, if these aggravating factors are present, then the sentencing judge must determine, among other factors, the defendant's prospects for rehabilitation and enter a sentence. The judge may not find that "manifest injustice" will occur, so that the "extraordinary" remedy of referral of the matter to the sentencing panel is not available.

JBC:gc:mi  
93-288.glc

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<sup>1/</sup>(...continued)

(a) If the defendant is subject to sentencing under AS 12.55.125(c), (d), (e), or (i) [the presumptive sentencing subsections,] and the court finds by clear and convincing evidence that manifest injustice would result from failure to consider relevant aggravating or mitigating factors not specifically included in AS 12.55.155 or from imposition of the presumptive term, whether or not adjusted for aggravating or mitigating factors, the court shall enter findings and conclusions and cause a record of the proceedings to be transmitted to a three-judge panel for sentencing under AS 12.55.175.

<sup>2/</sup> Under AS 12.55.165(b):

(b) In making a determination under (a) of this section, the court may not refer a case to a three-judge panel based on the defendant's potential for rehabilitation if the court finds that a factor in aggravation set out in AS 12.55.155(c)(2), (8), (10), (12), (15), (17), (18)(B), (20), (21), or (28) is present.

FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

Bill No. HB 212

Revision Date: \_\_\_\_\_ Department Affected: Alaska Court System  
 Title: Sentencing: Aggravating Factors BRU: Trial Courts  
 Components: \_\_\_\_\_  
 Sponsor: MacLean  
 Requestor: \_\_\_\_\_ COMPONENT SERIAL NO. 768

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS & CLAIMS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE						
FUND SOURCE						

FUNDING: (Thousands of Dollars)

1002 FEDERAL RECEIPTS						
1003 GF MATCH						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/PROGRAM RECEIPTS						
1006 GF/MHTA						
OTHER						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY 93) impact: None

ANALYSIS: (Attach a separate page if necessary)  
No fiscal impact.

Prepared by: C. S. Christensen III, Staff Counsel *CS* Phone: 264-8228  
 Division: Alaska Court System Date: 04/01/93  
 Approved by: Arthur H. Snowden, II, Administrative Director *AS*  
 Agency: Alaska Court System Date: 04/01/93

Distribution (by preparer): Legislative Finance, Legislative Sponsor, Requestor, OMB, & Impacted Agency(ies).

# DIVISION OF LEGAL SERVICES

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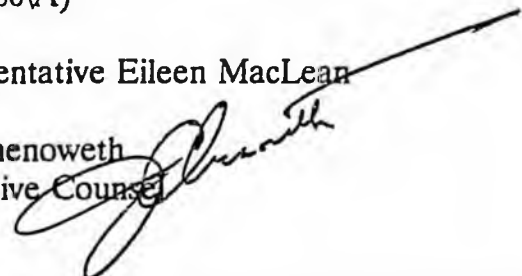
130 Seward Street, Suite 409  
Juneau, Alaska 99801-2105

### MEMORANDUM

March 9, 1993

**SUBJECT:** House Bill 212 -- sectional analysis (Work Order No. 8-LS0780\A)

**TO:** Representative Eileen MacLean

**FROM:** Jack Chenoweth  
Legislative Counsel 

You have introduced House Bill 212 and, through staff, have asked me to prepare a sectional analysis of the measure.

To reduce or eliminate disparity in criminal sentences, the criminal procedure code, AS 12, subjects offenders convicted of certain specified crimes to presumptive sentences. Presumptive sentences may be extended or reduced if the sentencing judge, by a decision based on clear and convincing evidence, identifies factors in aggravation or factors in mitigation of the sentence. AS 12.55.155(c) identifies a series of factors to be considered by the court in aggravation or extension of a presumptive sentence. **Bill section 1** amends AS 12.55.155(c)(18) by adding a new subparagraph under which the court may consider, as a factor in aggravation of a criminal sentence based on a conviction for sexual abuse of a minor in any degree (AS 11.41.434 - 11.41.440), evidence that the victim of the offense resided in the same household as the offender or evidence that the offender occupied a position of authority over the victim. The bill section offers a definition of the phrase "position of authority" by cross-reference to a definition of that term in the criminal code.

The criminal procedure code also provides for referral of certain criminal sentences by the sentencing judge to a three-judge sentencing panel. Under AS 12.55.165(a)

(a) If the defendant is subject to sentencing under [a presumptive sentencing provision] and the court finds by clear and convincing evidence that manifest injustice would result from . . . imposition of the presumptive term, whether or not adjusted for aggravating or mitigating factors, the court shall enter findings and conclusions and cause a record of the proceedings to be transmitted to a three-judge panel for sentencing under AS 12.55.175.

Representative Eileen MacLean  
March 9, 1993  
Page 2

However, subsection (b) of that section, added in 1992, limits the ability of the sentencing court to make a referral of a sentencing decision to a three-judge review panel in cases involving the application of certain aggravating factors. The amendment to AS 12.55.165(b) made by **bill section 2** places the aggravating factor added in the previous bill section to the list of aggravating factors whose application would not allow a sentencing judge to make a referral to a sentencing panel.

JBC:pl  
93-176.plm

# NORTH SLOPE BOROUGH SCHOOL DISTRICT

Box 169 • Barrow, Alaska 99723 • (907) 852-5311 • FAX (907) 852-5984

*Patsy Aamodt, Superintendent*



**March 30, 1993**

**Nunamit Wolves**  
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Alaska 99721  
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FAX (907) 661-3402

**Atkasuk Eagles**  
Merde River School  
Atkasuk, Alaska 99791  
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Fred Ipalook  
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**Nuiqsut Trappers**  
Trapper School  
Nuiqsut, Alaska 99789  
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**Tikigaq Harpooners**  
Tikigaq School  
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**Cully Qavviks**  
Cully School  
Point Lay, Alaska 99759  
(907) 833-2311  
FAX (907) 833-2315

**Alak Huskies**  
Alak School  
Box 10  
Walnwright, Alaska 99782  
(907) 763-2541  
FAX (907) 763-2550

**The Honorable Brian Porter, Chairman  
Judiciary Committee  
Alaska State House of Representatives  
Juneau, Alaska 99801**

**Dear Representative Porter:**

**I support House Bill 213 which amends the Alaska Statutes.**

**It is very important that people in positions of authority over minor children not be allowed to abuse that authority.**

**Thank you. If I can do anything to assist you in passing this legislation, please contact me.**

*Sincerely,*

**Patsy Aamodt  
Superintendent**

**cc: Senator Al Adams  
cc: Representative Eileen MacLean** ←

# North Slope Borough School District



## RESOLUTION 93-12 AMENDMENT TO TITLE ELEVEN OF THE ALASKA STATUTES

**WHEREAS** the North Slope Borough School District is strongly committed to the education and safety of its students; and

**WHEREAS** the NSBSD and the people of Alaska entrust the education and safety of their students to the teachers of the State; and

**WHEREAS** a breach of that trust involving the sexual contact of a student by a teacher causes irreparable harm to the student and society and, further, undermines the educational mission of the NSBSD and the State of Alaska; and

**WHEREAS** the NSBSD does not believe the criminal code sufficiently addresses sexual contact between a teacher and a student and, further, that likely punishments for teachers who have sexual contact with students who have been entrusted to them by the State and their families neither sufficiently reflects the trauma suffered by the student and society nor the intolerance which the people of the State of Alaska have for such conduct.

**NOW, THEREFORE, BE IT RESOLVED** that the NSBSD Board of Education strongly urges the Legislature of the State of Alaska to amend the criminal code (Title 11) so as to designate sexual contact of a student by a teacher as sexual abuse of a minor in the first degree; and

**BE IT FURTHER RESOLVED** that the Superintendent shall take such action as is necessary to make known and urge the immediate adoption of this position of the NSBSD to the Legislature and the Association of Alaska School Boards and the Alaska Association of School Administrators

Introduced: 2/09/93

Adopted: 2/09/93

  
\_\_\_\_\_  
Edith Vorderstrasse, Acting President, Board of Education

  
\_\_\_\_\_  
Pat Aamodt, Superintendent

every charge were properly joined, where the state's theory of the murder, kidnapping, and robbery offenses was that defendants committed the murder and carried out the kidnapping and robbery in defense of their cocaine distribution business. *Mathis v. State*, 778 P.2d 1101 (Alaska Ct. App. 1989).

Sexual assault and kidnapping, etc. Convictions for kidnapping and sexual assault do not merge. *Yearly v. State*, 805 P.2d 987 (Alaska Ct. App. 1991).

Sentences upheld. In accord with first paragraph. *Yearly v. State*, 805 P.2d 987 (Alaska Ct. App. 1991).

A total term of twenty-five years with ten years suspended was not excessive where sentence represented conviction of one class A felony (convictions of alternative counts of attempted kidnapping were merged into a single count), three class C felonies (third-degree assault), and two class A misdemeanors (reckless endangerment); this was so under the circumstances of this case, even though defendant was a first offender. *Rainey v. State*, Ct. App. Op. No. 1227 (File No. A-2610), P.2d (1992).

Cited in *Brandon v. State*, 778 P.2d 221 (Alaska Ct. App. 1989).

Sec. 11.41.320. Custodial interference in the first degree.

NOTES TO DECISIONS

Prosecution not barred. — Alaska prosecution for custodial interference, based on defendant's act of taking his son out of the state on or about August 2, 1988, was not barred by an Arizona conviction for custodial interference on or about March 9, 1990, and based upon de-

endant's act of keeping his son from the lawful custody of the son's natural mother. The two charges encompassed different acts and could support different charges. *Seaman v. State*, 826 P.2d 907 (Alaska Ct. App. 1992).

Sec. 11.41.370. Definitions.

NOTES TO DECISIONS

Quoted in *Alan v. State*, 703 P.2d 1081 (Alaska Ct. App. 1990).

Article 4. Sexual Offenses.

Section	Section
410. Sexual assault in the first degree	438. Sexual abuse of a minor in the third degree
420. Sexual assault in the second degree	440. Sexual abuse of a minor in the fourth degree
425. Sexual assault in the third degree	465. Unlawful exploitation of a minor
434. Sexual abuse of a minor in the first degree	470. Definitions
436. Sexual abuse of a minor in the second degree	

Sec. 11.41.410. Sexual assault in the first degree. (a) An offender commits the crime of sexual assault in the first degree if

- (1) the offender engages in sexual penetration with another person without consent of that person;
- (2) the offender attempts to engage in sexual penetration with another person without consent of that person and causes serious physical injury to that person;

(3) the offender engages in sexual penetration with another person (A) who the offender knows is mentally incapable; and (B) who is entrusted to the offender's care

(i) by authority of law; or (ii) in a facility or program that is required by law to be licensed by the Department of Health and Social Services; or

(4) the offender engages in sexual penetration with a person who the offender knows is unaware that a sexual act is being committed and

(A) the offender is a health care worker; and (B) the offense takes place during the course of professional treatment of the victim.

(b) Sexual assault in the first degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 3 ch 160 SLA 1978; am § 8 ch 102 SLA 1980; am § 6 ch 143 SLA 1982; am § 10 ch 78 SLA 1983; am § 1 ch 96 SLA 1988; am § 7 ch 4 SLA 1990; am § 6 ch 79 SLA 1992)

Effect of amendments. — The 1990 amendment, effective February 2, 1990, deleted "Being any age" at the beginning of paragraph (a)(1) and (a)(2); added "or" at the end of paragraph (a)(2); deleted "Being over the age of 18" at the beginning of paragraph (a)(3); and made a minor change in punctuation.

The 1992 amendment, effective September 14, 1992, in subsection (a), substituted "offender" for "person" and "defendant" throughout the subsection, added paragraph (4), and made related stylistic changes.

NOTES TO DECISIONS

I. General Consideration.

1. GENERAL CONSIDERATION.

Convictions for two separate offenses did not constitute double jeopardy. — Where evidence showed that defendant had slightly penetrated the victim's vagina one evening and forced her to perform fellatio on him the next morning, the two acts were sufficiently distinct, for double jeopardy purposes, to support convictions for two separate offenses. *Kepley v. State*, 791 P.2d 1020 (Alaska Ct. App. 1990).

Merger of sexual assault and sexual abuse convictions. — Defendant's convictions for sexually assaulting a twelve year old boy and sexually abusing the boy merged, where a single act of sexual pen-

etration with a child could not properly support separate sentences and convictions for both offenses. *Yearly v. State*, 805 P.2d 987 (Alaska Ct. App. 1991).

Sexual assault and kidnapping, etc. Convictions for kidnapping and sexual assault do not merge. *Yearly v. State*, 805 P.2d 987 (Alaska Ct. App. 1991).

Sentence upheld. See *Fagan v. State*, 779 P.2d 1268 (Alaska Ct. App. 1989); *Yearly v. State*, 805 P.2d 987 (Alaska Ct. App. 1991).

Quoted in *Mercy v. State*, 823 P.2d 860 (Alaska Ct. App. 1991). Cited in *Parker v. State*, 779 P.2d 1245 (Alaska Ct. App. 1989); *Copwell v. State*, 823 P.2d 1260 (Alaska Ct. App. 1991).

Sec. 11.41.420. Sexual assault in the second degree. (n) An offender commits the crime of sexual assault in the second degree if

- (1) the offender engages in sexual contact with another person without consent of that person;
- (2) the offender engages in sexual contact with a person
  - (A) who the offender knows is mentally incapable; and
  - (B) who is entrusted to the offender's care
- (i) by authority of law; or
- (ii) in a facility or program that is required by law to be licensed by the Department of Health and Social Services;
- (3) the offender engages in sexual penetration with a person who the offender knows is
  - (A) mentally incapable;
  - (B) incapacitated; or
  - (C) unaware that a sexual act is being committed; or
  - (4) the offender engages in sexual contact with a person who the offender knows is unaware that a sexual act is being committed and
    - (A) the offender is a health care worker; and
    - (B) the offense takes place during the course of professional treatment of the victim.

(b) Sexual assault in the second degree is a class B felony. (§ 3 ch 166 SLA 1978; am § 1 ch 78 SLA 1983; am § 2 ch 96 SLA 1988; am § 8 ch 4 SLA 1990; am § 6 ch 79 SLA 1992)

Effect of amendments. — The 1990 amendment, effective February 2, 1990, deleted "being over the age of 18" at the beginning of paragraphs (n)(2) and (n)(3).

The 1992 amendment, effective September 14, 1992, in subsection (n), added subparagraph (3)(C) and paragraph (4) and made related stylistic changes.

Sec. 11.41.425. Sexual assault in the third degree. (a) An offender commits the crime of sexual assault in the third degree if the offender engages in sexual contact with a person who the offender knows is

- (1) mentally incapable;
- (2) incapacitated; or
- (3) unaware that a sexual act is being committed.

(b) Sexual assault in the third degree is a class C felony. (§ 3 ch 96 SLA 1988; am § 9 ch 4 SLA 1990; am § 7 ch 79 SLA 1992)

Effect of amendments. — The 1990 amendment, effective February 2, 1990, deleted "the offender" in subsection (a) and rewrote paragraph (n)(2).

The 1992 amendment, effective September 14, 1992, added paragraph (n)(3) and made related stylistic changes.

Sec. 11.41.434. Sexual abuse of a minor in the first degree. (n) An offender commits the crime of sexual abuse of a minor in the first degree if

- (1) being 16 years of age or older, the offender engages in sexual penetration with a person who is under 13 years of age or aids, induces, causes, or encourages a person who is under 13 years of age to engage in sexual penetration with another person;
- (2) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 18 years of age, and the offender is the victim's natural parent, stepparent, adopted parent, or legal guardian; or
- (3) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 16 years of age, and
  - (A) the victim at the time of the offense is residing in the same household as the offender and the offender has authority over the victim; or
  - (B) the offender occupies a position of authority in relation to the victim.

(b) Sexual abuse of a minor in the first degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 2 ch 78 SLA 1983; am § 3 ch 66 SLA 1988; am § 1 ch 161 SLA 1990)

Effect of amendments. — The 1990 amendment rewrote paragraphs (n)(2) and (n)(3).

Legislative history reports. — For

legislative letter of intent in connection with the amendment of subsection (n) by § 1, ch. 161, SLA 1990 (IICS CSSR 366 (Jud)), see 1990 House Journal, p. 4199.

#### NOTES TO DECISIONS

Specific Intent is no longer an element of sexual abuse of a minor. *Duggans v. State*, 783 P.2d 1173 (Alaska Ct. App. 1989).

Conviction upheld. — Evidence supported defendant's conviction of attempted sexual assault in the first degree, where he brought his eight-year old stepdaughter and some syrup into a bathroom and asked the child if she would lick the syrup from his penis, and the fact that a wet drop of syrup was found on the counter supported the conclusion that he actually opened the syrup and poured some amount of it. *Mitchell v. State*, 818 P.2d 1163 (Alaska Ct. App. 1991).

Conviction reversed. — Defendant's jury trial conviction was reversed, where a psychologist's rebuttal testimony that because the victim gave a detailed account of the sexual abuse, she had been sexually abused, approached plain error and the trial court refused to allow defen-

dant to put on rebuttal. *Cox v. State*, 805 P.2d 374 (Alaska Ct. App. 1991).

Merger of sexual assault and sexual abuse convictions. — Defendant's convictions for sexually assaulting a twelve year old boy and sexually abusing the boy merged, where a single act of sexual penetration with a child could not properly support separate sentences and convictions for both offenses. *Yearly v. State*, 805 P.2d 987 (Alaska Ct. App. 1991).

Sentence upheld. In accord with first paragraph. *Yearly v. State*, 805 P.2d 987 (Alaska Ct. App. 1991).

Applied in *Simpson v. State*, 790 P.2d 840 (Alaska Ct. App. 1990).

Quoted in *Harris v. State*, 790 P.2d 1379 (Alaska Ct. App. 1990).

Cited in *Osterback v. State*, 789 P.2d 1037 (Alaska Ct. App. 1990); *Cook v. State*, 792 P.2d 682 (Alaska Ct. App. 1990); *Capwell v. State*, 823 P.2d 1260 (Alaska Ct. App. 1991).

Sec. 11.41.436. Sexual abuse of a minor in the second degree.  
(a) An offender commits the crime of sexual abuse of a minor in the second degree if

(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is 13, 14, or 16 years of age and at least three years younger than the offender, or aids, induces, causes or encourages a person who is 13, 14, or 16 years of age and at least three years younger than the offender to engage in sexual penetration with another person;

(2) being 16 years of age or older, the offender engages in sexual contact with a person who is under 13 years of age or aids, induces, causes, or encourages a person under 13 years of age to engage in sexual contact with another person;

(3) being 18 years of age or older, the offender engages in sexual contact with a person who is under 18 years of age, and the offender is the victim's natural parent, stepparent, adopted parent, or legal guardian;

(4) being 16 years of age or older, the offender aids, induces, causes, or encourages a person who is under 16 years of age to engage in conduct described in AS 11.41.455(a)(2) — (6); or

(5) being 18 years of age or older, the offender engages in sexual contact with a person who is under 16 years of age, and

(A) the victim at the time of the offense is residing in the same household as the offender and the offender has authority over the victim; or

(B) the offender occupies a position of authority in relation to the victim.

(b) Sexual abuse of a minor in the second degree is a class B felony. (5 2 ch 78 SLA 1983; am § 4 ch 66 SLA 1988; am § 2 ch 161 SLA 1990)

Effect of amendments. — The 1990 amendment rewrote paragraphs (a)(3) and (a)(5).

Legislative history reports. — For

legislative letter of intent in connection with the amendment of subsection (a) by § 2, ch. 161, SLA 1990 (HCS CSS) 366 (Jud), see 1990 House Journal, p. 4199.

NOTES TO DECISIONS

"Female breast." — The legislature intended that the term "female breast," as used in the statutory definition of "sexual contact" contained in AS 11.41.900(b)(63), be applied according to its plain meaning — referring to all females regardless of age or degree of development. *Stephan v. State*, 810 P.2d 664 (Alaska Ct. App. 1991).

Defense of misunderstanding as to victim's age. — Defendant was entitled to defend on the ground that he reason-

ably believed the thirteen year old victim was sixteen years of age or older, where most of the information he knew about her came from a telephone conversation with her in which he claimed she discussed her prior sexual history and experience in detail. *Bilba v. State*, 814 P.1d 738 (Alaska Ct. App. 1991).

Merger of counts. — Defendant's convictions for sexual abuse of a minor in the second degree for digital penetration, sexual abuse of a minor in the third degree

for touching the victim's breast, and sexual abuse of a minor in the second degree for cunnilingus merged, and he should have been sentenced only on a single count of sexual abuse of a minor in the second degree. *Newsum v. State*, 782 P.2d 689 (Alaska Ct. App. 1989).

Erroneous admission of witness's testimony, over defense objection, that defendant had once admitted being sexually abused as a boy by his father necessitated reversal of defendant's conviction, where such error, when considered in combination with other errors, appreciably affected the jury's verdict and deprived defendant of a fair trial. *Nelson v. State*, 782 P.2d 200 (Alaska Ct. App. 1989).

Conviction upheld. — Evidence was sufficient to sustain defendant's conviction where the state relied substantially upon the seven-year old victim's grand jury testimony and her interview with an investigating officer which was videotaped and played to the jury to sustain the burden of proof. *Sheldon v. State*, 796 P.2d 831 (Alaska Ct. App. 1990).

Sentence upheld. See *State v. Clark*, 782 P.2d 308 (Alaska Ct. App. 1989).

Sentences of ten years with four years suspended on each of two counts of sexual abuse of a minor in the second degree, such sentences to run consecutively to each other and consecutively to defendant's seven-year sentence which he was serving in another state, were affirmed where the record established that he had a long history of sexual involvement with

children. *Kirlin v. State*, 779 P.2d 1261 (Alaska Ct. App. 1989).

Sentence of 180 days, with 180 days suspended and probation, was affirmed, where there was no evidence that the victim suffered any physical or psychological injury, and appropriate therapy to resolve defendant's problems was available in his community. *State v. Capjohn*, 779 P.2d 1266 (Alaska Ct. App. 1989).

Sentence of ten years with four years suspended, in the case of a first offender convicted of six counts of sexual abuse of a minor in the second degree, was affirmed, where defendant was the victim's music teacher and his abuse of the student-teacher relationship made it an exceptionally aggravated case. *Osterback v. State*, 789 P.2d 1037 (Alaska Ct. App. 1990).

Sentence held excessive. See *Welsa v. State*, 784 P.2d 261 (Alaska Ct. App. 1989); *Davis v. State*, 793 P.2d 1064 (Alaska Ct. App. 1990).

Sentence held inadequate. — Sentence requiring 1,000 hours of community work, while suspending the entire term of three years' incarceration imposed upon a 27-year-old gym teacher convicted of sexually abusing a 14-year-old female student, was disapproved, where the sentence unduly depreciated the significance of his misconduct and inadequately served the sentencing goal of community condemnation. *State v. Jackson*, 776 P.2d 320 (Alaska Ct. App. 1989).

Cited in *Geer v. State*, 778 P.2d 609 (Alaska Ct. App. 1989); *Hayes v. State*, 780 P.2d 713 (Alaska Ct. App. 1990).

Sec. 11.41.438. Sexual abuse of a minor in the third degree.  
(a) An offender commits the crime of sexual abuse of a minor in the third degree if

(1) being 16 years of age or older, the offender engages in sexual contact with a person who is 13, 14, or 16 years of age and at least three years younger than the offender; or

(2) being 18 years of age or older, the offender engages in sexual penetration with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim.

(b) Sexual abuse of a minor in the third degree is a class C felony. (5 2 ch 78 SLA 1983; am § 3 ch 161 SLA 1990)

Effect of amendments. — The 1990 amendment added paragraph (a)(2) and made related stylistic changes. Legislative history reports. — For

legislative letter of intent in connection with the amendment of subsection (a) by § 3, ch. 161, SLA 1990 (HCS CSSD 366 (Jud)), see 1990 House Journal, p. 4109.

NOTES TO DECISIONS

Merger of counts. — Defendant's convictions for sexual abuse of a minor in the second degree for digital penetration, sexual abuse of a minor in the third degree for touching the victim's breasts, and sexual abuse of a minor in the second degree

for cunnilingus merged, and he should have been sentenced only on a single count of sexual abuse of a minor in the second degree. *Newsome v. State*, 782 P.2d 689 (Alaska Ct. App. 1989).

Sec. 11.41.440. Sexual abuse of a minor in the fourth degree. (a) An offender commits the crime of sexual abuse of a minor in the fourth degree if

- (1) being under 16 years of age, the offender engages in sexual penetration or sexual contact with a person who is under 13 years of age and at least three years younger than the offender; or
- (2) being 18 years of age or older, the offender engages in sexual contact with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim.

(b) Sexual abuse of a minor in the fourth degree is a class A misdemeanor. (§ 3 ch 166 SLA 1978; am § 9 ch 102 SLA 1980; am § 3 ch 78 SLA 1983; am § 4 ch 161 SLA 1990)

Effect of amendments. — The 1990 amendment added paragraph (a)(2) and made related stylistic changes. Legislative history reports. — For

legislative letter of intent in connection with the amendment of subsection (a) by § 4, ch. 161, SLA 1990 (HCS CSSD 366 (Jud)), see 1990 House Journal, p. 4199.

Sec. 11.41.455. Unlawful exploitation of a minor. (a) A person commits the crime of unlawful exploitation of a minor if, in the state and with the intent of producing a live performance, film, audio recording, photograph, negative, slide, book, newspaper, magazine, or other printed material that visually depicts the conduct listed in (1) — (7) of this subsection, the person knowingly induces or employs a child under 18 years of age to engage in, or photographs, films, records, or televises a child under 18 years of age engaged in, the following actual or simulated conduct:

- (1) sexual penetration;
- (2) the lewd touching of another person's genitals, anus, or breast;
- (3) the lewd touching by another person of the child's genitals, anus, or breast;
- (4) masturbation;
- (5) bestiality;
- (6) the lewd exhibition of the child's genitals; or
- (7) sexual masochism or sadism.

(b) A parent, legal guardian, or person having custody or control of a child under 18 years of age commits the crime of unlawful exploitation of a minor if, in the state, the person permits the child to engage in conduct described in (a) of this section knowing that the conduct is intended to be used in producing a live performance, film, audio recording, photograph, negative, slide, book, newspaper, magazine, or other printed material that visually depicts the conduct.

(c) Unlawful exploitation of a minor is a class B felony.

(d) In this section, "audio recording" means a nonbook prerecorded item without a visual component, and includes a record, tape, cassette, and compact disc. (§ 3 ch 166 SLA 1978; am § 1 ch 67 SLA 1983; am §§ 1 — 2, 3 ch 161 SLA 1990; am § 8 ch 79 SLA 1992)

Effect of amendments. — The 1990 amendment inserted "audio recording" in subsections (a) and (b); inserted "records" near the end of the introductory paragraph in subsection (a); and added subsection (d).

The 1992 amendment, effective September 14, 1992, added paragraph (a)(7) and made related stylistic changes.

NOTES TO DECISIONS

Applied in *Harrie v. State*, 790 P.2d 1379 (Alaska Ct. App. 1990).

Sec. 11.41.470. Definitions. For purposes of AS 11.41.410 — 11.41.470, unless the context requires otherwise,

(1) "health care worker" includes a person who is or purports to be an anesthesiologist, acupuncturist, chiropractor, dentist, health aide, hypnotist, massage therapist, mental health counselor, midwife, nurse, nurse practitioner, osteopath, naturopath, physical therapist, physical therapy assistant, physician, physician's assistant, psychiatrist, psychologist, psychological associate, radiologist, religious healing practitioner, surgeon, x-ray technician, or a substantially similar position;

(2) "incapacitated" means temporarily incapable of appraising the nature of one's own conduct and physically unable to express unwillingness to act;

(3) "legal guardian" means a person who is under a duty to exercise general supervision over a minor as a result of a court order, statute, or regulation, and includes foster parents and staff members and other employees of group homes or youth correctional facilities where a child is placed as a result of a court order or the action of the division of family and youth services, and police officers and probation officers when those officers are exercising custodial control over a minor;

(4) "mentally incapable" means suffering from a mental disease or defect that renders the person incapable of understanding the nature or consequences of the person's conduct, including the potential for harm to that person;

(5) "position of authority" means an employer, youth leader, scout leader, coach, teacher, counselor, school administrator, religious leader, doctor, nurse, psychologist, guardian ad litem, babysitter, or a substantially similar position, and a police officer or probation officer other than when the officer is exercising custodial control over a minor;

(6) "sexual act" means sexual penetration or sexual contact.

(7) "victim" means the person alleged to have been subjected to sexual assault in any degree or sexual abuse of a minor in any degree;

(8) "without consent" means that a person

(A) with or without resisting, is coerced by the use of force against a person or property, or by the express or implied threat of death, imminent physical injury, or kidnapping to be inflicted on anyone; or

(B) is incapacitated as a result of an act of the defendant. (§ 3 ch 166 SLA 1978; am § 5 ch 78 SLA 1983; am § 5 ch 96 SLA 1988; am § 28 ch 50 SLA 1989; am § 5 ch 151 SLA 1990; am § 9 ch 79 SLA 1992)

Reviser's notes. — Reorganized in 1988 to alphabetize the defined terms and in 1990 and 1992 to maintain alphabetical order.

Effect of amendments. — The 1990

amendment added paragraphs (2) and (4) (now (3) and (6)).

The 1992 amendment, effective September 14, 1992, added paragraphs (1) and (6).

Article 5. Robbery, Extortion, and Coercion.

Section 500. Robbery in the first degree

Sec. 11.41.600. Robbery in the first degree. (a) A person commits the crime of robbery in the first degree if the person violates AS 11.41.510 and, in the course of violating that section or in immediate flight therefrom, that person or another participant

(1) is armed with a deadly weapon or represents by words or other conduct that either that person or another participant is so armed;

(2) uses or attempts to use a dangerous instrument or a defensive weapon or represents by words or other conduct that either that person or another participant is armed with a dangerous instrument or a defensive weapon; or

(3) causes or attempts to cause serious physical injury to any person.

(b) Robbery in the first degree is a class A felony. (§ 3 ch 166 SLA 1978; am § 1 ch 59 SLA 1991)

Effect of amendments. — The 1991 amendment, effective September 15, 1991, inserted "or a defensive weapon" in two places in paragraph (a)(2).

NOTES TO DECISIONS

1. General Consideration.

1. GENERAL CONSIDERATION.

Admissibility of evidence. — Where evidence of cocaine possession and sale would have been admissible on murder, kidnapping, and robbery charges, but the murder, robbery, and kidnapping evidence would not have been admissible on the cocaine charges, the appropriate action upon appeal from conviction on all counts was to vacate the cocaine convictions but affirm the other convictions. Mathis v. State, 778 P.2d 1101 (Alaska Ct. App. 1989).

Joinder of charges. — Cocaine charges and murder, kidnapping, and robbery charges were properly joined, where the state's theory of the murder, kidnapping, and robbery offenses was that defendants committed the murder and carried out the kidnapping and robbery in defense of their cocaine distribution business. Mathis v. State, 778 P.2d 1101 (Alaska Ct. App. 1989).

Evidence supported defendant's conviction, where, although the victim, whose head was covered by a pillowcase,

did not see defendant remove money from her jacket, she heard the victim on the jacket being ripped open and was therefore aware that defendant was taking her money. Nappayonak v. State, 793 P.2d 1059 (Alaska Ct. App. 1990).

Sentence upheld.

In accord with main pamphlet. Markov v. State, 829 P.2d 1191 (Alaska Ct. App. 1992).

Sentence reversed.

Total sentence of fifty years, imposed after convictions of two counts of first-degree robbery and two counts of third-degree assault, was clearly mistaken, where defendant was a youthful offender who had never before demonstrated a proclivity toward comparable acts of aggravated violence and the court's decision to base defendant's sentence on the assumption that he was incorrigible was unjustified. DeCrona v. State, 810 P.2d 212 (Alaska Ct. App. 1991).

Cited in Newcomb v. State, 779 P.2d 1240 (Alaska Ct. App. 1989); Willingale v. State, 807 P.2d 1102 (Alaska Ct. App. 1991).

Sec. 11.41.610. Robbery in the second degree.

NOTES TO DECISIONS

Quoted in Nappayonak v. State, 793 P.2d 1059 (Alaska Ct. App. 1990).

Chapter 46. Offenses Against Property.

Article

1. Theft and Related Offenses (§§ 11.46.130, 11.46.295)

3. Arson, Criminal Mischief, and Related Offenses (§ 11.46.482)

Article 1. Theft and Related Offenses.

Section

130. Theft in the second degree

295. Prior convictions

(h) If a victim desires notice under this section, the victim shall maintain a current, valid mailing address on file with the commissioner of corrections. The commissioner shall send the notice to the victim's last known address. The victim's address may not be disclosed to the offender or to the offender's attorney. (§ 12 ch 166 SLA 1978; am § 27 ch 143 SLA 1982; am § 5 ch 69 SLA 1989; am §§ 7 — 9 ch 67 SLA 1991)

**Effect of amendments.** — The 1991 amendment, effective September 15, 1991, in subsection (d), added the language beginning "and has the right to give sworn testimony" to the end of the subsection; in subsection (f), inserted "written"; and, in subsection (g), inserted "testimony, or unsworn oral presentation."

**Sec. 12.55.090. Granting of probation.**

**NOTES TO DECISIONS**

**I. General Consideration.**

**I. GENERAL CONSIDERATION.**

**Good cause for revocation.** — Where the record establishes that, after two separate stints on probation, one probation revocation action, and a substantial period of counseling, the defendant has persisted in the same pattern of criminal misconduct that led to his original convictions,

the sentencing court properly found good cause to revoke probation. *Kriner v. State*, 798 P.2d 369 (Alaska Ct. App. 1990).

Quoted in *State v. Stanel*, 807 P.2d 613 (Alaska Ct. App. 1991).

Cited in *Wylie v. State*, 797 P.2d 651 (Alaska Ct. App. 1990); *Durt v. State*, 823 P.2d 14 (Alaska Ct. App. 1991).

**Sec. 12.55.100. Conditions of probation.**

**NOTES TO DECISIONS**

**I. General Consideration.**

**I. GENERAL CONSIDERATION.**

Cited in *Durt v. State*, 823 P.2d 14 (Alaska Ct. App. 1991).

**Sec. 12.55.116. Fixing eligibility for discretionary parole at sentencing.**

**NOTES TO DECISIONS**

**Judge must set forth reasons for restriction with particularity.** — When a sentencing judge restricts parole eligibility, the judge must specifically address the issue of parole restriction, setting forth with particularity his or her reasons for concluding that the parole eligibility prescribed by AS 33.10.090 and AS 33.15.100(c)-(d) is insufficient to protect

the public and insure the defendant's reformation. *Stern v. State*, 824 P.2d 442 (Alaska Ct. App. 1992).

**Sentence upheld.** — Denial of parole eligibility for defendant, who received a 99-year sentence after being convicted of murder, was not clearly mistaken, where the record showed him to be a racist, a man full of anger, a man with a severe

alcohol problem, and a man with a proclivity for assaulting people with firearms, and advised that he had just been released on felony probation a few days

before the murder. *Stern v. State*, 824 P.2d 442 (Alaska Ct. App. 1992).  
Cited in *Weltz v. State*, 794 P.2d 852 (Alaska Ct. App. 1990).

**Sec. 12.55.120. Appeal of sentence.**

**NOTES TO DECISIONS**

**I. General Consideration.**

**II. Sentencing.**

**C. Factors for Consideration.**

**I. GENERAL CONSIDERATION.**

Cited in *Wylie v. State*, 797 P.2d 651 (Alaska Ct. App. 1990).

**II. SENTENCING.**

**C. Factors for Consideration.**

**Judicial recommendation to parole board.** — Where the trial court's written judgment did not legally restrict defendant's parole, did not specifically provide that defendant would be eligible for parole

after serving the mandatory minimum period of time required by statute, and took into consideration defendant's prior favorable record, but considered his prospects for rehabilitation to be guarded because of the serious nature of the offense and defendant's failure to accept full responsibility for the crime, and also emphasized the need to deter similar offenses, such reasons were sufficient to justify the recommendation. *Dunkin v. State*, 818 P.2d 1169 (Alaska Ct. App. 1991).

**Sec. 12.55.125. Sentences of imprisonment for felonies.** (a) A defendant convicted of murder in the first degree shall be sentenced to a definite term of imprisonment of at least 20 years but not more than 99 years. A defendant convicted of murder in the first degree shall be sentenced to a mandatory term of imprisonment of 99 years when

(1) the defendant is convicted of the murder of a uniformed or otherwise clearly identified peace officer, fire fighter, or correctional officer who was engaged in the performance of official duties at the time of the murder;

(2) the defendant has been previously convicted of

(A) murder in the first degree under AS 11.41.100 or former AS 11.15.010 or 11.15.020;

(B) murder in the second degree under AS 11.41.110 or former AS 11.15.030; or

(C) homicide under the laws of another jurisdiction when the offense of which the defendant was convicted contains elements similar to first degree murder under AS 11.41.100 or second degree murder under AS 11.41.110; or

(3) the court finds by clear and convincing evidence that the defendant subjected the murder victim to substantial physical torture.

(b) A defendant convicted of murder in the second degree, attempted murder in the first degree, kidnapping, or misconduct involving a controlled substance in the first degree shall be sentenced to a

definite term of imprisonment of not less than five years but not more than 99 years.

(c) A defendant convicted of a class A felony may be sentenced to a definite term of imprisonment of not more than 20 years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.165 — 12.55.176:

(1) if the offense is a first felony conviction and does not involve circumstances described in (2) of this subsection, five years;

(2) if the offense is a first felony conviction, other than for manslaughter, and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, or knowingly directed the conduct constituting the offense at a uniformed or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, seven years;

(3) if the offense is a second felony conviction, 10 years;

(4) if the offense is a third felony conviction, 15 years.

(d) A defendant convicted of a class B felony may be sentenced to a definite term of imprisonment of not more than 10 years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.165 — 12.55.176:

(1) if the offense is a second felony conviction, four years;

(2) if the offense is a third felony conviction, six years;

(3) if the offense is a first felony conviction, and the defendant knowingly directed the conduct constituting the offense at a uniformed or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, two years.

(e) A defendant convicted of a class C felony may be sentenced to a definite term of imprisonment of not more than five years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.165 — 12.55.176:

(1) if the offense is a second felony conviction, two years;

(2) if the offense is a third felony conviction, three years;

(3) if the offense is a first felony conviction, and the defendant knowingly directed the conduct constituting the offense at a uniformed or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, one year;

(4) if the offense is a first felony conviction, and the defendant violated AS 08.54.520(a)(7) — (10), one year.

(f) If a defendant is sentenced under (a) or (b) of this section,

(1) imprisonment for the prescribed minimum term may not be suspended under AS 12.55.080;

(2) imposition of sentence may not be suspended under AS 12.55.085;

(3) imprisonment for the prescribed minimum term may not be otherwise reduced.

(g) If a defendant is sentenced under (c), (d)(1), (d)(2), (e)(1), (e)(2), or (i) of this section, except to the extent permitted under AS 12.55.165 — 12.55.176,

(1) imprisonment may not be suspended under AS 12.55.080;

(2) imposition of sentence may not be suspended under AS 12.55.085;

(3) terms of imprisonment may not be otherwise reduced.

(h) Nothing in this section or AS 12.55.135 limits the discretion of the sentencing judge except as specifically provided. Nothing in (a) of this section limits the court's discretion to impose a sentence of 99 years imprisonment, or to limit parole eligibility, for a person convicted of murder in the first or second degree in circumstances other than those enumerated in (a).

(i) A defendant convicted of sexual assault in the first degree or sexual abuse of a minor in the first degree may be sentenced to a definite term of imprisonment of not more than 30 years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.165 — 12.55.176:

(1) if the offense is a first felony conviction and does not involve circumstances described in (2) of this subsection, eight years;

(2) if the offense is a first felony conviction, and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 10 years;

(3) if the offense is a second felony conviction, 15 years;

(4) if the offense is a third felony conviction, 20 years.

(j) A defendant sentenced to a mandatory term of imprisonment of 99 years under (a) of this section may apply for a modification or reduction of sentence under the Alaska Rules of Criminal Procedure after serving one-half of the mandatory term without consideration of good time earned under AS 33.20.010.

(k) A first felony offender convicted of an offense for which a presumptive term of imprisonment is not specified under this section may not be sentenced to a term of unsuspended imprisonment that exceeds the presumptive term for a second felony offender convicted of the same crime unless the court finds by clear and convincing evidence that an aggravating factor under AS 12.55.155(c) is present, or that circumstances exist that would warrant a referral to the three-judge panel under AS 12.55.165. (§ 12 ch 166 SLA 1978; am § 18 ch 45 SLA 1982; am §§ 28-30 ch 143 SLA 1992; am § 8 ch 78 SLA 1983; am

§§ 1-3 ch 92 SLA 1983; am § 5 ch 59 SLA 1988; am § 4 ch 37 SLA 1989; am §§ 23-25 ch 79 SLA 1992)

**Cross references.** — For effect of the enactment of (j) of this section on Alaska Rule of Criminal Procedure 35, see § 34, ch 79, SLA 1992 in the Temporary and Special Acts.

**Effect of amendments.** — The 1992

amendment, effective September 14, 1992, in subsection (a), added the second sentence and paragraphs (l) to (j); added the second sentence in subsection (h); and added subsections (i) and (k).

## NOTES TO DECISIONS

- I. General Consideration.
- II. Sentencing.
  - A. In General.
  - B. Specific Crimes.
- III. Presumptive Sentencing.
  - A. In General.
  - B. First-Offenders.

### I. GENERAL CONSIDERATION.

Applied in *Machado v. State*, 797 P.2d 677 (Alaska Ct. App. 1990); *McGinnis v. State*, 807 P.2d 606 (Alaska Ct. App. 1991); *Noblit v. State*, 808 P.2d 280 (Alaska Ct. App. 1991); *Looney v. State*, 820 P.2d 775 (Alaska Ct. App. 1992); *Marker v. State*, 829 P.2d 1191 (Alaska Ct. App. 1992).

Cited in *Lepley v. State*, 807 P.2d 1086 (Alaska Ct. App. 1991); *Collins v. State*, 816 P.2d 1383 (Alaska Ct. App. 1991).

### II. SENTENCING.

#### A. In General.

AlA Standards' recommended 10-year benchmark.

Where the sentence is more than twice the maximum sentence for the most serious offense committed, and the composite sentence exceeds ten years of imprisonment, the sentence is improper under the AlA Standards unless the offender is particularly dangerous. *Neff v. State*, 799 P.2d 782 (Alaska Ct. App. 1990).

**Sentencing of "worst offender."**  
Sentence of 160 years without possibility of parole was not clearly mistaken, where the circumstances surrounding defendant's offenses of murder, robbery and assault plainly justified a worst offender finding and defendant had four times been convicted of felony offenses and had served substantial prior time in prison and on parole. *Waltz v. State*, 704 P.2d 952 (Alaska Ct. App. 1990).

**Sentencing for comparable crimes as point of reference.** — It is appropri-

ate for the court to consider drunken driving manslaughter cases as a point of reference for determining an appropriate sentence for an offender convicted of second-degree murder for comparable conduct. *Ratliff v. State*, 798 P.2d 1288 (Alaska Ct. App. 1990).

**Imposition of sentence upon revocation for violation of probation.** — Where a convicted criminal's original sentence on his first felony offense was four years of imprisonment for possession of cocaine for purposes of sale and a suspended imposition of sentence for a period of five years for possession of marijuana for purposes of sale, and the criminal had served his four-year sentence for possession of cocaine for purposes of sale, the judge should only have been able to sentence the criminal to an additional two years of imprisonment on revocation for a violation of his probation. *Dayne v. State*, 799 P.2d 1347 (Alaska Ct. App. 1990).

"Clearly mistaken" test for court review. — The "clearly mistaken" test implies a permissible range of reasonable sentences which a reviewing court, after an independent review of the record, will not modify. This "range of reasonableness" should be determined not by imposition of an artificial ceiling which limits a large class of offenses to the lower end of the sentencing spectrum, but, rather, by an examination of the particular facts of the individual case in light of the total range of sentences authorized by the legislature for the particular offense. *State v. Wentz*, 805 P.2d 962 (Alaska Ct. App. 1991).

### D. Specific Crimes.

#### Assault.

Trial court was not clearly mistaken when it suspended three years of defendant's fifteen-year sentence for first-degree assault, where the victim was defendant's deaf and mute wife, who was severely beaten and suffered permanent brain damage, and defendant had a substantial record of alcohol-related misdemeanor offenses, including numerous instances of disorderly conduct and property damage. *State v. Wentz*, 805 P.2d 962 (Alaska Ct. App. 1991).

**Misconduct involving controlled substance.**

Where the evidence showed that the one ounce sale was consistent with a lower-level wholesale transaction, the sale was not an isolated transaction, the stolen handgun and the large amounts of cash discovered by the police upon the defendant's arrest lent support to the conclusion that his involvement in cocaine trafficking was neither casual nor at the lowest levels of the trade, and the sentence for a mid-level trafficker was proper. *Vaquez-Villegas v. State*, 798 P.2d 362 (Alaska Ct. App. 1990).

**Sentence of 20 years imprisonment for sale of cocaine to a minor was excessive, where the offense involved the sale of approximately two grams of cocaine to an undercover agent who appeared relatively mature and who was within a month of his 18th birthday, and the case was remanded with directions to impose a sentence of not greater than 16 years of imprisonment, including suspended time.** *McPherson v. State*, 800 P.2d 928 (Alaska Ct. App. 1990).

#### Sentence upheld.

In accord with first paragraph. *Levitt v. State*, 800 P.2d 342 (Alaska Ct. App. 1991); *Erickson v. State*, 824 P.2d 725 (Alaska Ct. App. 1992); *Wiley v. State*, 822 P.2d 940 (Alaska Ct. App. 1991).

**Composite sentence of 40 years of imprisonment for solicitation of murder in the first degree, attempted murder in the first degree, and assault in the first degree was not clearly mistaken.** *Marzak v. State*, 795 P.2d 1374 (Alaska Ct. App. 1990).

#### Sentence not upheld.

Total sentence of fifty years, imposed after convictions of two counts of first-degree robbery and two counts of third-degree assault, was clearly mistaken, where defendant was a youthful offender who

had never before demonstrated a proclivity toward comparable acts of aggravated violence and the court's decision to base defendant's sentence on the assumption that he was incorrigible was unjustified. *DeGross v. State*, 816 P.2d 212 (Alaska Ct. App. 1991).

### III. PRESUMPTIVE SENTENCING.

#### A. In General.

The mandatory consecutive sentencing provisions of AS 12.55.026(h) have no integral relation to Alaska's presumptive sentencing scheme, AS 12.55.125 — 12.55.176. The legislature enacted the consecutive sentencing statute independently of the presumptive sentencing statute, and application of the provision does not turn on the applicability of presumptive sentencing. *State v. Wagner*, Ct. App. Op. No. 1220 (File No. A-3932), P.2d (1992).

**Deviation from presumptive sentences.**

Where a criminal defendant was convicted of two counts of misconduct involving a controlled substance in the fourth degree, a class C felony punishable by a maximum sentence of five years, for which the legislature had established a presumptive sentence of two years for a second-felony offender and three years for a third-felony offender, and the trial judge properly found that the case was aggravated, particularly since the defendant was on felony probation at the time that he committed the new offenses, and his prior conviction was for a more serious class of felony offense, the judge could not properly impose a sentence greater than five years, the maximum sentence for a class C felony. *Boyne v. State*, 709 P.2d 1347 (Alaska Ct. App. 1990).

#### B. First-Offenders.

**Sentence for first-time offender in excess of presumptive sentence for second or third offenders.**

**Composite term of eight years with four years suspended, for a first felony offender convicted for selling cocaine in 1/4 or 1/2 ounce packages on nine occasions, was clearly mistaken, and the sentence was therefore remanded for imposition of a composite term not exceeding six years with three years suspended.** *Major v. State*, 798 P.2d 341 (Alaska Ct. App. 1990).

**Standard for finding exception to Aulin rule.** — The clear and convincing

evidence standard should be applied to finding an exception to the rule in *Austin v. State*, 827 P.2d 657 (Alaska Ct. App. 1991), which held that first felony offenders convicted of offenses for which no presumptive term is specified should normally receive more favorable sentences than the presumptive term for second felony offenders convicted of like crimes. *Booy v. State*, 818 P.2d 1165 (Alaska Ct. App. 1991).

When conduct amounting to a probation violation is the sole basis for a finding of extraordinary circumstance, the conduct should be established by clear and convincing evidence (not merely a preponderance of the evidence) before an exceptional sentence under *Austin* (i.e., a sentence for a first offender which is greater than the presumptive sentence for a sec-

ond offender) is imposed. *Andrew v. State*, Ct. App. Op. No. 1231 (File No. A-3940), P.2d (1992).

Use of circumstance established by preponderance of evidence. — In probation violation cases, because the defendant's poor potential for rehabilitation, and not the probation violation itself, was the circumstance justifying an *Austin* rule exception, it was the former, not the latter, that had to be established by clear and convincing evidence. Hence, even when established by a mere preponderance of evidence, a probation violation could be factored together with other evidence concerning the defendant's rehabilitative potential. *Andrew v. State*, Ct. App. Op. No. 1231 (File No. A-3940), P.2d (1992).

**Sec. 12.55.135. Sentences of imprisonment for misdemeanors.** (a) A defendant convicted of a class A misdemeanor may be sentenced to a definite term of imprisonment of not more than one year.

(b) A defendant convicted of a class B misdemeanor may be sentenced to a definite term of imprisonment of not more than 90 days unless otherwise specified in the provision of law defining the offense.

(c) A defendant convicted of assault in the fourth degree committed in violation of the provisions of an order issued under AS 25.35.010 or 25.35.020 shall be sentenced to a minimum term of imprisonment of 20 days.

(d) A defendant convicted of assault in the fourth degree upon a uniformed or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the assault shall be sentenced to a minimum term of imprisonment of 30 days.

(e) Except as provided in AS 12.55.055(f), if a defendant is sentenced under (c), (d), or (f) of this section,

(1) execution of sentence may not be suspended and probation or parole may not be granted until the minimum term of imprisonment has been served;

(2) imposition of a sentence may not be suspended except upon condition that the defendant be imprisoned for no less than the minimum term of imprisonment provided in the section; and

(3) the minimum term of imprisonment may not otherwise be reduced.

(f) A defendant convicted of criminal mischief in the third degree in violation of AS 11.46.484(a)(2), whose conviction is not a felony under AS 11.46.484(c), shall be sentenced to a definite term of imprisonment of at least 72 hours but not more than one year. (§ 12 ch 166 SLA

1978; am § 2 ch 139 SLA 1980; am § 22 ch 59 SLA 1982; am § 13 ch 61 SLA 1982; am § 31 ch 143 SLA 1982; am §§ 4, 5 ch 92 SLA 1983; am §§ 5, 6 ch 53 SLA 1991)

**Cross references.** — For legislative findings and purpose in connection with the enactment of subsection (f), see §§ 1 and 2, ch. 53, SLA-1991 in the Temporary and Special Acts.

**Effect of amendments.** — The 1991 amendment, effective September 13, 1991, rewrote subsection (e) and added subsection (f).

#### Sec. 12.55.145. Prior convictions.

##### NOTES TO DECISIONS

**Prior conviction out of state.**  
Defendant's Oregon convictions for "unauthorized use of a vehicle" did not constitute a prior felony for presumptive sentencing purposes under this section, because the Oregon and Alaska offenses did not have similar elements, in view of the

fact that the Oregon statute did not require the state to prove a prior offense while the Alaska statute did have such a requirement. *Harlow v. State*, 820 P.2d 307 (Alaska Ct. App. 1991).

Cited in *Wiley v. State*, 822 P.2d 840 (Alaska Ct. App. 1991).

**Sec. 12.55.155. Factors in aggravation and mitigation.** (a) If a defendant is convicted of an offense and is subject to sentencing under AS 12.55.125(c), (d)(1), (d)(2), (e)(1), (e)(2), or (f) and

(1) the presumptive term is four years or less, the court may decrease the presumptive term by an amount as great as the presumptive term for factors in mitigation or may increase the presumptive term up to the maximum term of imprisonment for factors in aggravation;

(2) the presumptive term of imprisonment is more than four years, the court may decrease the presumptive term by an amount as great as 50 percent of the presumptive term for factors in mitigation or may increase the presumptive term up to the maximum term of imprisonment for factors in aggravation.

(b) Sentence increments and decrements under this section shall be based on the totality of the aggravating and mitigating factors set out in (c) and (d) of this section.

(c) The following factors shall be considered by the sentencing court and may aggravate the presumptive terms set out in AS 12.55.125:

(1) a person, other than an accomplice, sustained physical injury as a direct result of the defendant's conduct;

(2) the defendant's conduct during the commission of the offense manifested deliberate cruelty to another person;

(3) the defendant was the leader of a group of three or more persons who participated in the offense;

(4) the defendant employed a dangerous instrument in furtherance of the offense;

(5) the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, disability, ill health, or extreme youth or was for any other reason substantially incapable of exercising normal physical or mental powers of resistance;

(6) the defendant's conduct created a risk of imminent physical injury to three or more persons, other than accomplices;

(7) a prior felony conviction considered for the purpose of invoking the presumptive terms of this chapter was of a more serious class of offense than the present offense;

(8) the defendant's prior criminal history includes conduct involving aggravated or repeated instances of assaultive behavior;

(9) the defendant knew that the offense involved more than one victim;

(10) the conduct constituting the offense was among the most serious conduct included in the definition of the offense;

(11) the defendant committed the offense pursuant to an agreement that the defendant either pay or be paid for the commission of the offense, and the pecuniary incentive was beyond that inherent in the offense itself;

(12) the defendant was on release under AS 12.30.020 or 12.30.040 for another felony charge or conviction or for a misdemeanor charge or conviction having assault as a necessary element;

(13) the defendant knowingly directed the conduct constituting the offense at an active officer of the court or at an active or former judicial officer, prosecuting attorney, law enforcement officer, correctional employee, fire fighter, emergency medical technician, paramedic, ambulance attendant, or other emergency responder during or because of the exercise of official duties;

(14) the defendant was a member of an organized group of five or more persons, and the offense was committed to further the criminal objectives of the group;

(15) the defendant has three or more prior felony convictions;

(16) the defendant's criminal conduct was designed to obtain substantial pecuniary gain and the risk of prosecution and punishment for the conduct is slight;

(17) the offense was one of a continuing series of criminal offenses committed in furtherance of illegal business activities from which the defendant derives a major portion of the defendant's income;

(18) the offense was a crime

(A) specified in AS 11.41 and was committed against a spouse, a former spouse, or a member of the social unit comprised of those living together in the same dwelling as the defendant;

(B) specified in AS 11.41.410 — 11.41.460 and was committed against a minor, and the defendant has engaged in the same or similar conduct involving the same or another victim who was a minor; or

(C) specified in AS 11.41.410 — 11.41.425 or 11.41.455, and the defendant has previously engaged in conduct covered by one of those sections involving the same or another victim;

(19) the defendant's prior criminal history includes an adjudication as a delinquent for conduct that would have been a felony if committed by an adult;

(20) the defendant was on furlough under AS 33.30 or on parole or probation for another felony charge or conviction that would be considered a prior felony conviction under AS 12.65.145(n)(2);

(21) the defendant has a criminal history of repeated instances of conduct violative of criminal laws, whether punishable as felonies or misdemeanors, similar in nature to the offense for which the defendant is being sentenced under this section;

(22) the defendant knowingly directed the conduct constituting the offense at a victim because of that person's race, sex, color, creed, physical or mental disability, ancestry, or national origin;

(23) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the delivery of a controlled substance under circumstances manifesting an intent to distribute the substance as part of a commercial enterprise;

(24) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the transportation of controlled substances into the state;

(25) the defendant is convicted of an offense specified in AS 11.71 and the offense involved large quantities of a controlled substance;

(26) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the distribution of a controlled substance that had been adulterated with a toxic substance;

(27) the defendant, being 18 years of age or older,

(A) is legally accountable under AS 11.16.110(2) for the conduct of a person who, at the time the offense was committed, was under 18 years of age and at least three years younger than the defendant; or

(B) is aided or abetted in planning or committing the offense by a person who, at the time the offense was committed, was under 18 years of age and at least three years younger than the defendant;

(28) the victim of the offense is a person who provided testimony or evidence related to a prior offense committed by the defendant.

(d) The following factors shall be considered by the sentencing court and may mitigate the presumptive terms set out in AS 12.65.125:

(1) the offense was principally accomplished by another person, and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim;

(2) the defendant, although an accomplice, played only a minor role in the commission of the offense;

(3) the defendant committed the offense under some degree of duress, coercion, threat, or compulsion insufficient to constitute a complete defense, but which significantly affected the defendant's conduct;

(4) the conduct of a youthful defendant was substantially influenced by another person more mature than the defendant;

(5) the conduct of an aged defendant was substantially a product of physical or mental infirmities resulting from the defendant's age;

(6) in a conviction for assault under AS 11.41.200 — 11.41.220, the defendant acted with serious provocation from the victim;

(7) except in the case of a crime defined by AS 11.41.410 — 11.41.470, the victim provoked the crime to a significant degree;

(8) [Repealed, § 42 ch 143 SLA 1982.]

(9) the conduct constituting the offense was among the least serious conduct included in the definition of the offense;

(10) before the defendant knew that the criminal conduct had been discovered, the defendant fully compensated or made a good faith effort to fully compensate the victim of the defendant's criminal conduct for any damage or injury sustained;

(11) the defendant was motivated to commit the offense solely by an overwhelming compulsion to provide for emergency necessities for the defendant's immediate family;

(12) the defendant assisted authorities to detect, apprehend, or prosecute other persons who committed an offense;

(13) the facts surrounding the commission of the offense and any previous offenses by the defendant establish that the harm caused by the defendant's conduct is consistently minor and inconsistent with the imposition of a substantial period of imprisonment;

(14) the defendant is convicted of an offense specified in AS 11.71 and the offense involved small quantities of a controlled substance;

(15) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the distribution of a controlled substance, other than a schedule IA controlled substance, to a personal acquaintance who is 19 years of age or older for no profit;

(16) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the possession of a small amount of a controlled substance for personal use in the defendant's home;

(17) in a conviction for assault or attempted assault or for homicide or attempted homicide, the defendant acted in response to domestic violence perpetrated by the victim against the defendant and the domestic violence consisted of aggravated or repented instances of assaultive behavior.

(e) If a factor in aggravation is a necessary element of the present offense, or requires the imposition of a presumptive term under AS 12.55.125(c)(2), (d)(3) or (e)(3), that factor may not be used to aggravate the presumptive term. If a factor in mitigation is raised at trial

as a defense reducing the offense charged to a lesser included offense, that factor may not be used to mitigate the presumptive term.

(i) If the state seeks to establish a factor in aggravation at sentencing or if the defendant seeks to establish a factor in mitigation at sentencing, written notice must be served on the opposing party and filed with the court not later than 10 days before the date set for imposition of sentence. Factors in aggravation and factors in mitigation must be established by clear and convincing evidence before the court sitting without a jury. All findings must be set out with specificity.

(g) Voluntary alcohol or other drug intoxication or chronic alcoholism or other drug addiction may not be considered an aggravating or mitigating factor.

(h) In this section, "serious provocation" has the meaning given in AS 11.41.115(f). (§ 12 ch 166 SLA 1978; am §§ 39-41 ch 102 SLA 1980; am §§ 19, 20 ch 45 SLA 1982; am §§ 36, 38, 39, 42 ch 143 SLA 1982; am §§ 6, 7 ch 92 SLA 1983; am § 19 ch 37 SLA 1986; am § 1 ch 37 SLA 1987; am § 4 ch 69 SLA 1987; am § 1 ch 83 SLA 1987; am § 7 ch 66 SLA 1988; am § 1 ch 10 SLA 1990; am § 13 ch 21 SLA 1991; am § 6 ch 64 SLA 1991; am § 26 ch 79 SLA 1992)

Effect of amendments. — The first 1991 amendment, effective June 11, 1991, in paragraph (d)(6), made a reference substitution.

The second 1991 amendment, effective September 16, 1991, added paragraph (d)(17).

The 1992 amendment, effective September 14, 1992, added subparagraph (c)(18)(C) and made related stylistic changes.

#### NOTES TO DECISIONS

- I. General Consideration.
- II. Adjustment of Presumptive Sentences Generally.
- III. Aggravating and Mitigating Factors.
  - A. Aggravating Factors Generally.
  - B. Mitigating Factors Generally.
- V. Notice.

#### I. GENERAL CONSIDERATION.

Standard for finding exception to Austin rule. — The clear and convincing evidence standard should be applied to finding an exception to the rule in *Austin v. State*, 627 P.2d 657 (Alaska Ct. App. 1981), which held that first felony offenders convicted of offenses for which no presumptive term is specified should normally receive more favorable sentences than the presumptive term for second felony offenders convicted of like crimes. *Duoy v. State*, 818 P.2d 1165 (Alaska Ct. App. 1991).

Maximum sentence. — The purposes of sentence review are better served by

the interpretation that a defendant receives a "maximum sentence" if he or she is sentenced to the maximum term of imprisonment, whether or not the sentencing judge restricts or denies parole eligibility. *Capwell v. State*, 823 P.2d 1260 (Alaska Ct. App. 1991).

Sentence upheld.

In accord with first paragraph, *Larvitt v. State*, 800 P.2d 342 (Alaska Ct. App. 1991).

Sentence not upheld.

Case was remanded for resentencing on convictions of failing to stop, render aid, and contact authorities, where the trial court aggravated a first felony offender's

sentence on the basis of aggravating factors without giving advance notice and the court's findings included a finding of physical injury, which appeared to be an element of the offense. *Wylie v. State*, 797 P.2d 651 (Alaska Ct. App. 1990).

Sentence of 20 years imprisonment for sale of cocaine to a minor was excessive, where the offense involved the sale of approximately two grams of cocaine to an undercover agent who appeared relatively mature and who was within a month of his 19th birthday, and the case was remanded with directions to impose a sentence of not greater than 15 years of imprisonment, including suspended time. *McPherson v. State*, 800 P.2d 928 (Alaska Ct. App. 1990).

Applied in *Marzak v. State*, 790 P.2d 1374 (Alaska Ct. App. 1990); *Simpson v. State*, 790 P.2d 840 (Alaska Ct. App. 1990); *Kaunle v. State*, 796 P.2d 844 (Alaska Ct. App. 1990); *McCollin v. State*, 807 P.2d 608 (Alaska Ct. App. 1991); *Lepley v. State*, 807 P.2d 1096 (Alaska Ct. App. 1991); *DeGross v. State*, 816 P.2d 212 (Alaska Ct. App. 1991); *Louney v. State*, 825 P.2d 776 (Alaska Ct. App. 1992); *Marker v. State*, 829 P.2d 1191 (Alaska Ct. App. 1992).

Cited in *Weitz v. State*, 794 P.2d 962 (Alaska Ct. App. 1990).

## II. ADJUSTMENT OF PRESUMPTIVE SENTENCES GENERALLY.

"Clearly mistaken" test for court review. — The "clearly mistaken" test implies a permissible range of reasonable sentences which a reviewing court, after an independent review of the record, will not modify. This "range of reasonableness" should be determined not by imposition of an artificial ceiling which limits a large class of offenses to the lower end of the sentencing spectrum, but, rather, by an examination of the particular facts of the individual case in light of the total range of sentences authorized by the legislature for the particular offense. *State v. Weitz*, 805 P.2d 962 (Alaska Ct. App. 1991).

## III. AGGRAVATING AND MITIGATING FACTORS.

### A. Aggravating Factors Generally.

#### Victim's physical injuries.

A sentencing judge could properly consider that a defendant's use of a dangerous instrument against his victim was ex-

ceptionally brutal and involved deliberate cruelty, could consider the extraordinary level of both physical and sexual violence involved in defendant's assault violence that led to profound and lasting injuries, which went well beyond what might be considered typical even in cases of serious physical injury, and could properly consider the protracted and repeated nature of defendant's assaultive conduct (a consideration wholly independent of his use of a dangerous instrument and his infliction of serious physical injury). *Wiley v. State*, 822 P.2d 940 (Alaska Ct. App. 1991).

Commission of heinous offenses while on parole. — The sentencing judge could have properly concluded that defendant was a person from whom society may never be safe if released from custody, where defendant committed heinous offenses within a few weeks of being paroled, and when not incarcerated, defendant repeatedly committed crimes and violated probation and parole conditions, and his offenses continually increased in severity. *Marcy v. State*, 823 P.2d 660 (Alaska Ct. App. 1991).

The term "deliberate cruelty," etc. "Deliberate cruelty," as referred to in paragraph (c)(2), is conduct which involves gratuitously inflicted torture or violence. However, when the relevant conduct is merely a direct means to accomplish the crime charged, the conduct may not also be included as a separate aggravating factor. *Machado v. State*, 797 P.2d 677 (Alaska Ct. App. 1990).

Felonies committed under prior law. — When applying the aggravator in paragraph (c)(7) to felonies committed under prior law, the court of appeals looks to the offense defined by current law that is the nearest equivalent to the defendant's prior felony. *Capwell v. State*, 823 P.2d 1250 (Alaska Ct. App. 1991).

"Most serious conduct included." Trial court's finding that defendant's perjury "was among the most serious conduct included in the definition of the offense", as referred to in paragraph (e)(10), was not clearly erroneous, where his false testimony at a search warrant hearing concerned the events surrounding a car bombing for which he was subsequently prosecuted and convicted. *Machado v. State*, 797 P.2d 677 (Alaska Ct. App. 1990).

### B. Mitigating Factors Generally.

A mitigator may be outweighed by

the existence of other factors. *Machado v. State*, 797 P.2d 677 (Alaska Ct. App. 1990).

Although an offender's mental illness is a factor that the judge can properly take into account to decide the extent to which his offense was mitigated, an offender whose crime is the product of a mental illness should not automatically be entitled to a more mitigated sentence than would have been appropriate had no mental illness existed. *Washington v. State*, 828 P.2d 172 (Alaska Ct. App. 1992).

Applicability of (d)(12). — Trial court properly declined to reduce defendant's sentence, where his "assistance" in a police investigation also attempted to divert attention from his own role in a car bombing and thus in fact hampered and hin-

dered authorities. *Machado v. State*, 797 P.2d 677 (Alaska Ct. App. 1990).

## V. NOTICE.

### Notice to parties of factors, etc.

Both the defendant and the government are entitled to notice that the judge is considering previously unmentioned aggravating or mitigating factors before the parties present their sentencing arguments. *Collins v. State*, 818 P.2d 1383 (Alaska Ct. App. 1991).

Preservation of issue of lack of notice. — Absent plain error, a defendant will not be heard to complain on appeal that he or she lacked advance notice of aggravating factors unless the issue has been preserved by a timely objection in the trial court. *Collins v. State*, 818 P.2d 1383 (Alaska Ct. App. 1991).

**Sec. 12.55.166. Extraordinary circumstances.** (a) If the defendant is subject to sentencing under AS 12.55.125(c), (d), (e), or (f) and the court finds by clear and convincing evidence that manifest injustice would result from failure to consider relevant aggravating or mitigating factors not specifically included in AS 12.55.166 or from imposition of the presumptive term, whether or not adjusted for aggravating or mitigating factors, the court shall enter findings and conclusions and cause a record of the proceedings to be transmitted to a three-judge panel for sentencing under AS 12.55.175.

(b) In making a determination under (a) of this section, the court may not refer a case to a three-judge panel based on the defendant's potential for rehabilitation if the court finds that a factor in aggravation set out in AS 12.55.166(c)(2), (8), (10), (12), (15), (17), (18)(B), (20), (21), or (28) is present. (§ 12 ch 166 SLA 1978; am § 37 ch 143 SLA 1982; am § 2 ch 168 SLA 1990; am § 27 ch 79 SLA 1992)

Effect of amendments. — The 1992 amendment, effective September 14, 1992, added subsection (b).

## NOTES TO DECISIONS

Consideration of evidence of rehabilitation.

The superior court is justified in concluding that a defendant has unusually good potential for rehabilitation only when the court is satisfied, after reviewing the totality of the circumstances, that the defendant can adequately be treated in the community and need not be incarcerated for the full presumptive term in order to prevent future criminal activity.

*Lepley v. State*, 807 P.2d 1096 (Alaska Ct. App. 1991).

The defendant has the burden to prove the mitigating factor of uncommonly good potential for rehabilitation by clear and convincing evidence. *Lepley v. State*, 807 P.2d 1096 (Alaska Ct. App. 1991).

Quoted in *Wiley v. State*, 822 P.2d 940 (Alaska Ct. App. 1991); *State v. Wagner*, Ct. App. Op. No. 1229 (File No. A-3932), P.2d (1992).

(Cited in *Collins v. State*, 816 P.2d 1383 (Alaska Ct. App. 1991).

**Sec. 12.55.175. Three-judge sentencing panel.** (a) There is created within the superior court a panel of five superior court judges to be appointed by the chief justice in accordance with rules and for terms as may be prescribed by the supreme court. Three judges of the panel shall be designated by the chief justice as members. The remaining two judges shall be designated by the chief justice as first and second alternates to sit as members in the event of disqualification or disability in accordance with rules as may be prescribed by the supreme court.

(b) Upon receipt of a record of proceedings under AS 12.55.165, the three-judge panel shall consider all pertinent files, records, and transcripts, including the findings and conclusions of the judge who originally heard the matter. The panel may hear oral testimony to supplement the record before it. If the panel finds that manifest injustice would result from failure to consider relevant aggravating or mitigating factors not specifically included in AS 12.55.165 or from imposition of the presumptive term, whether or not adjusted for aggravating or mitigating factors, it shall sentence the defendant in accordance with this section. If the panel does not find that manifest injustice would result, it shall remand the case to the sentencing court, with a written statement of its findings and conclusions, for sentencing under AS 12.55.125.

(c) The three-judge panel may in the interest of justice sentence the defendant to any definite term of imprisonment up to the maximum term provided for the offense or to any sentence authorized under AS 12.55.015.

(d) Sentencing of a defendant or remanding of a case under this section shall be by a majority of the three-judge panel.

(e) If the three-judge panel determines under (b) of this section that manifest injustice would result from imposition of the presumptive term and the panel also finds that the defendant has an exceptional potential for rehabilitation and that a sentence of less than the presumptive term should be imposed because of the defendant's exceptional potential for rehabilitation, the panel

(1) shall sentence the defendant to the presumptive term required under AS 12.55.125;

(2) shall order the defendant under AS 12.55.015 to engage in appropriate programs of rehabilitation; and

(3) may provide that the defendant is eligible for discretionary parole under AS 33.16.090 during the second half of the sentence imposed under this subsection if the defendant successfully completes all rehabilitation programs ordered under (2) of this subsection. (§ 12 ch 166 SLA 1978; am § 28 ch 79 SLA 1992)

Effect of amendments. — The 1992 amendment, effective September 14, 1992, added subsection (c).

## NOTES TO DECISIONS

**Consecutive sentences.** — AS 12.55.025(h), which imposes mandatory consecutive sentences in certain instances, applies to sentencing decisions made by the three-judge panel. *State v. Wagner*, Ct. App. Op. No. 1229 (File No. A-3932), P.2d (1992).

Under subsection (c), the three-judge panel has broad discretion to determine the sentence appropriate for multiple of-

ferences over which it has jurisdiction and to determine what portion of each sentence should be consecutively imposed; the scope of this discretion is not affected by AS 12.55.025(h). *State v. Wagner*, Ct. App. Op. No. 1229 (File No. A-3932), P.2d (1992).

Quoted in *Wiley v. State*, 822 P.2d 940 (Alaska Ct. App. 1991).

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

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

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

(3) "domestic violence" has the meaning given in AS 25.35.050;

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

(5) "first felony conviction" means that the defendant has not been previously convicted of a felony;

(6) "judicial officer" has the meaning given in AS 11.55.900;

(7) "pecuniary gain" means the amount of money or value of property at the time of commission of the offense derived by the defendant from the commission of the offense, less the amount of money or value of property returned to the victim of the offense or seized by or surrendered to lawful authority before sentence is imposed;

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

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

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

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

(12) "victim" means

(A) a person against whom an offense has been perpetrated;

(B) one of the following, not the perpetrator, if the person specified in (A) of this paragraph is a minor, incompetent, or incapacitated:

(i) an individual living in a spousal relationship with the person specified in (A) of this paragraph; or

(ii) a parent, adult child, guardian, or custodian of the person;

(C) one of the following, not the perpetrator, if the person specified in (A) of this paragraph is dead:

(i) a person living in a spousal relationship with the deceased before the deceased died;

(ii) an adult child, parent, brother, sister, grandparent, or grandchild of the deceased; or

(iii) any other interested person, as may be designated by a person having authority in law to do so. (§ 12 ch 166 SLA 1978; am E.O. No. 55, § 9 (1984); am § 3 ch 154 SLA 1984; § 7 ch 69 SLA 1989; am § 6 ch 64 SLA 1991)

Reviser's notes. — Paragraph (3) was enacted as paragraph (12). Renumbered in 1991, at which time former paragraphs (3)-(11) were renumbered as (4)-(12).

Effect of amendments. — The 1991 amendment, effective September 16, 1991, added paragraph (3).

#### NOTES TO DECISIONS

Quoted in *Capwell v. State*, 823 P.2d 1259 (Alaska Ct. App. 1991).

### Chapter 61. Rights of Victims.

#### Article

1. Rights and Duties (§§ 12.61.010, 12.61.015)
2. Victim and Witness Information Confidentiality (§§ 12.61.100 — 12.61.160)

#### Article 1. Rights and Duties.

##### Section

10. Rights of crime victims
15. Duties of prosecuting attorney

Sec. 12.61.010. Rights of crime victims. (a) Victims of crimes have the following rights:

(1) the right to be informed by the appropriate law enforcement agency or the prosecuting attorney of the date of trial and the date of sentencing of the case in which the victim is involved;

(2) the right to be notified that a sentencing hearing or a court proceeding to which the victim has been subpoenaed will not occur as scheduled;

(3) the right to receive protection from harm and threats of harm arising out of cooperation with law enforcement and prosecution efforts, and to be provided with information as to the protection available;

(4) the right to be informed of the procedure to be followed to apply for and receive any compensation under AS 18.67;

(5) at the request of the prosecution or a law enforcement agency, the right to cooperate with the criminal justice process without loss of pay and other employee benefits except as authorized by AS 12.61.017 and without interference in any form by the employer of the victim of crime;

(6) the right to obtain access to immediate medical assistance and not to be detained for an unreasonable length of time by a law enforcement agency before having medical assistance administered; however, an employee of the law enforcement agency may, if necessary, accompany the person to a medical facility to question the person about the criminal incident if the questioning does not hinder the administration of medical assistance;

(7) the right to make a written or oral statement for use in preparation of the presentence report of a felony defendant;

(8) the right to appear personally at the defendant's sentencing hearing to present a written statement, and to give sworn testimony or an unsworn oral presentation; and

(9) the right to be informed by the prosecuting attorney, at any time after the defendant's conviction, about the complete record of the defendant's convictions.

(b) Law enforcement agencies, prosecutors, and the courts shall make every reasonable effort to ensure that victims of crimes have the rights set out in (a) of this section. However, a failure to ensure these rights does not give rise to a separate cause of action against law enforcement agencies, other agencies of the state, or a political subdivision of the state. (§ 4 ch 154 SLA 1984; am § 8 ch 69 SLA 1989; am § 10 ch 67 SLA 1991)

Effect of amendments. — The 1991 amendment, effective September 17, 1991, reworded paragraph (a)(6).

Sec. 12.61.015. Duties of prosecuting attorney. (a) If a victim of a felony or a domestic violence assault requests, the prosecuting attorney shall make a reasonable effort to

(1) confer with the person against whom the offense has been perpetrated about that person's testimony before the defendant's trial;

(2) in a manner reasonably calculated to give prompt actual notice, notify the victim

(A) of the defendant's conviction and the crimes of which the defendant was convicted;

(B) of the victim's right in a case that is a felony to make a written or oral statement for use in preparation of the defendant's presentence report, and of the victim's right to appear personally at the defendant's sentencing hearing to present a written statement and to give sworn testimony or an unsworn oral presentation;

(C) of the address and telephone number of the office that will prepare the presentence report; and

(D) of the time and place of the sentencing proceeding;

(3) notify the victim in writing of the final disposition of the case within 30 days after final disposition of the case.

maintenance or design of the taxiways and runways of Anchorage International Airport.

### III.

In conclusion, the judgment of the trial court is affirmed on the alternative ground that the public duty exception bars the State from seeking indemnification for its own negligence in the operation, maintenance or design of the runways and taxiways.

AFFIRMED.



STATE of Alaska, Appellant,

v.

Matthew JACKSON, Appellee.

No. A-2806.

Court of Appeals of Alaska.

June 16, 1989.

Defendant was convicted in the Superior Court, Third Judicial District, Anchorage, Karl S. Johnstone, J., of second-degree sexual abuse of a minor. The State appealed, claiming that the sentence was too lenient. The Court of Appeals, Bryner, C.J., held that a three-year suspended sentence, with the defendant placed on probation on condition that he complete an outpatient program of sexual offender counseling and perform 1,000 hours of community service, was too lenient for the sexual abuse of a victim who was 13 or 14 years old at the times of multiple incidents of sexual contact.

Sentence disapproved.

#### 1. Criminal Law $\Leftarrow$ 1208.1(1)

Typical first offender who commits typical or moderately aggravated Class B felony should receive unsuspended term of

one year or more, with four-year upper limit. AS 11.46.130.

#### 2. Criminal Law $\Leftarrow$ 1208.1(1)

For Class B felony that is exceptionally aggravated, but committed by first offender, term of up to six years of unsuspended incarceration would be justified, equal to presumptive term for third felony offender. AS 11.46.130.

#### 3. Criminal Law $\Leftarrow$ 1208.1(1)

For first-time felony offender who commits Class B felony in case that is less serious than typical offense, either because it involves mitigated conduct or offender whose probation indicates particularly favorable prospects for rehabilitation, non-probationary sentence below one-year to four-year range for typical offenses would be appropriate. AS 11.46.130.

#### 4. Criminal Law $\Leftarrow$ 982.4(1)

Probationary sentence involving less than 90 days of unsuspended incarceration would be appropriate for first-time offender who commits Class B felony only in cases that are significantly mitigated in terms of both offender and offense. AS 11.46.130.

#### 5. Infants $\Leftarrow$ 20

Three-year suspended sentence, with defendant to complete three years of probation, to complete outpatient treatment of sexual offender counseling, and to perform 1,000 hours of community service, was too lenient for second-degree sexual abuse of minor; although defendant's favorable prospects for rehabilitation would have justified sentence below one-year to four-year range for typical first offense, offense involved victim who was 18 or 14 years old at time of repeated incidents occurring over lengthy period of time, defendant violated trust placed in him by victim and her parents, and absence of force or coercion did not mitigate offense. AS 11.41.436(a)(1), (b), 12.55.125(d).

Elizabeth H. Sheley, Asst. Dist. Atty.,  
Dwayne W. McConnell, Dist. Atty., Anchor-

### STATE v. JACKSON

Cite as 776 P.2d 320 (Alaska App. 1989)

age, and Grace Berg Schauble, Atty. Gen., Juneau, for appellant.

William W. Whitaker and Kenneth A. Norsworthy & Associates, Anchorage, for appellee.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

### OPINION

BRYNER, Chief Judge.

Matthew Jackson was convicted upon his plea of no contest to a charge of sexual abuse of a minor in the second degree, a class B felony. AS 11.41.436(a)(1). Superior Court Judge Karl S. Johnstone sentenced Jackson to a term of three years and suspended the entire term, requiring Jackson to complete three years of probation. As special conditions of probation, Judge Johnstone ordered Jackson to complete an outpatient program of sexual offender counseling and to perform 1,000 hours of community service. The state appeals the sentence as too lenient. We conclude that the sentence is too lenient and disapprove it.<sup>1</sup>

### THE OFFENSE

In the summer of 1987, Matthew Jackson became romantically involved with thirteen-year-old M.S. Jackson was a teacher at a private gymnastics school. M.S. was one of his students. The relationship between Jackson and M.S. progressed during the fall of 1987, and, in December or January, approximately the time M.S. turned fourteen, Jackson engaged in sexual intercourse with her for the first time. The incident occurred at Jackson's home, where Jackson stopped in the course of giving M.S. a ride home from a gymnastics class.

From December of 1987 until March of 1988, Jackson had sexual intercourse with M.S. on five or six additional occasions. Jackson and M.S. also engaged in oral sex on several other occasions. One of these

1. When the state appeals a sentence as too lenient, we are authorized only to express approval or disapproval of the sentence and have no authority to modify the sentence. AS 12.55.

occasions occurred in March, 1988, while Jackson and M.S. were in Seattle, Washington, attending a gymnastics meet.

Sexual relations between Jackson and M.S. ended sometime in March, 1988; they were apparently stopped by Jackson. During the summer of 1988, M.S. reported her sexual involvement with Jackson. Jackson encouraged her to report their relationship, and, once it was reported, he admitted his involvement and acknowledged responsibility.

None of the incidents of sexual intercourse between Jackson and M.S. involved any force or coercion. Jackson and M.S. were mutually attracted to each other. After reporting the relationship, M.S. felt guilty and suffered some emotional difficulty. She indicated that she was still in love with Jackson and expressed a desire to marry him when she turned eighteen. Disclosure of the relationship also had a significant impact on the relationship between M.S. and her parents. As a result of the disclosure, M.S. and her parents found it necessary to undergo regular family counseling sessions.

### THE OFFENDER

At the time of his involvement with M.S., Jackson was twenty-seven years of age. He had graduated from high school in Anchorage with above average grades and had attended three years of college.

Jackson had ten years' experience as a gymnastics instructor and coach for both private organizations and public schools. He was highly regarded by his employers, his students, and their parents. In addition to his work in gymnastics, Jackson had a steady record of employment as a laborer in his own maintenance and janitorial business.

Jackson had no prior criminal record. He was married in June of 1986, but felt his marriage was breaking up by the time he got involved in the relationship with

120(b). See *State v. Woods*, 680 P.2d 1195, 1196 n. 1 (Alaska App. 1984); *State v. Coats*, 669 P.2d 1329, 1330 n. 1 (Alaska App. 1983).

M.S. Jackson separated from his wife in January of 1988 and obtained a divorce later that year. Jackson maintains strong family ties in Anchorage, and his parents have continued to be very supportive of him.

Although there are indications in the record that Jackson is somewhat emotionally immature, there is no evidence to indicate that he suffers from any significant psychological or emotional disorder. Since his relationship with M.S. was reported, Jackson has consistently accepted responsibility for his conduct and has acknowledged its wrongfulness. He has expressed remorse for the damage that he has caused M.S. and her family.

#### SENTENCING PROCEEDINGS

Jackson was charged with one count of sexual abuse of a minor in the second degree. The statute governing the offense, AS 11.41.436, proscribes several distinct forms of sexual contact between adults and minors.<sup>2</sup> Jackson was charged under AS 11.41.436(a)(1), which covers conduct formerly called statutory rape. The relevant portion of AS 11.41.436(a)(1) provides that the offense of sexual abuse of a minor in the second degree occurs when an offender who is sixteen years of age or older "engages in sexual penetration with a person who is 18, 14, or 15 years of age and at

#### 2. Alaska Statute 11.41.436 provides:

*Sexual abuse of a minor in the second degree.*

(a) An offender commits the crime of sexual abuse of a minor in the second degree if

(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is 13, 14, or 15 years of age and at least three years younger than the offender, or aids, induces, causes or encourages a person who is 13, 14, or 15 years of age and at least three years younger than the offender to engage in sexual penetration with another person;

(2) being 16 years of age or older, the offender engages in sexual contact with a person who is under 13 years of age or aids, induces, causes, or encourages a person under 13 years of age to engage in sexual contact with another person;

(3) being 18 years of age or older, the offender engages in sexual contact with a person who is under 18 years of age and who

least three years younger than the offender."

Sexual abuse of a minor in the second degree is a class B felony, AS 11.41.436(b), and is punishable by a maximum term of ten years' imprisonment. Presumptive terms for second and subsequent felony offenders are four and six years. No presumptive term is prescribed for individuals who, like Jackson, have not previously been convicted of a felony. See AS 12.65.125(d).

Jackson entered a plea of no contest to the charge and appeared for sentencing before Superior Court Judge Karl S. Johnstone. At the sentencing hearing, the state urged the court to impose a substantial term of imprisonment. The state relied in part on *State v. Coats*, 669 P.2d 1829 (Alaska App.1983), in which we disapproved as too lenient a sentence of sixty days for an offender convicted of a single incident of sexual contact with his twelve-year-old stepdaughter. The state also relied on several appellate decisions dealing with sentences for offenders convicted of statutory rape. In particular, the state cited *Goulden v. State*, 656 P.2d 1218 (Alaska App. 1983) (affirming a first offense sentence of five years with three years suspended); *Skrepich v. State*, 740 P.2d 960 (Alaska App.1987) (reversing maximum sentence of ten years, but remanding for imposition of a sentence of ten years with four years suspended); and *Foster v. State*, 761 P.2d

(A) is entrusted to the offender's care by authority of law; or

(B) is the offender's son or daughter, including an illegitimate or adopted child, or a stepchild;

(4) being 16 years of age or older, the offender aids, induces, causes, or encourages a person who is under 16 years of age to engage in conduct described in AS 11.41.435(a)(2)-(6);

(5) being 18 years of age or older, the offender engages in sexual contact with a person who is under 16 years of age, and the victim at the time of the offense is

(A) residing as a member of the social unit in the same household as the offender and the offender is in a position of authority over the victim; or

(B) temporarily entrusted to the offender's care.

Cite as 776 P.2d 320 (Alaska App. 1989)

1888 (Alaska App.1988) (indicating appropriateness of a term of four years, with two and one-half years suspended).

At the conclusion of the hearing, Judge Johnstone found that Jackson's conduct toward M.S. had resulted from genuine and reciprocal affection between Jackson and M.S. The judge also found Jackson to be sincerely remorseful and contrite and noted that there was no evidence to indicate that Jackson had engaged in similarly inappropriate behavior toward other minors. Judge Johnstone concluded that Jackson was not a person who had an abnormal affinity toward children or who was prone to deviant sexual behavior. The judge believed that, instead, Jackson's offense was situational and that it was consequently unlikely to recur.

In determining an appropriate sentence for Jackson, the judge carefully considered the sentencing criteria articulated by the Alaska Supreme Court in *State v. Chaney*, 477 P.2d 441, 443-44 (Alaska 1970), focusing primarily on Jackson's strong potential for rehabilitation. Relying on Jackson's favorable background, his remorse and contrition, and the situational nature of the offense, Judge Johnstone expressed the belief that Jackson was essentially rehabilitated, that there was little danger of subsequent offenses, and that he was in need of no further deterrence.

These findings led Judge Johnstone to conclude that no further incarceration was necessary for Jackson's deterrence or rehabilitation, and that there was no need to isolate him for the protection of the public. The judge stated that, to the extent that there was any additional need for rehabilitation, that need could be addressed by requiring Jackson to seek outpatient treatment as a condition of probation.

Judge Johnstone recognized that Jackson's offense had significant psychological effects on M.S. and her parents and consequent financial harm. The judge characterized Jackson's misconduct as serious. While Judge Johnstone acknowledged the need to express community condemnation in imposing a sentence, he concluded that this goal could adequately be provided by

requiring Jackson to perform a substantial period of community service as a condition of probation.

Judge Johnstone found significant factual distinctions between the cases relied on by the state and Jackson's case. The judge thus concluded that existing case law dealing with statutory rape provided little useful guidance and did not mandate the imposition of a substantial term of imprisonment. Accordingly, the judge sentenced Jackson to a term of three years, suspended the entire term, and ordered Jackson to complete a three-year period of probation. As special conditions of probation, the judge required Jackson to complete a course of outpatient counseling for sexual offenders and to perform 1,000 hours of community service.

#### ANALYSIS

On appeal, the state argues that the sentence imposed below is clearly mistaken, *McClain v. State*, 610 P.2d 811, 813-14 (Alaska 1974), in that it gives insufficient attention to the seriousness of Jackson's criminal misconduct and fails to make adequate provision for the sentencing goal of community condemnation. We find that the state's argument has merit. In our view, a probationary sentence was clearly mistaken under the circumstances of Jackson's case.

#### A. Relevant Case Law

Our analysis must begin with *State v. Coats*, 669 P.2d 1829 (Alaska App.1983). In *Coats*, we had occasion to discuss the seriousness of the harm that results from sexual abuse of minors and the consequent need for emphasis on the sentencing goal of community condemnation, or reaffirmation of societal norms:

[T]his court has consistently expressed the view that sexual abuse of children cannot be condoned. There is a compelling need in such cases to express community condemnation of those who sexually abuse children and to make clear to offenders that conduct is abhorrent to contemporary social norms.

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In most sexual abuse cases, the young victims are particularly vulnerable to abuse and are as a practical matter incapable of effectively defending themselves. Innocent children who have been the victims of sexual abuse may suffer serious, long-term emotional and psychological injuries; the nature and scope of the injuries is often difficult to predict with accuracy. In almost all cases, a sexual abuse victim must have tremendous courage and determination simply to cope with the emotional trauma involved as the primary witness in the adversary process of a formal prosecution. And often the disruption of normal family life occasioned by a prosecution will lead a youthful victim to feel confused and guilty.

669 P.2d at 1334 (citations omitted).

*Coats* involved a conviction under Alaska's former sexual abuse of children statute, AS 11.41.440, which ranked the offense as a class C felony—the lowest category of felony offenses. Nevertheless, given the seriousness of the harm in child sexual abuse cases, we specifically concluded in *Coats* that, even for first offenders, probationary sentences are appropriate only under limited circumstances:

All of these considerations demand that due emphasis be placed on expressing community condemnation of offenders who sexually abuse children; sentences must make it clear to the offender and the victim alike that the offender, not the victim, has committed the crime. Although we think that a probationary sentence may properly be used when a first offender is convicted of a class C felony involving sexual abuse of a child, such a sentence will be appropriate only if mitigating circumstances exist and the offender is a promising candidate for rehabilitation through probationary supervision.

669 P.2d at 1334.

*Coats* thus makes it clear that, to justify a probationary sentence, the sentencing court must find not only that the offender has an unusually strong potential for rehabilitation, but also that the circumstances

surrounding the commission of the offense are mitigated.

Since this court decided *Coats*, Alaska's statutes dealing with sexual abuse of children have undergone significant revisions, bolstering the conclusion that we reached in *Coats*. Conduct traditionally referred to as statutory rape and formerly designated as a class C felony has now been defined as sexual abuse of a minor in the second degree, a class B felony. The reclassification of the offense underscores the need for adherence to our decision in *Coats*, for, as we said in *State v. Woods*, 680 P.2d 1195, 1197 (Alaska App.1984): "Other things being equal, one convicted of a class B felony should receive a greater sentence than one convicted of a class C felony."

Since deciding *Coats*, we have consistently emphasized that mitigated circumstances and a strong potential for rehabilitation are both prerequisites for probationary sentences in class B felonies. In *State v. Karnos*, 696 P.2d 685 (Alaska App.1985), we disapproved a probationary sentence for a first felony offender convicted of first-degree theft, a class B felony. The sentencing record indicated that the defendant had unusually strong prospects for rehabilitation, but the factual circumstances surrounding the theft were not particularly mitigated. We concluded that, absent significant mitigating circumstances, the seriousness of the offense required imposition of a sentence involving a substantial period of incarceration.

We reached a like conclusion in *State v. Hooper*, 760 P.2d 840 (Alaska App.1988). Hooper was convicted of the class B felony of misconduct involving a controlled substance in the third degree for possessing two ounces of cocaine with intent to deliver. He was initially sentenced to four years with two and one-half years suspended. Subsequently, Hooper moved for reduction of the sentence. He made a compelling showing that he had been rehabilitated while his case was pending on appeal. Based on Hooper's demonstrated rehabilitation, the sentencing court reduced the original sentence, suspending the full four-year term of imprisonment.

Cite as 776 P.2d 320 (Alaska App. 1989)

On appeal, we disapproved the imposition of a probationary term in Hooper's case. We did not quarrel with the sentencing court's conclusion that Hooper had made an adequate showing of actual rehabilitation. Rather, we emphasized that Hooper's rehabilitation could not alone justify a probationary sentence for a class B felony. While we declined to hold that probationary sentences could never be appropriate for class B felonies, we reiterated that a probationary term could be justified only when the crime itself was mitigated. Because the circumstances involved in Hooper's offense were neither particularly aggravated nor mitigated, we held that a substantial sentence of imprisonment was necessary to avoid depreciating the seriousness of the offense and to express community condemnation. *Id.* at 842-43.

We have reached similar conclusions when considering class B felonies involving sexual abuse of children. In *State v. Woods*, 680 P.2d 1195 (Alaska App.1984), the defendant was convicted of a single episode of sexually abusing his five-year-old daughter. The sentencing court found Woods' conduct to be comparable to the conduct involved in *State v. Coats*, and found that Woods' prospects for rehabilitation were comparable to *Coats*. Accordingly, the court imposed an unsuspended sentence of six months' imprisonment—the sentence that this court had indicated as initially appropriate for *Coats*. See *State v. Coats*, 669 P.2d at 1334. We disapproved Woods' six-month sentence as too lenient, noting that Woods' offense involved a child younger than the child involved in the *Coats* case and emphasizing that Woods had been convicted of a class B felony instead of a class C felony. We concluded that an unsuspended term of not less than eighteen months to serve should have been imposed. *Id.* at 1197-98.

In *Foster v. State*, 761 P.2d 1088 (Alaska App.1988), a statutory rape case like Jackson, the defendant, a twenty-five-year-old first offender, was convicted of a single

episode of sexual intercourse with a fourteen-year-old girl. Foster was sentenced to serve four years with two and one-half years suspended. The superior court thereafter declined Foster's motion to reduce the sentence. We upheld the superior court's decision, noting that the sentencing record supported the court's apparent conclusion that Foster's conduct was not particularly mitigated and that his prospects for rehabilitation were not particularly favorable.

When significant aggravating circumstances have been established or when an offender's potential for rehabilitation has been shown to be particularly bad, we have not hesitated to approve first offense child sexual abuse sentences substantially exceeding eighteen months of unsuspended incarceration. For example, in *Goulden v. State*, 666 P.2d 1218 (Alaska App.1988), the defendant, a forty-three-year-old school principal and teacher, was convicted of a single incident of statutory rape involving a fourteen-year-old student. The incident occurred after a party at Goulden's house and not during school hours. It involved no force or coercion. While alcohol and marijuana had been consumed by some of the guests at Goulden's party, there was nothing to indicate that Goulden had provided those substances, and it was not clear whether the victim had consumed any intoxicants.

Goulden was convicted of sexual abuse of a minor under Alaska's former statute, which made the offense a class C felony. In imposing sentence, the superior court found Goulden's background and prospects for rehabilitation to be favorable and concluded that, in most respects, his offense was mitigated. Although Goulden's victim was characterized as slightly retarded, the sentencing court expressly found that she was sexually experienced, that no force was used against her, and that she had sustained no lasting damage. *Goulden* 666 P.2d at 1221.

dealing with convictions for misconduct involving a controlled substance in the third degree, a class B felony, lends further support to the conclusions that we reached in *Hooper* and *Karnos*.

In *Smith v. State*, 745 P.2d 1375, 1378 (Alaska App.1987), we had occasion to review Alaska sentencing decisions dealing with drug offenses. Our review of the drug cases, particularly those

Nevertheless, the sentencing court concluded that Goulden's conduct was particularly serious because he had breached his trust as a teacher by engaging in sexual relations with one of his students. On this basis the court imposed a term of five years with three years suspended. On appeal, this court approved the sentence, relying principally on the breach of trust inherent in Goulden's relationship to the victim.

*Skrepich v. State*, 740 P.2d 950 (Alaska App.1987), provides another useful example. Skrepich was convicted of sexual abuse of a minor in the second degree. Like Jackson, he was convicted for conduct amounting to statutory rape. A thirty-seven-year-old karate instructor, Skrepich became romantically and sexually involved with a fifteen-year-old student. The relationship lasted several months. The sentencing court imposed the maximum term of ten years' imprisonment. On appeal, although we noted that in some respects Skrepich's conduct was not particularly aggravated, we found it significant under *Goulden* that Skrepich had violated his trust as a teacher in committing the offense. We also found that Skrepich's background of prior similar misconduct, for which he had never been convicted, made him a particularly poor candidate for rehabilitation. On these grounds, although concluding that a sentence of ten years was excessive, we held that a sentence of up to ten years with four years suspended would be justified.

4. Our conclusion that a significant term of incarceration will be appropriate for typical first offenders who commit class B felonies is not inconsistent with the supreme court's decision in *Leuch v. State*, 633 P.2d 1006 (Alaska 1981). In *Leuch*, the court indicated that, for first offenders convicted of crimes against property, "probation, coupled with restitution, is the appropriate sentence unless other factors militate against it." 633 P.2d at 1013-14. *Leuch*, however, dealt with convictions for grand theft under our former criminal code. The convictions involved conduct that would have amounted to theft in the second degree, a class C felony under our current criminal code. See AS 11.46.130. The decision in *Leuch* expressly recognized that, even with property crimes, the seriousness of any given offense is a legitimate consideration in determining the appropriateness of a probationary term. In fact, in *Leuch*'s case, the court declined to apply the rule favor-

Our review of these cases suggests four distinct sentencing ranges for first offenders convicted of class B felonies:

[1] 1. A typical offender committing a typical or moderately aggravated offense should receive an unsuspended term of a year or more to serve.<sup>4</sup> The upper limit in such cases should be four years, reflecting our decision in *Austin v. State*, 627 P.2d 657, 657-58 (Alaska App.1981). In *Austin*, we indicated that first offenders should normally receive a sentence more lenient than the presumptive term for a second felony offender.

[2] 2. For an offense that is exceptionally aggravated—one that involves the existence of significant statutorily specified aggravating factors or other extraordinarily aggravated circumstances—a term of up to six years of unsuspended incarceration, the presumptive term for a third felony offender, would be justified.

[3] 3. For a case that is less serious than the norm for the offense, either because it involves mitigated conduct or an offender whose background indicates particularly favorable prospects for rehabilitation, a nonprobationary sentence below the one-year to four-year range for typical offenses will be appropriate. By "nonprobationary," we mean a sentence involving at least ninety days of unsuspended incarceration—in other words, a term that exceeds the sixty-day limit of a sentence involving

ing imposition of a probationary term. The court concluded that, because *Leuch* had a misdemeanor record and because one of the two felony thefts for which he was convicted involved "large-scale crime and had a severe impact on the uninsured victim," 633 P.2d at 1014, a period of incarceration was appropriate. Under Alaska's revised criminal code, only aggravated property crimes are designated as class B felonies. In contrast to *Leuch*, in which the most serious theft involved property valued at approximately \$12,500, under the current code theft in the first degree, a class B felony, is restricted to cases involving property valued at \$25,000 or more. See AS 11.46.130. Thus, in most cases, the inherent seriousness of property offenses that qualify as class B felonies will justify an exception to the rule in *Leuch* and call for the imposition of a nonprobationary term. See *Karr v. State*, 686 P.2d 1192, 1195-96 (Alaska 1984).

"shock probation." See *Langton v. State*, 682 P.2d 954, 959 (Alaska App.1983); *State v. Hooper*, 750 P.2d 840, 842 n. 8 (Alaska App.1988); *Leuch v. State*, 627 P.2d 1006, 1014 n. 22 (Alaska 1981). In such cases, sentencing courts have broad discretion to require that any period of incarceration be served as a condition of a suspended imposition of sentence.

[4] 4. A probationary sentence—a term involving less than ninety days of unsuspended incarceration—should be reserved for cases that are significantly mitigated in terms of both the offender and the offense. When an offense involves mitigated conduct but is committed by an offender who does not show unusually good prospects for rehabilitation, the imposition of a nonprobationary sentence will further the sentencing goals of both community condemnation and personal deterrence. When an offender who has good prospects for rehabilitation commits a crime involving conduct typical for the offense, the seriousness of the conduct and the resulting need to express community condemnation will militate in favor of a nonprobationary sentence. Thus, a probationary sentence will be appropriate only when an offender's conduct is significantly less serious than typical conduct for the offense and only when the offender's prospects for rehabilitation are shown to be significantly better than the typical first offender's conduct.<sup>5</sup>

We emphasize that these benchmarks are just that. They are not inflexible categories to be rigidly adhered to. Rather, they are general guidelines that should serve as a starting point for analysis. In each case, the sentencing court must decide upon an appropriate sentence based on the totality of the circumstances before it. It is to be expected that many cases will not fit neatly into any one of the specific categories that we have enumerated.

5. In most cases, the imposition of a substantial but relatively moderate period of incarceration—a period within the range of ninety days to eighteen months—would be unlikely to conflict with an offender's rehabilitation. In some truly exceptional cases, however, specific circumstances might warrant the conclusion that even a relatively brief period of incarceration would substantially jeopardize an offender's

### B. Application of Case Law to Jackson's Case

[5] It remains to be determined whether Jackson's case falls within these benchmark ranges. The sentencing court's primary focus was on Jackson's potential for rehabilitation. Given the court's findings, there seems little doubt concerning Jackson's unusually favorable prospects for rehabilitation. Jackson's strong family and community ties, his solid educational and employment history, his lack of any prior criminal record, the situational nature of his offense, and his genuine remorse and contrition all support the conclusion that incarceration is unnecessary to further the sentencing goals of rehabilitation, personal deterrence, or isolation.

In contrast to the attention it gave Jackson's background and prospects for rehabilitation, the sentencing court made comparatively few specific findings concerning the seriousness of Jackson's conduct. We see little if anything in this case to justify the conclusion that Jackson's conduct was significantly less serious than the norm for the offense.

M.S. was thirteen and fourteen years of age at the time of the offense. Her age falls within the lower range of the statutorily specified limits for the offense. Conversely, while Jackson was not particularly advanced in age, neither was he a youth offender. At age 27, Jackson was a thirteen years older than M.S.

It is also significant that Jackson was not convicted for an isolated instance of misconduct. His offense involved multiple incidents occurring over a lengthy period of time. See, e.g., *Smith v. State*, 745 P.2d 1875, 1877 n. 2 (Alaska App.1987); *Higg State*, 676 P.2d 610 (Alaska App.1984). See also *State v. Karnos*, 696 P.2d at

prospects for rehabilitation. We do not include the imposition of a probationary sentence when case-specific circumstances place the sentencing goal of community condemnation in actual conflict with the goal of rehabilitation and when the sentencing record supports the conclusion that the offender's rehabilitation must be given priority.

It is even more significant that, in sexually abusing M.S., who was one of his gymnastics students, Jackson violated the trust placed in him by M.S. and her parents. See *Goulden v. State*, 656 P.2d at 1221; *State v. Andrews*, 707 P.2d 900, 911 (Alaska App. 1985); *Depp v. State*, 686 P.2d 712, 721 (Alaska App. 1984). While this breach of trust might not have been as significant as it would have been had Jackson been M.S.'s teacher at school, or her parent or guardian, the breach nonetheless contributes markedly to the seriousness of the offense and, in our view, precludes the conclusion that Jackson's conduct was significantly less serious than the norm for the offense. See *Skrepich v. State*, 740 P.2d at 964.

It is true, as Jackson points out, that his conduct toward M.S. was motivated by genuine reciprocal affection and involved no coercion or force. However, while the sincerity of Jackson's feelings toward M.S. may to a limited extent be viewed as an extenuating circumstance, the absence of force or coercion cannot. Neither force nor lack of consent is an element of sexual abuse of a minor in the second degree. In cases of statutory rape, the typical offense involves mutually consensual conduct. It is precisely because the law deems children to be incapable of rendering meaningful consent in such situations that the offense has been defined to make consent irrelevant. Thus, had Jackson used force or coercion in committing his offense, his conduct would have been significantly aggravated. The absence of such conduct, however, does not mitigate the offense.<sup>6</sup>

Jackson's conduct would qualify as less serious than the typical conduct within the definition of sexual abuse of a minor in the second degree only if we assumed that the conduct involved in statutory rape is *per se* less serious than the other types of conduct that are proscribed in the statutory defini-

tion of sexual abuse of a minor in the second degree. Such an assumption, however, would be untenable. It is well established that all of the categories of conduct classified within a single statutory provision must, in the abstract, be presumed equally serious; differences in seriousness between similarly classified offenses must thus be evaluated on a case-by-case basis. See, e.g., *Walsh v. State*, 677 P.2d 912, 916-17 (Alaska App. 1984); *Juneby v. State*, 641 P.2d 823, 841 (Alaska App. 1982), modified in part, 655 P.2d 30 (Alaska App. 1983).

In summary, Jackson's actual conduct in committing the offense for which he was convicted was at best only slightly mitigated. Thus, while Jackson's favorable prospects for rehabilitation would have justified a sentence below the one-year to four-year range for typical first offenses, the absence of significantly mitigated conduct calls for imposition of a nonprobationary term—one equivalent to at least ninety days of incarceration.

Jackson's sentence does not provide for any unsuspended term of incarceration. However, in imposing sentence, Judge Johnstone did require, as a condition of probation, that Jackson complete 1,000 hours of community work. The 1,000-hour community work requirement cannot, in our view, be dismissed as wholly inconsequential or insubstantial. We have previously emphasized that in cases involving first offenders convicted of class B felonies, sentencing courts have broad discretion to provide for periodic confinement on weekends or at other suitable intervals, and to substitute community work for incarceration. See *State v. Hooper*, 750 P.2d at 848 n. 5; *State v. Karnos*, 690 P.2d at 687.

fourteen-year-old daughter of a friend. It appears that the "victim" was a willing participant and may have even instigated the contact. There was no evidence of violence, and up until that time Smith had an exemplary record. Nevertheless, the offense was serious, given the substantial age disparity between the participants.

745 P.2d at 1377 n. 2 (citations omitted).

The legislature has also clearly expressed the view that community work may constitute an appropriate substitute for incarceration. In AS 12.55.065(d), the legislature has provided:

The court may offer a defendant convicted of an offense the option of performing community work in lieu of a sentence of imprisonment. Substitution of community work shall be at a rate of 8 hours per each day of imprisonment. A court may not offer substitution of community work for any mandatory minimum period of imprisonment or for any period of a presumptive term of imprisonment.

Gauging Jackson's sentence by the statutory formula set forth in AS 12.55.065(d), the community work requirement imposed below is equivalent to 127 days of imprisonment. At least arguably, then, the community work requirement substantially exceeds the ninety-day jail term that would qualify Jackson's sentence as nonprobationary.

In our view, however, the language of AS 12.55.065(d) makes it reasonably clear that the legislature did not regard community work as the functional equivalent of incarceration in all situations. Had the legislature desired to make community work interchangeable with incarceration, it would not have enacted a restriction against offering community work as an alternative to minimum and presumptive terms. The fact that the legislature chose to restrict the use of community work provides a strong indication that, in its view, the goals of sentencing could not adequately be fulfilled under some circumstances by a sentence involving community work rather than imprisonment. By analogy to the expression of legislative intent embodied in AS 12.55.065(d), we conclude that community work cannot properly be relied on to replace jail time altogether when the circumstances surrounding an offender's conviction for a class B felony, and the consequent need to emphasize community condemnation, would require the imposition of a nonprobationary term. In such cases, reliance by the sentencing court on community work to the exclusion of incarceration

would unduly depreciate the seriousness of the offense and underemphasize the community's condemnation of the offender's misconduct.

Despite the significant community work requirement imposed by the sentencing court, we are constrained to find that, because it fails to incorporate any actual period of confinement, Jackson's sentence unduly depreciates the significance of his misconduct and inadequately serves the sentencing goal of community condemnation. Our independent review of the sentencing record convinces us that the sentence imposed below was clearly mistaken. *McClain v. State*, 510 P.2d 811, 813-14 (Alaska 1974).

Accordingly, this sentence is DISAPPROVED.



Donald L. BUMPUS, Appellant,

v.

STATE of Alaska, Appellee.

No. A-2606.

Court of Appeals of Alaska.

June 23, 1989.

Defendant was convicted after pleading no contest to two counts of burglary in first degree, in the Superior Court, Third Judicial District, Palmer, J. Justin Ripley J., and received sentence of adjusted presumptive terms of seven years for each count, which were made consecutive to each other and to nine-year sentence defendant received in another court for related burglary and theft convictions, which sentences were to be served without eligibility for parole. Defendant appealed. The Court of Appeals, Bryner, C.J., held that (1) defendant was properly characterized as worst offender and dangerous offender

6. In this regard, *Smith v. State*, 745 P.2d 1375 (Alaska App. 1987), is relevant. Smith was a forty-five-year-old second offender. He had previously been convicted of sexually abusing a minor. The conviction involved conduct similar to that in Jackson's case. In considering his prior offense, we stated:

Smith had sexual intercourse on numerous occasions, during a four month period, with a

HB

214

(7)

Date Referred: March 10, 1993

FURTHER REFERRALS:

Date of Committee Action: 4-2-93

The JUDICIARY Committee considered:

HB 214

HOUSE BILL NO. 214

DISCLOSURE OF MINOR'S RECORDS BY PARENT

"An Act allowing the parent or legal guardian of a minor to disclose certain records and information about the minor to certain state officials and state employees; prohibiting further disclosure of the records and information to unauthorized persons; and providing for an effective date."

RECOMMENDATIONS:

be replaced with

CS HB 214 (JUD)

the same title

a new title

have attached amendments(s)

do pass

do not pass

no recommendations

individual recommendations

additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of intent

ATTACHES NEW FISCAL NOTE(S): \_\_\_\_\_ (Dept)

APPROVES PREVIOUS: \_\_\_\_\_ (Dept/Date)

fiscal impact \_\_\_\_\_

fiscal note(s) \_\_\_\_\_

zero fiscal note LAW

zero fiscal note(s) \_\_\_\_\_

SIGNING <u>DO</u> PASS	DP	<u>OTHER</u> RECOMMENDATIONS	DNP	NR	AM
<i>Janette James</i>	<input checked="" type="checkbox"/>				
<i>Joseph W. Porter</i>	<input checked="" type="checkbox"/>				
<i>David Fortate</i>	<input checked="" type="checkbox"/>				
<i>Gail Phillips</i>	<input checked="" type="checkbox"/>				
<i>Tom Woodard</i>	<input checked="" type="checkbox"/>				
<i>Ken East</i>	<input checked="" type="checkbox"/>				

*Ken A. Porter*

CHAIRMAN'S SIGNATURE

FISCAL NOTE

BILL NO. HB 214

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

Revision Date: April 2, 1993  
 Title: "...allowing the parent or legal guardian of a minor to disclose certain records and information about the minor..."  
 Sponsor: House Rules/Req. of Legislative Council  
 Requestor: House Judiciary

Department Affected: Department of Law  
 BRU: Legal Services  
 Component: Operations  
 COMPONENT SERIAL NO. 0093

EXPENDITURES/REVENUES:

OPERATING	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
FUND SOURCE:						

FUNDING:

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

Estimate of current year (FY93) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)

Please see the attached analysis.

Prepared by: Richard I. Peques, Director  
 Division: Administrative Services Division

Phone: 465-3672  
 Date: April 2, 1993

Approved by Commissioner: Richard I. Peques/FCR/  
Charles E. Cole, Attorney General  
 Agency: Department of Law

Date: April 2, 1993

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FISCAL NOTE

STATE OF ALASKA  
1993 LEGISLATIVE SESSION

BILL NO. HB 214

ANALYSIS (Continued):

This bill amends the state statute providing for the confidentiality of juvenile records, AS 47.10.090, to permit the parent or legal guardian of a minor to disclose records or other information about the minor to certain state officers for review or use in their official capacity. Under the bill, the persons to whom disclosure is made would be prohibited from disclosing the records or information to anyone who is not authorized to receive the records or information. The Department of Law would not normally be involved in this process and, consequently, there should not be a fiscal impact for the department.

8-LS0699E  
Lauterbach  
4/2/93

CS FOR HOUSE BILL NO. 214(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:  
Referred:

Sponsor(s): HOUSE RULES COMMITTEE BY REQUEST OF THE LEGISLATIVE COUNCIL

A BILL

FOR AN ACT ENTITLED

1 "An Act allowing the parent or legal guardian of a minor to disclose information  
2 about the minor to certain state officials and state employees; prohibiting further  
3 disclosure of the information to unauthorized persons; amending Alaska Child in  
4 Need of Aid Rule 22; and providing for an effective date."

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

6 \* Section 1. AS 47.10.090(a) is amended to read:

7 (a) The court shall make and keep records of all cases brought before it. The  
8 court's official records may be inspected only with the court's permission and only by  
9 persons having a legitimate interest in them. Except as provided in AS 47.10.092,  
10 all [ALL] information and social records pertaining to a minor and prepared by an  
11 employee of the court or by a federal, state, or city agency in the discharge of the  
12 employee's or agency's official duty, including driver's license action under AS  
13 28.15.185, are privileged and may not be disclosed directly or indirectly to anyone  
14 without the court's permission. However, a state or city law-enforcement agency shall

1 disclose information regarding a case that [WHICH] is needed by the person or  
 2 agency charged with making a preliminary investigation for the information of the  
 3 court. The court shall forward a record of adjudication of a violation of an offense  
 4 listed in AS 28.15.185(a) to the Department of Public Safety [,] if the court imposes  
 5 a license revocation under AS 28.15.185. Within 30 days of the date of a minor's 18th  
 6 birthday or, if the court retains jurisdiction of a minor past the minor's 18th birthday,  
 7 within 30 days of the date on which the court relinquishes jurisdiction over the minor,  
 8 the court shall order sealed all the court's official records, information, and social  
 9 records pertaining to that minor, as well as records of all driver's license proceedings  
 10 under AS 28.15.185, criminal proceedings against the minor, and punishments assessed  
 11 against the minor except for traffic offenses. A person may not use these sealed  
 12 records for any purpose except that the court may order their use for good cause  
 13 shown or may order their use by an officer of the court in making a presentencing  
 14 report for the court.

15 \* Sec. 2. AS 47.10 is amended by adding a new section to read:

16 Sec. 47.10.092. PARENTAL RIGHT TO DISCLOSE ~~RECORDS~~ INFORMATION. (a)  
 17 Notwithstanding AS 47.10.090, a parent or legal guardian of a minor subject to a  
 18 proceeding under AS 47.10.010 - 47.10.142 may disclose confidential or privileged  
 19 information about the minor, including information that has been lawfully obtained  
 20 from agency or court files, to the governor, the lieutenant governor, a legislator, the  
 21 ombudsman appointed under AS 24.55, the attorney general, and the commissioners  
 22 of health and social services, administration, or public safety, or an employee of these  
 23 persons, for review or use in their official capacities. A person to whom disclosure  
 24 is made under this section may not disclose confidential or privileged information  
 25 about the minor to a person not authorized to receive it.

26 (b) The disclosure right under (a) of this section is in addition to, and not in  
 27 derogation of, the rights of a parent or legal guardian of a minor.

28 (c) A person who violates a provision of this section is guilty of a  
 29 misdemeanor, and upon conviction is punishable by a fine of not more than \$500 or  
 30 by imprisonment for not more than one year, or by both.

31 \* Sec. 3. COURT RULE CHANGE. AS 47.10.092, added by sec. 2 of this Act, amends

- 1 Alaska Child in Need of Aid Rule 22, by providing an exception to the confidentiality of  
2 information pertaining to a minor who is the subject of Child In Need of Aid proceedings.  
3 \* Sec. 4. This Act takes effect immediately under AS 01.10.070(c).

# HOUSE COMMITTEE REPORT

(7)

Date Referred: March 10, 1993

FURTHER REFERRALS:

Date of Committee Action: 4-2-93

The JUDICIARY Committee considered:

HB 214

HOUSE BILL NO. 214

DISCLOSURE OF MINOR'S RECORDS BY PARENT

"An Act allowing the parent or legal guardian of a minor to disclose certain records and information about the minor to certain state officials and state employees; prohibiting further disclosure of the records and information to unauthorized persons; and providing for an effective date."

RECOMMENDATIONS:

be replaced with \_\_\_\_\_

CS HB 214 (JUD)

[ ] the same title

a new title

[ ] have attached amendments(s)

do pass

[ ] do not pass

[ ] no recommendations

[ ] individual recommendations

[ ] additional referral to the \_\_\_\_\_ Committee

ADOPTS: \_\_\_\_\_ letter of Intent

ATTACHES NEW FISCAL NOTE(S): \_\_\_\_\_ (Dept)

APPROVES PREVIOUS: \_\_\_\_\_ (Dept/Date)

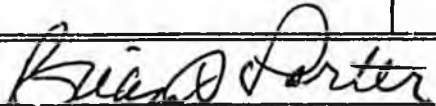
[ ] fiscal impact \_\_\_\_\_

[ ] fiscal note(s) \_\_\_\_\_

zero fiscal note LAW

[ ] zero fiscal note(s) \_\_\_\_\_

SIGNING <u>DO</u> PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
<i>Janette James</i>	✓				
<i>James H. Porter</i>	✓				
<i>David J. Fort</i>	✓				
<i>Yair Phillips</i>	✓				
<i>Tommy Anderson</i>	✓				
<i>Ken Felt</i>	✓				

  
 CHAIRMAN'S SIGNATURE

Rep. Brian Porter, Chairman

# House Judiciary Committee

Date: April 2, 1993

Place: Capitol Room 120

HB 217 Native Corporation Dividends to Minors  
 HJR 27 Desecration of U. S. Flag  
 HB 231 Aggravating/Mitigating Factors/Sex Crimes

**Subject of Meeting:** HB 54 Telephone Consumer Protection; HB 212 Sentencing: Aggravating Factors

HB 214 Disclosure of a Minor's Record by Parent

Please Print Name	Representing	Business/Personal Mailing Address	Zip	(H) Phone	(W) Phone	Do you Want to Testify?	Which Subject/ Which Bill?
✓ Randall Hines	DHSS	Box 110630	99811	-	465-3187	(Y) N	HB 217
✓ Marcia McKenzie	CDVSA	Box 111200	99811		465-4356	(Y) N	HB 54
✓ Jean Fowlk	Ombudsman	Box 113000	99811		5581	(Y) N	HB 214
✓ Kay Brown	bill sponsor					(Y) N	HB 54
✓ Margaret Knuth	Law - Oregon	113000			4049	(Y) N	HB 212 HB 231
Janine Reep	Law - Civil	"			3603	to answer your question	HB 214
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	
						Y N	



State of Alaska  
**ombudsman**

Duncan C. Fowler

MEMORANDUM

DATE: April 1, 1993  
TO: Representative Brian Porter, Chair  
House Judiciary Committee  
FROM: Duncan C. Fowler, Ombudsman  
SUBJ: Ombudsman's Position  
Committee Substitute for House Bill 214

Reply to:

- P.O. Box 102636  
Anchorage, AK 99510-2636  
(907) 277-8848  
(800) 478-2624
- P.O. Box 113000  
Juneau, AK 99811-3000  
(907) 465-4970  
(800) 478-4970
- P.O. Box 74358  
Fairbanks, AK 99707-4358  
(907) 452-4001  
(800) 478-3257

**BACKGROUND**

This bill attempts to resolve problems with judicial interpretation of AS 47.10.090 which came to light last year. That statute by its terms restricts access to court records and prohibits disclosure of information and records which are prepared by federal, state or city agencies when those records pertain to a minor.

This statute has been interpreted by a superior court judge to prohibit a parent involved in a Child In Need of Aid (CINA) proceeding from providing specific information on the matter to their legislator, other elected officials or the ombudsman. While the court's order was eventually modified to allow the parent to provide information to the ombudsman, the limitations on discussions with elected officials remained in place.

This matter is being appealed to the Alaska Superior Court by the mother involved in the CINA case. The Legislative Council did authorize the submission of an Amicus brief supporting a parent's right to contact their elected officials in such matters

**EFFECT OF PROPOSED LEGISLATION**

This committee substitute provides parents or guardians an affirmative right to provide information about state actions involving a minor to elected officials or other selected state officials who would be in a position to correct any allegedly inappropriate acts by the state agencies involved. The substitute prohibits re-disclosure of confidential information by these officials.

It is broad enough to overcome any disclosure prohibitions in other state statutes, regulations and court rules such as CINA Rule 22 and Delinquency Rule 27 which, along with AS 47.10.090, also prohibit disclosure of information.

While it stops short of affirmatively exempting parents and guardians from coverage of disclosure restrictions or specifically allowing parents to disclose information not obtained from agency records to persons other than state officials, it clarifies that it should not be interpreted to limit existing parental rights by implication.



State of Alaska  
**ombudsman**

Duncan C. Fowler

MEMORANDUM

DATE: April 1, 1993  
TO: Representative Brian Porter, Chair  
House Judiciary Committee  
FROM: Duncan C. Fowler, Ombudsman  
SUBJ: Ombudsman's Position - House Bill 214

Reply to:

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Juneau, AK 99811-3000  
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**EFFECT OF PROPOSED LEGISLATION**

This bill makes it clear that AS 47.10.090 does not prohibit a parent or guardian from providing information protected by that statute to elected officials or other selected state officials who would be in a position to correct any allegedly inappropriate acts by the state agencies involved. The bill also prohibits re-disclosure of confidential information by these officials.

**OMBUDSMAN'S POSITION**

The ombudsman supports the position that parents should be allowed to contact state officials to seek relief from agency actions that have such a significant impact on their personal lives. That cannot be done effectively unless parents are allowed to share information with those officials. Because this bill eliminates one source of restrictions on such contacts, while protecting the privacy interests of the minor involved, the ombudsman supports it.