ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672
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145

crime. As the average time served went down dramatically, crime went up.

Most people would say that kind of makes sense. Criminals can count, too. It was interesting that an organization in Texas the National Center for Policy Analysis, did an economist's computation of the cost of crime. They acted on the proposition that crimes are intentional acts and that they're freely committed by people who calculate the cost to them for committing crimes. And that in many cases the criminals, while they may not do it in a mathematical way like economists, nevertheless have a general feeling of what their chances are of getting caught. And if they do get caught, what's going to happen to them.

And so they did some calculations. They multiplied of percentage of criminals that got caught for each offense times the likelihood of conviction, times the amount of months that they would serve, and they came to a very interesting statistic. And that was that the expected time in prison for each murder is something like 2.3 years. For rape, it's 80.5 days. For robbery, it's 27 days. For aggravated assault, just a little over 13 days, and for burglary it's 5.4 days.

Now, obviously those that are caught serve much more time than that. But that's taking the average time that people serve, and then multiplying that by a factor of what their chances are of being caught. Now as I say, I don't think that criminals figure those things out exactly, but they do have a pretty general idea. And for that reason, many of them feel that crime does pay.

The important thing is, as was mentioned earlier in the opening remarks, today we have a situation where criminals are spending actually very little time in prison. We have a revolving door situation where the same people are coming back to prison, spending a little time, then going out to commit more crimes. And then most of them are coming back to prison at one time or another.

It seems to me that there's several things that we need to do, and while I could go into the analysis even more, I think it's perhaps important that we talk about what are the changes that have to be made. Let me just say this, however: We did have a period of time during the last 30 years when crime began to go down, and that was at the beginning of the 1980s. By that time, citizens had had enough of the old lenient philosophy and by the last half of the 1970s, into the early eighties, judges were sentencing more people to prison for serious crimes...particularly violent felonies...and they were sentencing them for longer periods of time. And so from about 1981 through 1985, crime actually went down in the United States...the first time that had happened, since World War II.

But what happened by 1985 was that the prisons were full, overcrowded...and so it was at that point, if you look at the statistics, that people started being let out much earlier and not completing their full sentence.

Indeed, today the facts are that the average sentence for a felony in the United States is four years, but the average time served is about 13 months. And that's just the average for all felonies. That's everything from car theft on one end up to murder on the other end. But the amount of time that people are actually serving is only about a quarter of that, and most of that is because of a lack of prison capacity.

The other thing that I think we have to recognize is that even though in 1990 the crime rate in the United States was lower than it was in 1980, there were two significant differences in 1990 over 1980.

One was the tremendous amount of violence, and while property crimes in general were down or plateauing, violent crimes were considerably greater. Secondly, that drugs, particularly crack, was an increasing problem in the inner city.

The drug problem is kind of interesting. Up until 1981 or '82, most of the emphasis, what emphasis there was, on a national scale, was on law enforcement. In 1982, there was a comprehensive national strategy which included prevention, education, treatment and rehabilitation, along with strong law enforcement and strong international action.

And from 1982, that period when this strategy was implemented, up until the present time, we had a 50 percent decrease in drug use in the United States. Most of the decrease in drug use was due to the preventive activities in schools and drug-free workplace programs in business and industry. And so we have approximately half as many people today using drugs as we did at the beginning of the 1980s.

The drug problem, however, is starting to turn up again, particularly in high school and junior high school aged students. The reason is because we have this problem

in the United States that when something's no longer getting a lot of attention, people start to forget about it. And so the preventive efforts in schools and businesses are perhaps not as diligent as they have been in the past. We have to be very wary that we don't get another major drug problem in our schools.

However, the thing that has happened is that among those people who commit most of the crimes in the inner cities, both small crimes and major crimes, drug use has actually intensified. Because with half the market lessened, drugs have been relatively available in the inner cities. The price has been cheap because you don't have the demand that you had before. In addition to that, you have had crack introduced, which in my opinion was a cynical economic marketing act by the drug purveyors, who could no longer sell hundred dollar lines of cocaine to relatively affluent people. So now they manufacture cocaine in crystalline form, so they could sell $5, $10 and $20 rocks of cocaine to less affluent people in their communities.

So we have these things facing us today: a continuing problem with crack, an increase of drug use in the inner city, a revolving door situation as far as prisons are concerned, and a tremendous increase in violence.

There were two interesting comments that I noted yesterday in the paper. One was that there's been a 61 percent increase during the 1980s...61 percent increase...in shootings committed by Americans 15 to 19 years of age. That's junior high and high school aged kids. For example, in our nation's capital, in Washington, D.C., the children and teenagers treated for knife and gunshot wounds in the last seven years has increased 1,740 percent. In some inner cities like Washington, D.C., New York, Los Angeles and other places, we literally have a war going on. What we have is a juvenile army out there, with the latest figures indicating that 270,000 children carry guns to school each day.

Now, 270,000 children...it's hard to put that into any kind of context, but for comparison that's half the projected size of the United States Army by the year 1995. The number of kids going to school carrying weapons today, is half the size of what the Army is going to be in 1995. What do we do about it?

The first thing is we've got to be realistic about sentencing. We have got to change sentencing and recognize that only if we're able to put people in prison for violent crimes, or for repetitive crimes, that we will start to get them off the street. Many people say that we're spending more for prisons than we do for education in our state. That may be true, but let me say this: Prisons are more effective in the job they're set up to do than the educational establishment is with the job it is charged with.

We know that while people are in prison, they're not committing crimes against citizens on the street and in their homes. And I can't say that education is equally effective in teaching people to read and write under some of the conditions in some states today.

Now, obviously we need to support both. I think one of the mistakes we often make is that people will say, well, we've got to do this instead of that, or we can't put money into prisons...because we have to give it to education. We need to do both. And I know probably all of you face these tremendous dilemmas at home in terms of trying to squeeze all the requirements into the revenues that are available. But I think it is important.

The other thing that we need to do is decide who belongs in prison, as was stated earlier by Representative Alwin. Earlier he mentioned that some people shouldn't be there. How do you know when a person belongs in prison?

Well, it's tough. It's not always possible to tell on their first time through. But you sure know when they've been to prison and gotten out and committed a new felony, and come back a second time and gotten out and committed a third felony. About the third or fourth time around, they have self-selected themselves as a candidate for a long time in prison. And I think when that happens, we ought to say this person is going to go to prison for, if not the rest of their life, at least until they get to that period where statistically we know they kind of burn out as far as crime is concerned. Maybe they can't jump the fences anymore, running ahead of the police or whatever it is, but we know statistically that by the time a person gets to about 50 years of age, they're not as likely to commit crimes anymore. I hope it isn't true that in prison they learn to read and write, so that the robber becomes a forger when he gets out about that age. But in any event we do know that if a person after the third or fourth time around is kept in prison, we know that that individual who has the capability of committing anywhere from two dozen to 150 crimes per year is going to be out of reach where he or she can no longer prey on society.

The second thing we've got to do is we've got to have society keep its promises. We have to keep our promises to the citizens of our country and also to the criminals.

One of the things we do when a person is put on probation, is that the judge very sternly lectures him or her and says, "I'm putting you on three years' probation. I'm suspending two years in prison. Now if you get caught committing a crime or violating your probation during this three-year period, you're going to go to prison." Well, actually the judge knows, and the criminal knows, that that's probably not true. When that individual does commit a new crime, a new robbery, a new burglary, they're going to come back maybe in front of the same judge, or in front of another judge who sees the record, and what that judge is going to do. If he sentences him to prison the second time at all, he's going to make it concurrent with the sentence that was suspended for the first crime. In effect, the person on probation gets a free crime.

We have got to start living up to our promises,and when an individual violates their probation, they go to jail or prison for the length of the term of the first crime, and on top of that serve whatever the sentence is for the second crime, so that we don't give away crimes as a condition of probation.

Thirdly, we have to recognize that what I've been talking about...being realistic in keeping promises...has serious implications for the criminal justice system, particularly corrections. And it's important that we look at the whole criminal justice system.

Yesterday President Clinton announced federal funding to support putting up to a hundred thousand new police officers on the street. I think perhaps there's a good deal that can be done along that line. Actually, the money he talked about will barely support 60,000 officers on the street, but at least it's a start, and it's going to take time to work through this. And there were a lot of other proposals, too, many of them which are good.

But the thing that was forgotten is you can't just look at that stage of the criminal justice system. We have today, in cities and counties on the streets of our nation, just under 500,000 police officers. Now if we add, let's say, somewhere between 60 and a hundred thousand new officers, we're making a dramatic increase in the number of officers on the street. Particularly if these are added to the street patrol forces, because a good third, at least, of those other officers are working on specialized details or administrative duties.

Now, unless we have the courts, the judges, and ultimately the correctional facilities, to accommodate the arrests made by those officers, they really will not be adding to our ability to stop crime and to be a credible deterrent to the criminal.

In a bill that was introduced last week, by Senator Dole and several other members of the Senate, is a provision that does recognize the flow-through of the criminal when you add new police officers. This bill not only provides for new police officers, but also provides for matching grants to states for prison construction, as well as the building of some regional prisons which can be used for both federal and state prisoners. Now I think this is a much more realistic approach to solving these problems, because the bill that looks at the whole system.

We also have to recognize that we have to look at more cost effective ways to build additional prisons as they are necessary, so that we can accommodate people for longer periods of time. I don't think we have to go on building prisons forever. You know, there's some people in the ACLU and elsewhere who say if you keep building prisons at the rate that we did during the 1980s, by the year 2050 every other person in the United States will be in prison.

Well, let's be realistic. I don't think any of us believes that's true. I think there will be a point at which we don't have to build any more prisons because we'll have the people who need to be in prison there.

We have, at the present time, a little over 800,000 people out of a population of 252 million who are in prison. Of the three million people total, or less than one and a half percent of the population, who are under correctional custody, only a quarter of those people, about 26 percent, are actually in prison; the rest are on parole or on probation.

So it seems to me that adding additional prison capacity for a short period of time, and making sure the people who belong there stay there, is going to be a very good investment in the long run. However, it will not be the horrendous continuation of the building boom of prisons during the eighties, which was in large part because no prisons were built between 1950 and the late 19 .0s, due to the move away from incarceration.

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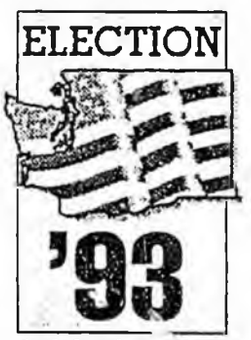
Editorials

Time to target hard-core criminals

Too many people in this state, public safety is an oxymoron. Violence is seemingly committed at will, criminals slip through the cracks, and the price is paid only by those who obey the law.

Into this mix comes Initiative 593, the so-called "Three Strikes You're Out" measure. It would send those who commit three violent felonies to prison for life, without the possibility of parole.

By itself, I-593 won't wipe crime from our doorsteps — it's certainly no panacea for the societal problems that plague us. But it is a way to bring fairness back to sentencing and it should be approved by the voters on Nov. 2.



Initiatives are, almost by definition, a poor way to make law. It removes a measure from the give-and-take possible when divergent interests work to hone an idea to general acceptability.

Those behind Initiative 593 tried to do that during the last session of the Legislature. Though a majority of House members signed on to a proposal essentially the same as now before us on the general election ballot, it never came to a vote. The proposed law became the initiative.

I-593 is fair. Though crime and criminals seem all around us, only 7 percent of criminals commit 70 percent of the violent crime. It's these criminals who pose the greatest danger to our society and it is these whom I-593 would put in prison for good.

Someone who faces a third conviction for violent crime shows clearly that he or she has not learned from past mistakes and has chosen not to be a law-abiding citizen. I-593 will remove the worst element of criminals, the hard core, from society.

The key, remember, is *violent* crime. Merely breaking a law doesn't earn someone a life sentence.

Voters should not be put off by appeals that such a proposal will bankrupt the system or condemn the wrong people to a life behind bars. Only the most serious offenders will face such a future. But if they don't, the rest of us may not have one at all.

EDITORIALS

'Three strikes' deserves approval

Initiative 593 would be one tough law. If enacted, "Three Strikes, You're Out" would mandate true life imprisonment — with no possibility of parole — for adults convicted of their third violent felony.

Washington state would thus acquire the harshest habitual-criminal law in the nation. Frankly, this doesn't sound like such a bad idea — though no one should assume this limited measure is going to make much of a difference in the crime rate.

Opponents of I-593 have offered some impressive-sounding arguments against the measure. But none of the charges quite stick.

For example, much has been made of the fact that second-degree assault — a crime that could occur during a barroom brawl or strong-arm robbery — would constitute a "strike" under the initiative. Opponents raise the specter of tavern rowdies accumulating minor offenses and eventually being sent up for life.

ELECTION RECOMMENDATION

This argument fails the real-world test. State conviction records show that of the 63 felons who would have "struck out" under I-593's provisions in 1991, virtually all were real bad guys: killers, rapists, armed robbers and the like. Of those who would have struck out with a second-degree assault conviction this year, all were violent criminals who had plea-bargained down from a more serious charge.

Another contention is that I-593 would impose excessive costs on the criminal justice system. Yet the law would affect only a relative handful of convicts — 40 to 70 a year, according to the state Sentencing Guidelines Commission.

It's true this many additional life sentences would entail geriatric and medical expenses. Unfortunately, taxpayers get stuck with such bills anyway when aging ex-convicts ultimately wind up in nursing homes and hospitals at state expense. Likewise flawed are the claims that prison-construction and criminal-defense costs will grow onerous under I-593. The high numbers cited by opponents typically assume that three-time offenders, once freed, don't commit additional crimes and generate additional expenses. That's a naive assumption, to say the least.

In this context, it's a grave mistake to focus only on the cost of imprisonment. When active criminals are allowed to return to a life of crime, they visit horrific new costs on victims and communities. In 1988, a U.S. Justice Department study estimated that such non-prison expenses average $430,000 a year — per offender.

I-593 is narrowly targeted, and it isn't likely to make a noticeable dent in the overall crime rate. At a minimum, though, it would snare some of the state's most dangerous felons and put them out of commission for good. And with any luck, other hardened criminals may feel a sudden inclination to wreak their havoc in more forgiving states.

❖VICTIMS FOR JUSTICE❖

Volume 4 Issue 2 November 1993

- CRIME SUMMIT- SPEAK OUT ON VIOLENT CRIME- DEC.6TH

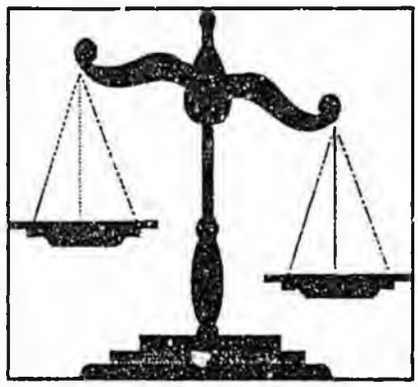
Evil abounds when good people do nothing. Are you concerned for your children's future? About the increase of gangs in our town? Are you frightened? Do you feel safe? There are some active things we can do to decrease crime and violence in our community. But it can only happen if you are willing to get involved. Please plan to attend our Crime Summit a public forum, Monday, **December 6th, 7:00 p.m. at East High Auditorium.**

A brief presentation will be given by the following professionals to identify the problems and inform us of what important choices are needed to change what is happening in our community:

Charlie Cole	Attorney General
Dr. Bill Mell	Dir. of Secondary Ed.
Kevin O'leary	Chief, APD
Mike Grimes	President, APOA
Frank Pruitt	Comm. Corrections
Edward McNally	District Attorney
Janice Lienhart	Victims for Justice

All assembley people will be invited as well as all Anchorage legislators.

We will inform you of what each person can do to make a difference. If the legislators and the assemblyman see the volumes of citizens who are willing to get involved, they will work harder to make laws that work for the people. You will learn of a new program that is directed towards preventing juvenile crime. You will learn of important legislation that needs community support to stop the increasing crime in our community. We hope to set up a phone



chain so that by one simple phone call thousands of messages will be directed towards legislators showing them people care and demand action.

It is not too late to save Anchorage from the gang problems and crimes of the big cities.

WE MUST ACT NOW!

VICTIM JUSTICE

VFJ joins in "celebrating" with the Samuel's family to see that the Alaska Supreme Court has agreed with Judge Michalski's original finding over 4 years ago, that Jonathan Norton's confession of killing Duane Samuels in 1989 was admissable as evidence. Though we have no understanding of why it took so long for the Justices to make the "right decision"; we do applaud and praise them. Not only for the Samuel families' ordeal, but for Duane Samules who can no longer speak for himself, this decision will set a precedent for future juveniles. Thank you, Justices Moore, Matthews, Burke, Rabinowitz and Compton!

"THREE STRIKES AND YOU'RE OUT!"

UNDERLYING CURRENTS

by Janice Harris Lord

Down at the courthouse, the defense attorney tosses his file on the counsel table and walks slowly to the jury box. He makes eye contact with every juror, one at a time. After a long and pregnant pause, he crosses his arms, puts his finger to his lips and frowns, obviously pondering the gravity of the words to come. He leans over the jury rail and whispers as if his very life depended on it. "If I could only bring the deceased back to life, believe me, I would. But punishing my client won't do it either." He pauses again and in a more audible voice, "It wasn't his fault. He never intended to kill. This woman the state is calling the "victim" was simply... and he pauses to make each word count..." in the wrong place at the wrong time."

Various exerts say they know what is wrong with America. Alienation. Boredom. Clearly it is "somebody else's fault." Have we lost the ability to speak the language of personal accountability? Is our moral vocabulary so lacking and our convictions so weak that we simply quit? Are we so afraid to face honest guilt, honest pain, honest responsibility that the simplest way out is to blame somebody else? This is the face and voice of almost every offender. Let us stop finding reasons to let them out of prison early, making excuses for them. Instead of processing them over and over - adopt Washington's law; 3 STRIKES AND YOUR OUT! The 3rd felony regardless, constitutes a life sentence! That would cut the crime 75-80% at least, since 80% of crime is done by repeat offenders! Now that's deterrence!

Harsh Punishment on Washington Agenda

A state Supreme Court ruling and a proposed initiative would make a powerful package of crime protection and retribution in Washington state.

The Washington high court upheld a controversial measure that allows the state to hold some sex offenders past their release date on a civil commitment. And on Nov. 2 voters will decide on a "Three Strikes You're Out" initiative that would lock up persistent offenders for life.

There is reason to believe that a public that has hailed the state's Community Protection Act, of which the civil commitment is a part, will like Initiative 590 (the proposed Persistent Offender Accountability Act).

Under the "Three Strikes" initiative, resurrected from a House bill that did not pass, someone convicted of a third serious offense would be labeled a "persistent offender" and get a mandatory life sentence without possibility of parole. The proposed measure is harsher than other states' habitual offender laws. All Class A felonies—generally violent crimes like murder, rape, controlled substance homicide, homicide by abuse, assault of a child, first degree arson and first degree attempted arson—would count. Manufacture, delivery or possession with intent to deliver cocaine or heroin also can be charged as a Class A felony. Other crimes listed as serious offenses in the proposal include second degree assault, second degree child molestation, second degree child assault, indecent liberties, second degree robbery, vehicular assault, any Class B felony with a sexual motivation or any felony committed with a deadly weapon.

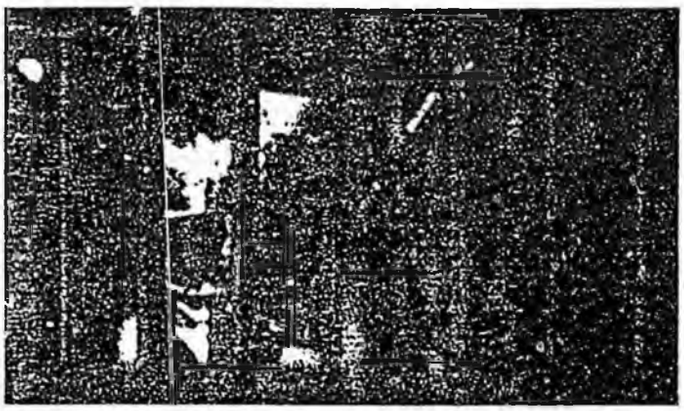


Illustration Bruce Holdaman

Some of the state's lawmakers who agree with the persistent offender concept, however, are not comfortable with the long list of crimes defined in the initiative as serious offenses that add up to life without parole. Conceivably, a third bar fight could get you life without parole under this initiative depending on the charges filed. An analysis by the state's Sentencing Guidelines Commission said that the measure would affect a relatively small group, increasing the prison population by about 300 beds a decade from now.

The small impact numbers were predicted mostly because third felonies are infrequent, and because offenders committing the most violent of the crimes would probably get tiff sentences anyway. Roxanne Lieb, a former director of the Sentencing Commission now with the Washington State Institute for Public Policy, said that other habitual offender proposals made since guidelines were enacted usually predicted dire fiscal consequences. Still, Lieb and others who helped craft the sentencing guidelines find it disturbing that this broadly applicable, mandatory minimum law could eclipse some of what the guidelines have achieved in sentencing reform. She said mandatory sentences remove flexibility but don't necessarily ensure more certainty and fairness because of bargaining over charges and other side-stepping.

"You can adjust the guidelines if you want harshness," Lieb said, acknowledging that feelings of frustration and helplessness about violent crime give life to these grass-roots proposals. "I don't see where the opposition is going to come from."

Meanwhile, the initiative has strong, deep-pocket backers like the National Rifle Association. The NRA says its efforts in Washington state represent ongoing interests in criminal justice reform and victims' rights. Groups on the other side of the gun lobby, however, say the NRA's latest tack is to divert attention from guns by imploring states to simply lock up felons forever.

Many of the serious offenses named in the "Three Strikes" proposal are sex crimes, including specific crimes against children. Despite the sweeping sexual predator legislation approved in 1990, belief that sex offenders don't get long enough sentences is helping drive this initiative.

Civil commitment of sex offenders, a unique, controversial provision of Washington's Community Protection Act, was designed to fill a perceived gap in the law that allowed release of known, dangerous criminals. The Washington Supreme Court this summer upheld the right of the state to hold some convicts past their release dates by committing them as mental patients.

The outrage of civil libertarians and the Washington State Psychiatric Association notwithstanding, the high court said the law does not violate a person's right to due process or other constitutional guarantees. The law says "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence" may be considered for commitment. Release from the Special Commitment Center is possible only if a court finds that the person's mental abnormality or disorder has changed in such a way that the community is safe. The unsuccessful challenge to that premise was made on behalf of some of the 21 people held under the provision.

Welfare Incentives Have Merit, but Reforms Must Go Deeper

By Suzanne Fields

Money talks. It talks to the rich and it talks to the poor. But it has a different vocabulary for rich and poor.

A prosperous father promises his teenage daughter a dollar for every A on her report card. Welfare strategists use similar strategies to keep teenage mothers in school.

A welfare program in Ohio, for example, fattens the welfare check by $62 each month that a teenage mother stays in school or returns to school after dropping out. But, like the child whose allowance is docked because of bad grades, a teenage mother who quits school or who has more than two unexcused absences has her welfare check cut by $62.

B.F. Skinner, the behavioral psychologist who pushed rewards and punishments as a powerful means of changing behavior, would appreciate this imaginative public boxing of his theory. An Ohio teenage mother with one child, who is eligible for a monthly grant of $274, soon learns that she can earn as much as $336 a month if she attends school and as little as $212 if she doesn't.

> An attempt to turn incentives around can't hurt, but until we redefine social standards and revive social stigma for hurtful behavior, nothing else is likely to make much of a difference.

The acronym for the Ohio program, LEAP — for Learning, Earning and Parenting — emphasizes the main benefit of a high school education: hope for a better job. LEAP also shows that discipline and learning can pay as you go.

Not everybody takes advantage of the program.

In a six-year study of more than 7,000 teenage mothers, the Manpower Demonstration Research Corp. of New York found 61 percent of teenagers stayed in school when they earned the bonus, compared with 51 percent in a control group who did not. Nearly half the teen dropouts who received economic enticements returned to school, compared with about a third who did not. Such percentages demonstrate promise.

What's striking is that so many teenagers who would earn extra money decided to forgo the bonus and accept the penalty rather than go to school.

This tells us that to many teenage mothers, $62 doesn't mean much, at least not enough to go to school. Some teenage mothers probably have other means of hidden support from their families or even the fathers of their children. Many of these young women never learned the value of education.

The incentive approach to welfare is benign, and a 10 percent increase in the number of teenagers who stay in school makes it worthwhile. But behavioral approaches to welfare and education suffer from the same problem that critics of Skinner identified when they applied his theories to many other human endeavors. They don't get to the root of problems. Whether measured in dollars or sense, such incentives are superficial.

Thirty years ago, welfare agencies became moral regulators, refusing to pay an unmarried woman who had a man in her house. The state became the husband who looked for cheaters under the bed, sending out snoops at all hours to ensure the uprightness of the welfare recipient. The law of unintended consequences let men off the hook altogether. Marriage didn't pay. Only sex did.

Stigma disappeared. The number of welfare mothers who gave birth to children out of wedlock soared. The stigma of unwed motherhood evaporated, too. The rise in the number of unwed mothers accounts for more than 70 percent of additional welfare families between 1987 and 1991.

Sen. Daniel Patrick Moynihan of New York, the godfather of welfare reform, wants even more incentive programs for welfare recipients. He's especially troubled by the way society has come to accept increasing types of deviant behavior as normal.

Unwed motherhood, in this scenario, has been normalized. What was once shocking has become commonplace. What was once shameful is now celebrated. An attempt to turn incentives around can't hurt, but until we redefine social standards and revive social stigma for hurtful behavior, nothing else is likely to make much of a difference.

Harsh, maybe, but true. Money talks. But those who take it often talk back, and we may not like what we hear. ●

Suzanne Fields, a columnist for the Washington Times, is nationally syndicated.

Three Strikes and You're Out — for Good

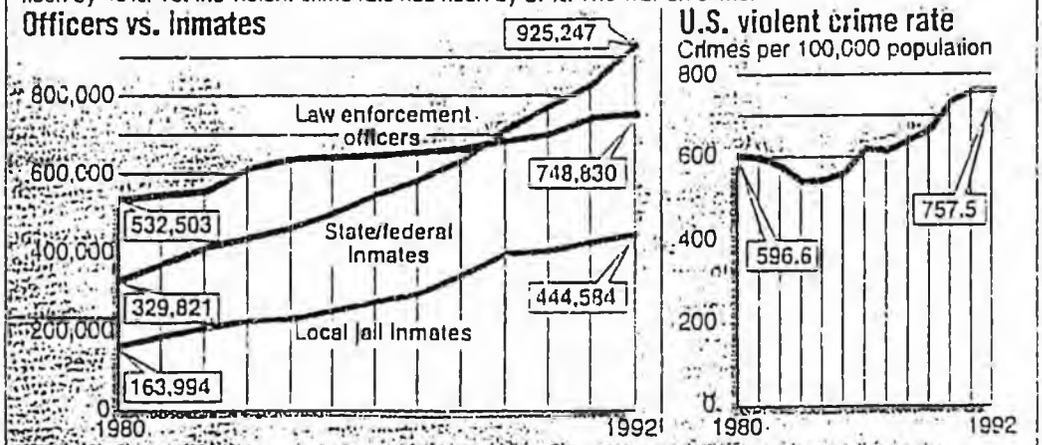
By Deroy Murdock

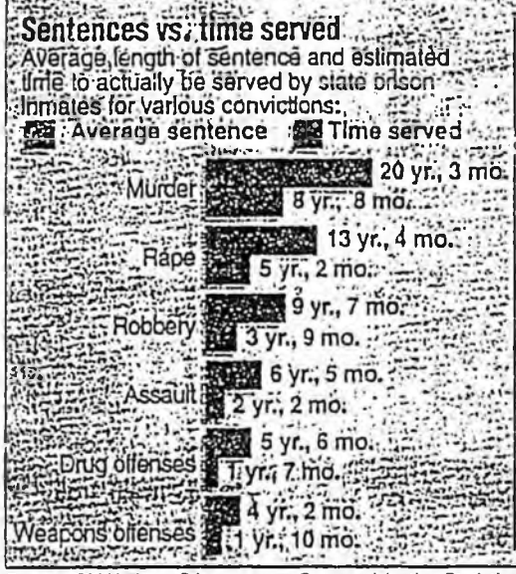
Some people just never learn. After serving less than five years of two 15-year prison terms for convictions in two rapes, Walter "Animal" McFadden did it again. In 1981, he was sentenced to another 15 years for the kidnapping and rape of a woman while he was on parole. By 1985, though, McFadden was out on the street once more. Within a year, he met an 18-year-old Texas girl, whom he raped and murdered. Then he killed her two young friends.

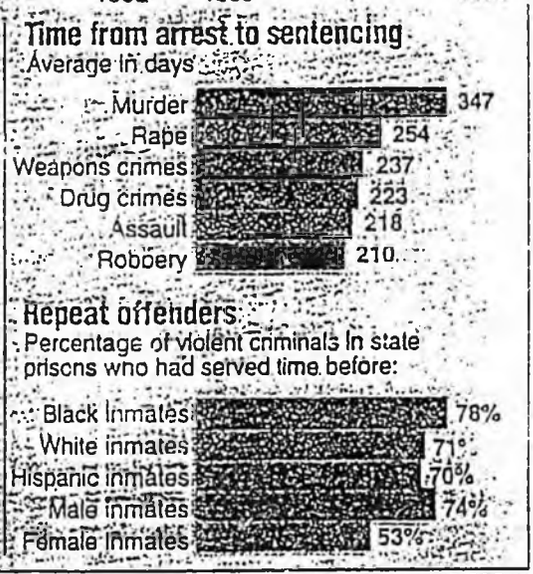
Ambrose Harris doesn't get it either. Authorities say that after 44 trips to jail for rapes and armed robberies, Harris, 40, abducted Kristin Huggins, a 22-year-old Philadelphia-area artist. A week before this past Christmas Eve, Harris allegedly shot Huggins twice in the head, then buried her. Spinning through the justice system's revolving door apparently made Harris dizzy. Perhaps that's why he laughed through his arraignment.

Combating guns with jail, prison

The number of criminals in prisons in the USA has increased by more than 160% since 1980, and the number in local jails has more than doubled. The number of full-time law enforcement officers has risen by 40%. Yet the violent-crime rate has risen by 27%. The war on crime:







Source: FBI Uniform Crime reports; Bureau of Justice Statistics reports

By Marty Baumann, USA TODAY

"Such people are the right people to put away," says Eric Sterling of Washington's Criminal Justice Policy Foundation.

But Sterling says it's hard to identify potential repeat offenders. He fears that "blunderbuss" get-tough laws more easily snag drug or burglary offenders than the violent criminals they're designed to stop.

And, he says, overcrowded and underfunded prisons may contribute to violence by making criminals more hardened than when they went in.

"Where did all these criminals come from?" Sterling asks. "Well, they came from our correctional institutions."

A 1992 study by the Sentencing Project shows the USA has the world's highest incarceration rate, about 455 per 100,000 people, compared with a rate of 311 per 100,000 in South Africa; 111 per 100,000 in China; and 42 per 100,000 in Japan.

Overall, the state and federal prison population hit a record 925,247 inmates in June, up more than 180% since 1980.

But there's no evidence that such explosive prison growth has stemmed crime.

Violent-crime reports nationwide dipped slightly in the first six months of 1993, but there still has been a 45% rise since the early 1980s.

Such numbers, though, don't reflect the public cry for punishment. It's "beyond dispute," McNulty says, that criminals can't harm the public from jail. "At least we're stopping those offenders. People will realize the price they'll pay."

'Revolving door' syndrome feeds cycle of violence

By Sam Vincent Meddis
USA TODAY

In Washington, D.C., a teenager facing charges of deadly assault goes joy-riding while free on $1,000 bond. He fatally shoots a woman in another car because he feels like "bustin' somebody."

In Hugo, Okla., a 39-year-old with a record of assault and property crimes buys an assault weapon and kills two people, wounds three others, then kills himself.

Many blame the easy access to guns for such carnage. But similarly under fire is a justice system that, to critics, seems to do little more than recycle criminals to the streets.

That outrage has sparked calls for a crackdown on repeat criminals nationwide: Washington state voters approved stiffer sentencing last year, and California voters consider an initiative this fall.

About 30 states are weighing similar measures, most of which provide long sentences without early parole for many repeat offenders.

"People have just had it — they don't want to live with the fear anymore," says Paul McNulty of the First Freedom Coalition, a group that advocates stiff crime penalties.

Looking at the numbers, repeat crime seems to be becoming the nationwide norm:

➤ About 60% of prison inmates have been behind bars before, according to a U.S. Bureau of Justice Statistics study; 44% were on probation or parole when re-arrested.

➤ A mere 108,000 criminals in one federal study had a staggering 1.9 million arrests between them.

Recent U.S. and Pennsylvania studies found [illegible] criminals commit [illegible] of violent crimes.

Targeting those criminals sounds simple. The reality is tougher.

'3 strikes, you're out' likely in California

In what could spark a new wave of citizen action nationwide, California voters are expected to approve a crackdown on career criminals in a November 1994 ballot measure.

The measure, known as "Three Strikes and You're Out," would double sentences for criminals convicted of second serious felonies — and require a minimum of 25 years to life for a third offense.

Thirty other states are considering similar measures to toughen sentences for repeat offenders.

Gov. Pete Wilson supports the concept, and supporters appear to have easily topped the 385,000 signatures needed to place it on the 1994 ballot.

The initiative has been pushed by Fresno photographer Mike Reynolds, whose 18-year-old daughter was killed by a parolee in June.

USA Today, p.7A 12/29/93

THE WALL STREET JOURNAL

WEDNESDAY, MAY 13, 1992

Crime Strikes Out

Advocates for victims of violent crime in the state of Washington hope to send the criminals there a message this November: "Three strikes, you're out." That's the informal name of a tough anti-crime initiative that would sentence a person convicted of three violent crimes to life in prison. No parole. No time off for good behavior. No exceptions. Goodbye and good riddance.

The sponsors of the measure believe that murderers, rapists, robbers, drug dealers and the like belong behind bars, rather than out on the street, routinely wreaking havoc on other human beings. As John DiIulio writes nearby, most Americans share that view. They also believe that too many criminals are getting off lightly. Ida Ballasiotes of Friends of Diane, one of the initiative's sponsors, says: "When I tell people about the initiative, the question we're asked most often is, 'Why are we waiting three times?' "

It's instructive to look at what happens to a violent criminal in Washington under current law. As in about 30 states, criminals in Washington are sentenced according to a set of guidelines authorized by the legislature. Take rape. A man convicted of first-degree rape with two prior convictions for violent crimes receives an average sentence of 10 years, nine months, under the guidelines. Deduct the standard one-third for good behavior and he'll typically serve just over seven years.

Robbery: If someone with two prior convictions for violent crimes is convicted of first-degree robbery — which means he had a weapon or severely beat up his victim — he gets, under the guidelines, an average sentence of five years and will probably serve three and a half.

A convicted murderer with two priors gets an average of 27 years, four months; that translates to about 18 years. Washington's guidelines are strict in that they mandate that the criminal serve two-thirds of his term. Judges are permitted to deviate from the guidelines but rarely bother since a stricter sentence brings with it an automatic appeal. The state has a death penalty on the books but hasn't used it since 1963.

Supporters estimate that, if passed, the initiative would affect only 30 to 60 hard-core criminals a year, a burden the state's overloaded prison system could bear. But the rule would catch the heavy hitters: It's well documented that a minority of recidivist criminals commit a majority of violent crimes. "The major cause of violent crime is letting violent criminals out of jail," says John Carlson, president of the Washington Institute for Policy Studies, which is leading the signature-collection campaign. "Seventy percent of violent crimes are committed by 6% of violent criminals."

It's too early to predict the success of the initiative, since petitions went out about two weeks ago. So far 5,000 have been counted; 150,001 are needed by July 2.

The initiative's formal title is the Persistent Offenders Accountability Act. It is wisely named. "Accountability" is a concept largely gone from our criminal justice system. And while a mandatory life sentence isn't necessarily the system's best tool — a genuinely repentant or rehabilitated criminal can suffer — it carries the crucial message of personal accountability: If you commit a severe crime, you get a severe punishment. Do it three times, and you're out.

(over)

he News
it to Print"

The New York Times

Nation
Washington and Cascades. Elsew- few showers. He- coast tonight. We- casts for other ar-

I.... No. 49,585 SUNDAY, JANUARY 23, 1994

Crime Joins Economic Issues As Leading Worry, Poll Says

By RICHARD L. BERKE

Crime now rivals the economy in the eyes of Americans as the single most important problem facing the country, but they are divided over whether Republicans or Democrats are best able to do something about it, according to the latest New York Times/CBS News Poll.

The sharp rise in concern about crime helps assure that it will be a front-line issue in this election year. But there is also a widespread sense that the country is powerless to deal with it, with most Americans saying they do not expect violence to decline significantly in the next few years.

The poll also found that many Americans seemed to question President Clinton's assertion that the health care system was in such a state of crisis that he must begin working on it before coming forward with his welfare reform plan. Asked which issue the Government should concentrate on first, 43 percent chose health care and 49 percent welfare reform.

While people put the economy at the top of the agenda for years, anxieties about the economy have diminished in recent months, and crime has filled the vacuum. Asked to cite the single biggest problem facing the nation, 19 percent said crime or violence, with an additional 2 percent saying guns. Fifteen percent cited health care.

Among economic issues, 14 percent said the state of the economy concerned them most, and 12 percent unemployment or jobs.

The next most cited issue, at 5 percent, was the deficit, a major issue in the 1992 campaign. In an issue that was once a dominant concern, 3 percent cited drug abuse.

The telephone poll of 1,146 adults nationwide underscores why the political parties are battling so intensely to claim the crime issue as their own: Republicans may have lost the edge as the party seen as best poised to preserve law and order, leaving the potent political issue up for grabs.

Thirty-one percent said the Democrats had an advantage in dealing with crime, while a group of identical size cited the Republicans. The poll, conducted Jan. 15 to 17, has a margin of sampling error of plus or minus three percentage points.

The failure of either party to make itself the clear law-and-order cham-

Continued on Page 14, Column 1

Memorandum

State of Alaska
Department of Corrections
Division of Administrative Services
(907) 276-8122 Fax (907) 258-7512
800 A Street, Suite 102, Anchorage, Alaska

To: Diane Schenker
Special Assistant

Date: November 4, 1993

File: A-1-8A

From: Steve Schwartz
Research Analyst IV
Department of Corrections

Subject: Rep. Bunde request

The information requested from Rep. Bunde offices is as follows:

Inmate population on November 4, 1993 is 2,692 (In-state, out-of-state - excludes CRCs).

Inmates with two felony cases is 560 or 20.8%
Inmates with three felony cases is 253 or 9.4%
Inmates with four felony cases is 123 or 4.6%
Inmates with five or more felony cases is 133 or 4.9%

Rep. Bunde's original question was; "What percentage of prisoners in our present population have returned to jail after three felony convictions?" This percentage is 9.5% .

Thank you.

Post-it™ brand fax transmittal memo 7671 | # of pages ▸ 1

To Patti Swenson	From D. Schenker
Co. Rep. Bunde	Co. DOC
Dept.	Phone #
Fax #	Fax #

BILL TEXT Report for H.R.3355
As passed by the Senate (Engrossed Amendments), November 19, 1993
Showing the Full Text of Each Item
With reference to 'LIFE'
AND With reference to 'SENTENC'
AND Limited to Item(s): 341 342 343 621 631

H.R.3355 As passed by the Senate (Engrossed Amendments), November 19, 1993

Item 341: (36) SEC. 2406. MURDER INVOLVING FIREARM.

SEC. 2406. MURDER INVOLVING FIREARM.

(a) In General.--Chapter 51 of title 18, United States Code, as amended by section 504(a), is amended by adding at the end the following section:

"Sec. 1122. Murder involving firearm

"(a) Offense.--A person who has been found guilty of causing, through the use of a firearm, as defined in section 921 of this title, the death of another person, intentionally, knowingly, or through recklessness manifesting extreme indifference to human life, or through the intentional infliction of serious bodily injury, shall be punished by death or imprisoned for any term of years or for life. Whenever the government seeks a sentence of death under this section, the procedures set forth in title 18, chapter 228, shall apply.

"(b) Jurisdiction.--There is Federal jurisdiction over an offense under this section if--

"(1) the conduct of the offender occurred in the course of an offense against the United States; or

"(2) a firearm involved in the offense has moved at any time in interstate or foreign commerce.

"(c) It is the intent of Congress that--

"(1) this paragraph shall be used to supplement but not supplant the efforts of State and local prosecutors in prosecuting murders involving firearms that have moved in interstate or foreign commerce that could be prosecuted under State law; and

Federal

"(2) the Attorney General shall give due deference to the interest that a State or local prosecutor has in prosecuting a person under Staat law.

"(d) This paragraph does not create any rights, substantive or procedural, enforceable at law by any party in any manner, civil or criminal nor does it place any limitations on otherwise lawful prerogratives of the Attorney General.",

(b) Technical Amendment.--The chapter analysis for chapter 51 of title 18, United States Code, as amended by section 504(b), is amended by adding a the end the following new item:

"Sec. 1122. Murder involving firearm.".

Item 342: (36) SEC. 2407. MANDATORY MINIMUM PRISON SENTENCES FOR THOSE WHO SE ILLEGAL DRUGS TO MINORS OR WHO USE MINORS IN DRUG TRAFFICKING ACTIVITIES.

SEC. 2407. MANDATORY MINIMUM PRISON SENTENCES FOR THOSE WHO SELL ILLEGAL DRUGS TO MINORS OR WHO USE MINORS IN DRUG TRAFFICKING ACTIVITIES.

(a) Distribution to Persons Under Age 18.--Section 418 of the Controlled Substances Act (21 U.S.C. 859) is amended--

(1) in subsection (a) (first offense) by inserting after the second sentence "Except to the extent a greater minimum sentence is otherwise provided by section 401(b), a term of imprisonment under this subsection in a case involving distribution to a person under 18 years of age by a person 21 or more years of age shall be not less than 10 years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the preceding sentence."; and

(2) in subsection (b) (second offense) by inserting after the second sentence "Except to the extent a greater sentence is otherwise authorized by section 401(b), a term of imprisonment under this subsection in a case involving distribution to a person under 18 years of age by a person 21 or more years of age shall be a mandatory term of life imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the preceding sentence.".

(b) Employment of Persons Under 18 Years of Age.--Section 420 of the Controlled Substances Act (21 U.S.C. 861) is amended--

(1) in subsection (b) by adding at the end the following: "Except to the extent a greater minimum sentence is otherwise provided, a term of imprisonment of a person 21 or more years of age convicted under this subsection shall be not less than 10 years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the preceding sentence."; and

Federal

(2) in subsection (c) (penalty for second offenses) by inserting after the second sentence the following: "Except to the extent a greater minimum sentence is otherwise provided, a term of imprisonment of a person 21 or more years of age convicted under this subsection shall be a mandatory term of life imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the preceding sentence.".

Item 343: (21) SEC. 2408. LIFE IMPRISONMENT WITHOUT RELEASE FOR DRUG FELONS AN VIOLENT CRIMINALS CONVICTED A THIRD TIME.

SEC. 2408. LIFE IMPRISONMENT WITHOUT RELEASE FOR DRUG FELONS AND VIOLENT CRIMINALS CONVICTED A THIRD TIME.

Section 401(b)(1)(A) of the Controlled Substances Act (21 U.S.C. 841(b)(1)(A)) is amended by striking "If any person commits a violation of this subparagraph or of section 418, 419, or 420 after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence." and inserting "If any person commits a violation of this subparagraph or of section 418, 419, or 420 (21 U.S.C. 859, 860, and 861) or a crime of violence after 2 or more prior convictions for a felony drug offense or crime of violence or for any combination thereof have become final, such person shall be sentenced to not less than a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. For purposes of this subparagraph, the term 'crime of violence' means an offense that is a felony punishable by a maximum term of imprisonment of 10 years or more and has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or by its nature involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.".

Item 621: (22) SEC. 5101. CREDITING OF "GOOD TIME".

SEC. 5101. CREDITING OF "GOOD TIME".

Section 3624 of title 18, United States Code, is amended--

(1) by striking "he" each place it appears and inserting "the prisoner";

(2) by striking "his" each place it appears and inserting "the prisoner's";

(3) in subsection (d) by striking "him" and inserting "the prisoner"; and

(4) in subsection (b)--

Federal

(A) in the first sentence by inserting "(other than a prisoner serving a sentence for a crime of violence)" after "A prisoner"; and

(B) by inserting after the first sentence the following: "A prisoner who is serving a term of imprisonment of more than 1 year for a crime of violence, other than a term of imprisonment for the duration of the prisoner's life, may, at the discretion of the Bureau, receive credit toward the service of the prisoner's sentence beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, if the Bureau of Prisons determines that, during that year, the prisoner has displayed exemplary compliance with such institutional disciplinary regulations.".

Item 631: (20) SEC. 5111. MANDATORY LIFE IMPRISONMENT OF PERSONS CONVICTED OF THIRD VIOLENT FELONY.

SEC. 5111. MANDATORY LIFE IMPRISONMENT OF PERSONS CONVICTED OF A THIRD VIOLENT FELONY.

Section 3581 of title 18, United States Code, is amended by adding at the end the following new subsection:

"(c) Imprisonment of Certain Violent Felons.--

"(1) Definition.--In this section, 'violent felony' means a crime of violence (as defined in section 16) under Federal or State law that--

"(A) involves the threatened use, use, or risk of use of physical force against the person of another;

"(B) is punishable by a maximum term of 5 years or more; and

"(C) is not designated as a misdemeanor by the law that defines the offense.

"(2) Mandatory life imprisonment.--Notwithstanding any other provision of this title or any other law, in the case of a conviction for a federal violent felony, the court shall sentence the defendant to prison for life if the defendant has been convicted of a violent felony on 2 or more prior occasions.

"(3) Rule of construction.--This subsection shall not be construed to preclude imposition of the death penalty.".

Federal

105 John A. Cherberg Building
P.O. Box 40475
Olympia, Washington 98504-0475
(206) 786-7402

Washington State Senate

Law and Justice Committee

Senator Adam Smith
Chairman

INITIATIVE 593

TO: Senator Adam Smith, Chair

FROM: Dick Armstrong, Staff

SUBJECT: Initiative 593 (Persistent Offender)

DATE: July 15, 1993

INTRODUCTION

You requested a memorandum which explains Initiative 593, commonly referred to as "Three Strikes and You're Out". As the phrase implies, the Initiative provides that any person who commits three serious felonies (as defined) must be sentenced to a term of life imprisonment without possibility of parole.

To assist with your understanding of Initiative 593, the memo provides: (1) background information on how habitual offenders were treated prior to the 1984 Sentencing Reform Act (SRA) and how repeat offenders are now sentenced under the SRA; (2) a summary of the provisions of the Initiative, including a list of crimes which constitute a "most serious" felony; and (3) information on the fiscal impact of the Initiative.

BACKGROUND

Any person who was convicted of a crime committed before July 1, 1984 which involved fraud or an intent to defraud as an element, or larceny or any felony, could be sentenced to life imprisonment as a habitual criminal if he or she had two prior felony convictions, or had been convicted four times of any crime which involved fraud or intent to defraud as an element. Any person sentenced to life imprisonment as a habitual criminal was still eligible for parole.

The Sentencing Reform Act applies to felonies committed on or after July 1, 1984. The sentencing grid used pursuant to the Sentencing Reform Act counts prior felony convictions as part of the offender's criminal history score. Offenders with previous convictions receive higher scores under the grid, and as a result are given longer sentences. The sentencing judge can give an exceptional sentence that varies from the presumptive sentence if aggravating or mitigating

circumstances are present. Certain offenses (i.e., first degree murder, first degree rape and first degree assault) have mandatory minimum sentences.

The Sentencing Reform Act does not provide a punishment of life imprisonment for habitual offenders.

SUMMARY

A person who meets the definition of a "persistent offender" must be sentenced to a term of life imprisonment without the possibility of parole, unless the offender is sentenced to death for the crime of aggravated murder.

"Persistent offender" is defined as an offender who has been convicted of a felony considered a "most serious offense," and has been previously convicted on at least two separate occasions of felonies that would be considered as most serious offenses.

"Most serious offense" is defined to include the following felonies or attempted felonies (For your information, the type of felony and the seriousness level on the sentencing grid is set forth):

- Any Class A felony (see attachment);
- Assault 2nd degree (Class B, Level IV);
- Assault of a child 2nd degree (Class B, Level IX);
- Child molestation 2nd degree (Class B, Level VII);
- Controlled substance homicide (Class B, Level IX);
- Extortion 1st degree (Class B, Level V);
- Incest with child under age 14 (sexual intercourse - Class B, Level VI; sexual contact - Class C, Level V);
- Indecent liberties (Class B, forced - Level IX, unforced - Level VII);
- Kidnapping 2nd degree (Class B, Level V);
- Leading organized crime (Class B, Level X);
- Manslaughter 1st degree (Class B, Level IX);
- Manslaughter 2nd degree (Class C, Level VI);
- Promoting prostitution 1st degree (Class B, Level III);
- Rape 3rd degree (Class C, Level V);
- Robbery 2nd degree (Class B, Level IV);
- Sexual exploitation (Class B, Level IX);
- Vehicular assault (Class C, Level IV);
- Vehicular homicide when proximately caused by driving under the influence or by driving recklessly (Class B, Level VII);
- Any other Class B felony with a finding of sexual motivation; and
- Any felony with a deadly weapon finding.

Persons convicted of first degree murder, first degree rape, and first degree assault are not eligible for community custody, earned early release time, furlough, home detention, partial confinement, work crew, work release, or any other form of early release or authorized leave

of absence unless it is for emergency medical treatment or inpatient treatment because of a first degree rape conviction.

Sentencing judges, law enforcement agencies, and correctional facilities are authorized, but not required, to give offenders who have been convicted of a serious offense notice of sanctions imposed upon persistent offenders.

The Governor is urged to refrain from pardoning or granting clemency to anyone sentenced as a persistent offender until the offender has reached the age of at least 60 and is judged to no longer be a threat to society. The Governor must provide reports at least twice a year on the status of persistent offenders who are released during the Governor's tenure. The reports must continue for at least ten years after the offender's release or until the death of the offender.

FISCAL IMPACT

A review of Initiative 593 indicates that it will increase the prison population by about 40 beds per year. However, the impact will occur largely in the future. In addition, the analysis of the impact on prison populations needs to be considered with caution, as indicated in the attachments.

The fiscal analysis that is available is based on a 1992 review of Initiative 590 (Persistent Offender Accountability Act), which is nearly identical to Initiative 593. The only major difference between the Initiatives is that the crime of Rape in the 3rd Degree (statutory rape) is included as a "most serious offense" under Initiative 593. A copy of the analysis is attached. Dave Fallen, Executive Director of the Sentencing Guidelines Commission, is of the opinion that the impact analysis that he did in 1992 is essentially still valid for Initiative 593.

The impact of Initiative 593 on the state prison population is difficult to accurately predict because the initiative only applies to a relatively small group of offenders with an extensive history of recidivism. As to this select group of offenders, data does not exist which documents the rate, nature, and timing of recidivism.

However, as can be seen from the analysis provided by the SGC, the impact of the Initiative is largely in the future. A "worse case impact" provides that the average daily prison population will increase (a) 63 by the year 1998; (b) 292 by the year 2003; (c) 571 by the year 2008; and (d) 855 by the year 2013.

A fiscal note prepared by the Department of Corrections indicates a cost of $18,046 for the 1993-95 biennium, $3,731,383 for the 1995-97 biennium, and $8,786,791 for the 1997-99 biennium.

NOTE: The information provided above is for analytical and legislative policy purposes only. It is not provided as an expression of support for or opposition to the measure.

ATTACHMENT "A"

CLASS A FELONIES

Statute	Offense	Sericusness Level
10.95.020	Aggravated Murder 1	XV
9A.48.020	Arson 1	VIII
9A.36.120	Assault of a Child 1	XII
9A.36.011	Assault 1	XII
9A.76.170	Bail Jump with Murder 1 Offense	VI
9A.52.020	Burglary 1	VII
9A.44.083	Child Molestation 1	X
69.50.415	Controlled Substance Homicide (Subsequent Drug Conviction)	IX
69.50.401(b)(1)(i)	Create, Deliver, or Possess a Counterfeit Controlled Substance - Schedule I or II Narcotic (First Drug Conviction)	II
9A.28.040	Criminal Conspiracy - Murder 1	Attempt**
9A.28.020(3)(a)	Criminal Attempt - Arson 1 or Murder 1	Attempt**
9A.28.030(2)	Criminal Soiicitation - Arson 1 or Murder 1	Attempt**
70.74.280(1)	Damaging Building, Etc., by Explosion with Threat to Human Being	X
70.24.270(1)	Endangering Life and Property by Explosives with Threat to Human Being	IX
70.74.180	Explosive Device, (Possession with Intent to Use)	IX
9A.32.055	Homicide by Abuse	XIV

9A.40.020	Kidnapping 1	X
9A.82.060(1)(a)	Leading Organized Crime	X
69.50.401(a)(1)(i)	Manufacture, Deliver, or Possess with Intent to Manufacture or Deliver Heroin or Cocaine (Subsequent Drug Conviction or in a Protected Zone)	VIII
69.50.401(a)(1)(i)	Manufacture, Deliver, or Possess with Intent to Manufacture or Deliver Narcotics from Schedule I or II (Except Heroin or Cocaine) (Subsequent Drug Conviction or in a Protected Zone)	VI
9A.32.030	Murder 1	XIV
9A.32.050	Murder 2	XIII
69.50.406	Over 18 and Deliver Narcotic from Schedule I or II to Someone Under 18	X
9.40.120	Possession of Incendiary Device	Unranked
9A.44.050	Rape 2	X
9A.44.040	Rape 1	XI
9A.44.076	Rape of a Child 2	X
9A.44.073	Rape of a Child 1	XI
9A.56.200	Robbery 1	IX
9.41.180	Setting Spring Gun	Unranked
9.82.010	Treason	Unranked
9.41.225	Use of Machine Gun in Commission of Felony	Unranked

A Look at The Persistent Offender Accountability Act
Initiative 590 – "Three Strikes, You're Out"

593

SENTENCING GUIDELINES COMMISSION
STATE OF WASHINGTON

May 5, 1992

David L. Fallen, Ph.D.
Sentencing Guidelines Commission
3400 Capitol Blvd.
Olympia, WA 98504-0927

CHANGES TO PUNISHMENT:

① Mandatory life in prison without the possibility of parole for "persistent offenders".

② No earned good time reductions for offenders convicted of Murder in the first degree, Assault in the first degree, Assault of a Child in the first degree, or Rape in the first degree.

OFFENDERS AFFECTED BY CHANGES:

① A "persistent offender" is someone convicted of a "most serious offense" who has at least two prior convictions on different occasions for a "most serious offense". Juvenile adjudications and offenses not counted in the offender score are not considered.

"Most serious offense" is defined as any of the following felonies (including attempts):

- Any Class A felony (including conspiracies and solicitations)
- Assault in the second degree
- Assault of a child in the second degree
- Child molestation in the second degree
- Controlled substance homicide
- Extortion in the first degree
- Incest when committed against a child under age fourteen
- Indecent liberties
- Kidnapping in the second degree
- Leading organized crime
- Manslaughter in the first degree
- Manslaughter in the second degree
- Promoting prostitution in the first degree
- Robbery in the second degree
- Sexual exploitation
- Vehicular assault
- Vehicular homicide (under the influence or recklessness)
- Any Class B felony with a sexual motivation finding
- Any felony with a deadly weapon finding

There were 16,554 adult felony offenders sentenced in Fiscal Year 1991. It is estimated that 63 of them would have met the definition of "persistent offender". The most common category of current conviction offense is Robbery (34%) followed by Sex offenses (26%) and Assault (16%). These categories are displayed in Figure 1.

② In Fiscal Year 1991, there were 119 offenders sentenced to prison for Murder in the first degree, Assault in the first degree, Assault of a Child in the first degree, or Rape in the first degree. The proposed removal of good time reductions for these offenders is independent of criminal history (i.e., even offenders with no criminal history would not be eligible for good time reductions).

IMPACT ON STATE PRISON POPULATION:

① The potential impact of mandatory sentences of life imprisonment for "persistent offenders" cannot be analyzed with the methods normally employed in this office. Unlike most sentencing proposals, this sentencing initiative applies only to a relatively small group of offenders with an extensive history of recidivism. Accordingly, the recidivism component must be explicitly factored into the impact estimation. Unfortunately, no Washington State data exist which documents the rate, nature, and timing of recidivism for this select group of offenders. One clue regarding the nature of the recidivism can be gleaned from the Commission's Fiscal Year 1991 data. Of the 16,554 SRA sentences that year, 1,844 of the offenders had one or more prior "most serious offenses". The *current* conviction for 25 percent of these 1,844 offenders was also a "most serious offense". The other 75 percent were convicted of less serious felonies.

The mandatory sentencing provisions of this initiative apply to offenders who would be drawing substantial prison terms under the current sentencing policies. Thus any impact of the mandatory sentencing provisions would be well into the future. In order to obtain a sense of the timing for the potential impact, a *worst case scenario* impact was estimated. This analysis used no phase-in adjustments (applies immediately to all offenders regardless of date of offense) and assumes no offender recidivates. Because this last assumption is unrealistic for this group of offenders, it must be emphasized this analysis should not be taken at face-value. The actual impact of this proposal would be substantially less than the figures in the following table.

Worst Case Impact of Mandatory Life Sentences for "Persistent Offenders"
(for timing purposes only – not a forecast)

YEAR	IMPACT	YEAR	IMPACT
1	1	11	296
2	5	12	342
3	18	13	390
4	36	14	439
5	62	15	488
6	93	16	539
7	127	17	589
8	166	18	642
9	207	19	695
10	250	20	746

Note: Impact is defined as an increase to the prison average daily population.

The impact detailed in the previous table is graphed in Figure 2.

A separate analysis was conducted to estimate the impact of removing eligibility for good time reductions for offenders convicted of Rape 1, Assault 1, Assault of a Child 1, and Murder 1. As mentioned earlier, this portion of the initiative would apply to all offenders convicted of these offenses, regardless of their previous criminal history (if any).

In Fiscal Year 1991, there were 119 prison sentences for offenders convicted of Rape 1, Assault 1, or Murder 1 (excluding Aggravated Murder 1). Under current sentencing law, offenders convicted of these offenses are eligible for up to 15 percent sentence reduction for earned good time. The following impact analysis assumes offenders sentenced under current law would earn 87% of their good time (on the average, based on historical data). This analysis does not contain a phase-in adjustment (i.e., the early impact is slightly over-estimated).

Potential Impact of Removing Good Time Eligibility for Offenders Convicted of Rape 1, Assault 1, or Murder 1

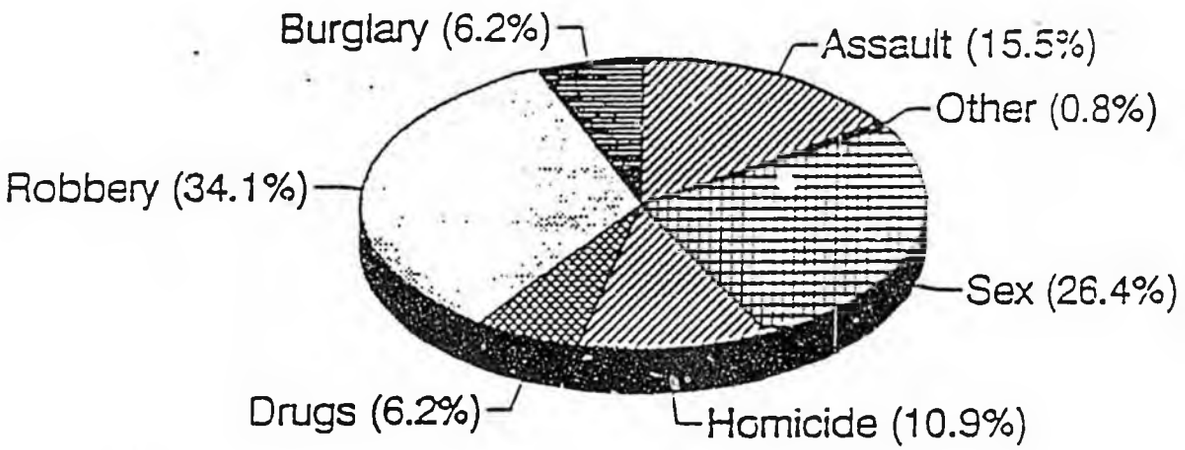
YEAR	IMPACT	YEAR	IMPACT
1	0	11	51
2	0	12	61
3	0	13	69
4	0	14	76
5	1	15	83
6	2	16	88
7	8	17	92
8	17	18	97
9	29	19	103
10	42	20	109

Note: Impact is defined as increase to the prison average daily population.

The impact detailed in the previous table is graphed in Figure 3.

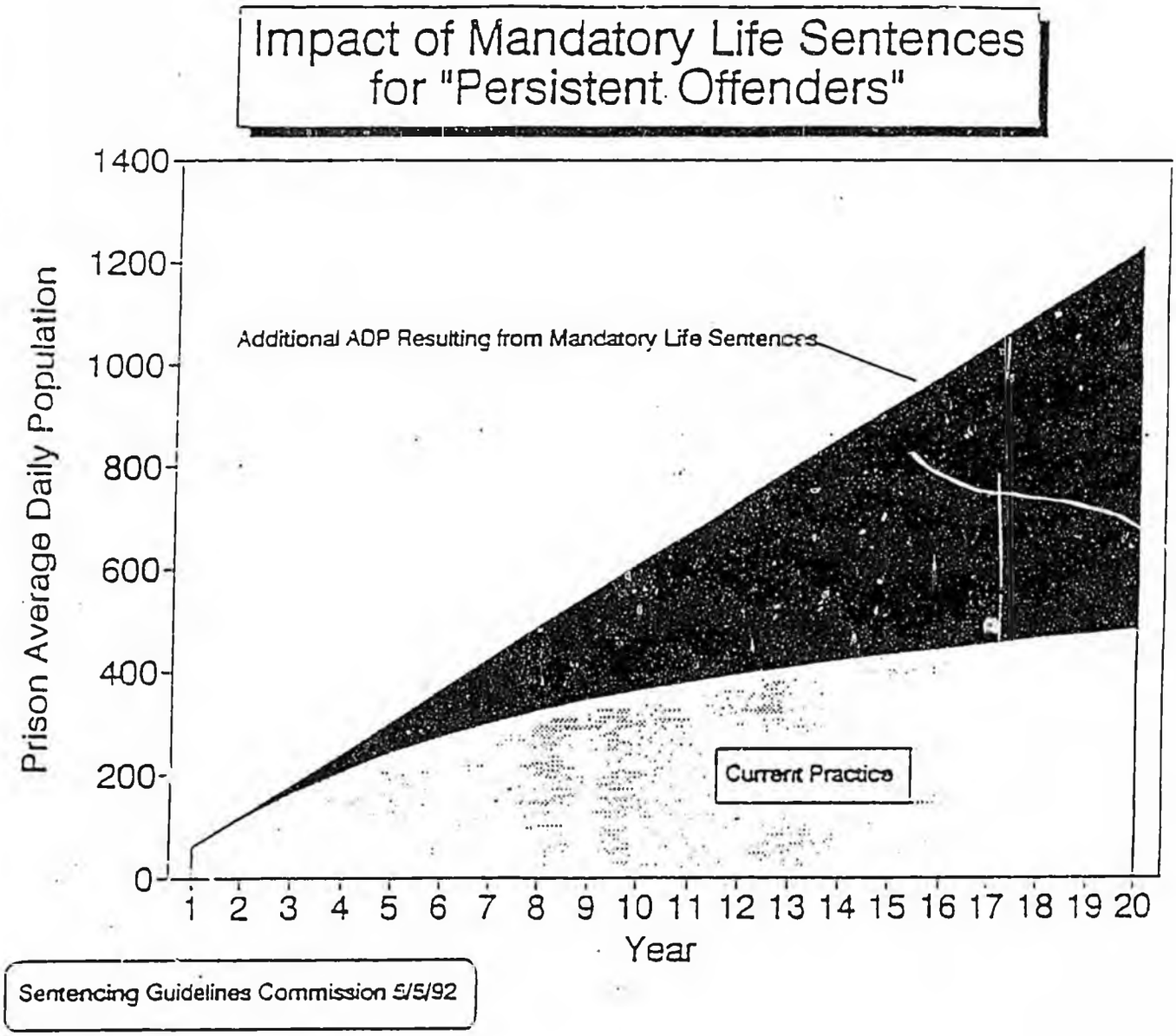
Figure 1

Conviction Offense for "Persistent Offenders" Receiving a Life Sentence



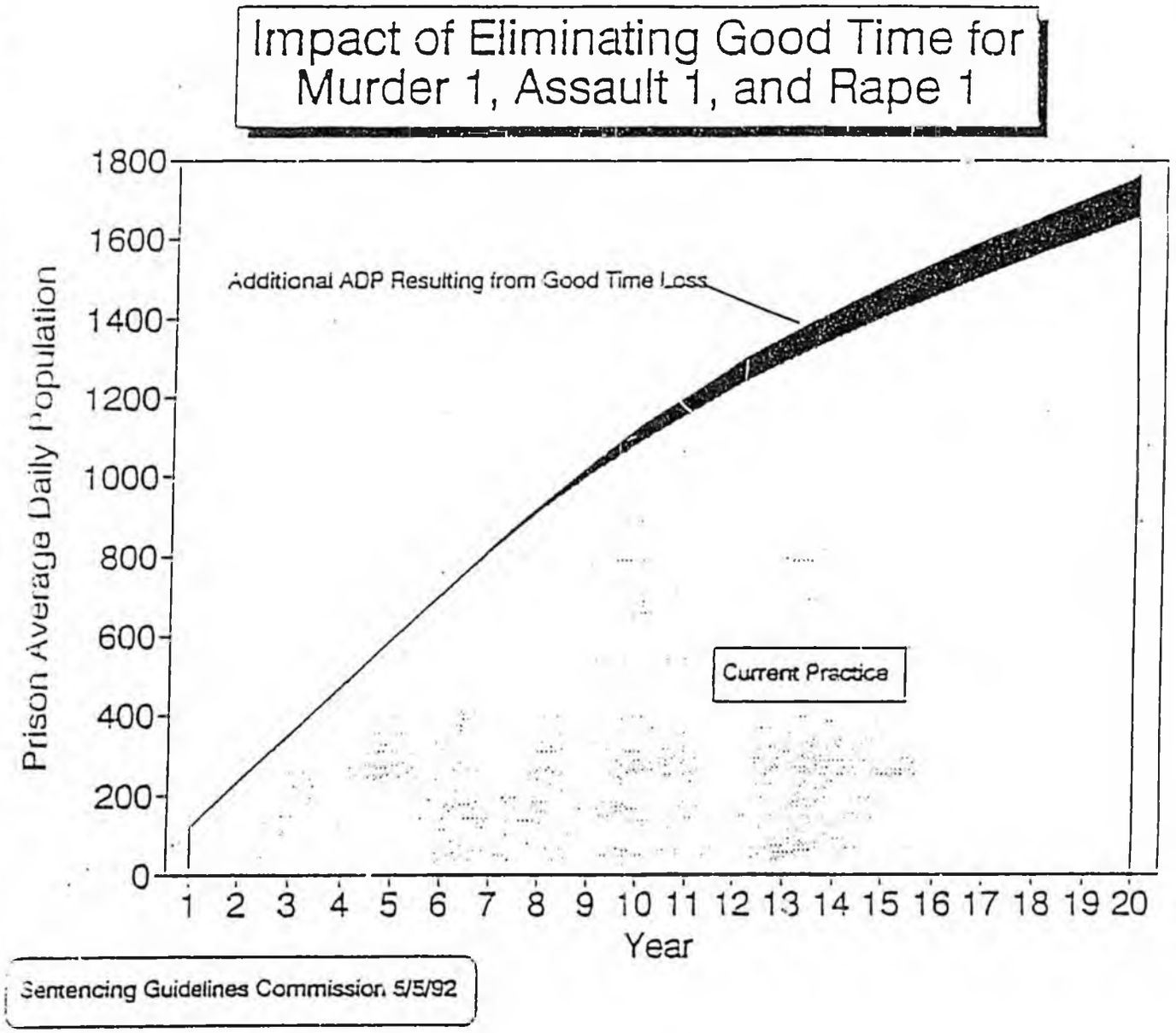
Sentencing Guidelines Commission 5/5/92

Figure 2



Note: This graph displays a worst case scenario and is intended only to display the timing of any potential impact. It is not a forecast.

Figure 3


Impact of Eliminating Good Time for Murder 1, Assault 1, and Rape 1
Prison Average Daily Population
1800
1600
1400
1200
1000
800
600
400
200
0
Additional ADP Resulting from Good Time Loss
Current Practice
1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20
Year
Sentencing Guidelines Commission 5/5/92

3 STRIKES and YOU'RE OUT

POINT **INITIATIVE 593** **COUNTERPOINT**

New weapon against crime or a costly formula for injustice?

By Ida Ballasiotes and Dave LaCourse

Laurie, 31, had just left a work-training class in Kent when a stranger grabbed her from behind. He forced her into her car, holding a knife against her body and ordered her to drive. After directing her behind an abandoned building, he turned up the radio to muffle her screams. Then he forced her down onto the seat and began assaulting her. During the attack, he shoved the knife into her mouth, cutting her, and threatened to plunge it down her throat.

Laurie may not have known her attacker, but the police did. His long string of felony convictions dated back to 1975. His attack on Laurie came less than two weeks after his probation period ended for the last conviction. He had a total of 11 separate prior convictions, including second-degree assault, sexual abuse of a child, sodomy (three counts), first-degree theft, resisting arrest (twice) and first-degree forgery, among others.

His sentence for this brutal kidnapping and rape, even with such an extensive record, was only 12 years and 10 months — not counting time off for "good behavior." He'll be returning to a neighborhood near you around the end of the decade.

Unfortunately, this is not an unusual prison term. Current law recommends sentences that are far lower than most people expect. For example, the sentence for a rapist convicted on a *third attack* is just 14 years, two months.

For child molesters, the law is even more lenient. A third conviction for first-degree child molestation dictates a recommended sentence of only nine years, six months. And if you've been wondering why robberies are increasing, you need only look at how we punish the crime. If someone is convicted of first-degree robbery, his sentence is just five years — even if his rap sheet already contains two violent felonies.

Under initiative 593, Laurie's attacker and other three-time violent criminals would receive a mandatory sentence of life without parole. Which penalty system strikes closer to your sense of justice?

Initiative 593 is refreshingly clear. It states that anyone convicted on a third occasion of a violent crime will receive a mandatory sentence of life in prison. No parole. No probation. No more excuses. Three strikes and you're out.

Only the "worst of the worst" could ever qualify under initiative 593. It would nail only 40 to 70 hard-core criminals per year. But these few chronic criminals are responsible for large amounts of violent crime.

A study by Marvin Wolfgang, criminologist at the University of Pennsylvania, showed that just 7 percent of the criminals committed about 66 percent of violent crime. This included 75 percent of the rapes and robberies and almost all of the murders. Furthermore, these hard-core individuals were rarely punished. They avoided arrest for about a dozen crimes for every crime that led to an arrest. Project Triggerlock, a program of mandatory federal sentences that targets armed drug traffickers and career violent criminals, pegged the figures at 6 percent of the criminals committing 70 percent of the violent crime.

These high-rate, repeat offenders have not only shown society a pattern of violence, but also represent a real danger of returning to crime if released. The Bureau of Justice Statistics cites the odds of recidivism for three-timers at 76 percent. The actual number of criminals returning

Please see Yes, G6

Ida Ballasiotes is a Republican state legislator from Mercer Island. Dave LaCourse is campaign coordinator for Initiative 593

By Tom Wales and Robert Kastama

Initiative 593 is presented as requiring life in prison without parole upon a third conviction only for "the most serious" offenses. When we hear this, we think of crimes like murder and forcible rape. In fact, 593's list of "most serious" offenses is extremely long. Consider this scenario:

"Rick," a 19-year-old, gets into a very bad argument at home. His father orders him to leave the house. Rick grabs a knife from the kitchen, waves it in front of his father and says, "Just try to make me leave." Father calls the police. Rick is convicted of second-degree assault and gets a mid-range sentence of 6 months.

At age 20, he and a friend rob a convenience store. Nobody has a weapon, but Rick sticks his finger in his pocket as if he did. He's convicted of second-degree robbery and sentenced to a year and a month.

Nine years later, at age 30, Rick goes to a tavern with his friends after work. They drink several beers, and Rick has a blood alcohol level of [illegible] a familiar road and rear ends [illegible] mph, causing a [illegible] collarbone to the other driver. He is convicted of vehicular assault.

Rick's sentence for vehicular assault under 593: mandatory life imprisonment, without the possibility of parole. For Rick, that's about a half century of prison. The judge may not consider Rick as an individual or even look at the specific circumstances of the offense.

These types of offenses should be punished. But the punishment should fit the crime. That can happen under the laws we have now; under 593, it won't.

The long list of crimes subject to 593, combined with the complete lack of any judicial discretion, makes 593 a formula for injustice. We should reject out of hand the notion that purse-snatchers should be indiscriminately catalogued with our worst violent predators and sentenced to life behind bars.

Sentencing laws for the worst crimes are already tough. The Leg-

Please see No, G6

Tom Wales has been a public prosecutor for 10 years. Robert Kastama is former superintendent of the Washington State Penitentiary at Walla Walla

No

Continued from G1

islature has been more than willing to respond to citizen outrage about truly serious, violent criminal acts with laws that provide severe punishment, meted out by a judiciary that has no tolerance for violent crime.

We already can put the most serious criminals in prison for many years. Under current law, those convicted of three serious, violent felonies are already getting "standard range" sentences that keep them in prison until their 60s and longer.

In addition, laws we have now allow a judge to impose a sentence far above the standard range on any crime where there are severe aggravating factors.

This power includ s. In cases of sex crimes, the ability to go far above the "standard range" when there is evidence that the offender cannot be treated and will be a future danger. In addition, the Community Protection Act allows indefinite commitment of especially dangerous sex offenders even after they have served their entire prison sentence. And, for those convicted of aggravated first-degree murder, the sentence is either life without parole or death.

Current law already is tough on those who commit the very serious offenses. Unlike 593, however, current law also retains the important element of judicial discretion to assure fairness.

593 won't increase public safety. Proponents of 593 argue that a small group of offenders is responsible for a disproportionate amount of crime. What they don't tell you is that identifying these offenders is not as easy as we'd like to think. Social scientists who have researched this issue have found that, while some offenders are more active than others, it is very difficult to identify this group on the basis of its record alone.

So what happens if 593 passes?

■ People who commit three serious, violent crimes, who are already getting long sentences, will remain in prison for a few more years, into their 70s and 80s — ages when they are least likely to commit another crime.

This probably won't cause even the smallest reduction in the rate of serious, violent crimes.

■ At the other extreme, those convicted of crimes like second-degree assault, second-degree robbery or vehicular assault will see their sentences for a third offense increase dramatically, by as much as 40 or more years.

Their sentences will be lengthened even though we know that criminal activity drops precipitously as people enter their 40s and 50s, and even though we know we can't use conviction records to predict future criminal behavior.

593 costs too much. The proponents of 593 say we don't need to worry about money now; added costs only come later, after those convicted under the law start serving the additional time 593 would require.

But the state will need to start preparing now for the tremendous future tax burden under 593. Washington already has the fastest-growing prison population in the country. Passage of 593 would mean hundreds more old-age "lifers" in our prisons and, eventually, more, expensive prison construction.

The current cost of housing a prisoner is about $25,700 annually. This figure would be even higher for the older prisoners serving under 593 who would need expensive geriatric care. This annual amount doesn't include the price of building new prison space, at about $100,000 per bed.

Costs also would rise dramatically at the county level, where these prosecutions would occur. With 593, we could expect fewer guilty pleas and more — and longer — trials. That would mean far higher costs for already expensive jails, prosecutors and public defenders.

In times of scarce and finite resources, we need to ask: Is keeping such offenders in prison for the rest of their lives the best way to protect public safety? Wouldn't the money be better spent on confining truly violent and dangerous offenders, and on measures that prevent crime?

Initiative 593 would cause great injustice. The alleged benefits would not be there. We already have very tough sentences for the worst crimes, especially upon a third conviction, and 593 would not increase our chance of incapacitating the "most serious" offender. Initiative 593 would cost much more than advertised. It is bad and expensive public policy and should be rejected by the voters of Washington.

Yes

Continued from G1

to crime must be even higher since most violent crimes do not lead to an arrest, conviction or incarceration.

Not surprisingly, police groups and crime victims are among the strongest supporters of Initiative 593. These groups are joined by many prosecutors, business leaders, the Washington state grange and sportsmen's organizations. Supporters gathered the fourth-highest number of signatures ever for an initiative. The 290,000 plus signatures from around the state were about 110,000 more than required for ballot placement.

Despite this widespread support, narrow interest groups have been trying to kill the initiative by misleading the public. For example, they claim that tougher sentences are not working in other states. In truth, there are no other states with a law substantially similar to this proposal. However, a pilot program to get "serious habitual offenders" off the streets in Oxnard, Calif., during the early 1980s worked very well in reducing that city's violent crime. By 1989, after all of the targeted criminals were locked up, "murders declined 60 percent, robberies by 40 percent and burglaries by 29 percent."

The career criminal cares about the sentence he will face if he reoffends. Many inmates in this state have requested information on the "Three Strikes" proposal. In fact, as word of this initiative spread, inmates from as far away as Georgia and Florida have asked about this "get tough" measure.

Critics attack the initiative as being overly broad, but the facts do not support this contention. An independent "worst-case scenario" study completed by the Sentencing Guidelines Commission confirmed the narrow focus of the initiative. It found that for fiscal 1991, only an estimated 63 offenders of the 16,554 felony sentences were covered under the initiative. A proposal that affects .4 percent of felony sentences and only 2.5 percent of violent offenders in a given year is hardly a shotgun approach.

As far as costs are concerned, they are minuscule.

The Department of Corrections worst-case estimate of $12 million over the first six years for incarcerating these people is not a budget buster. In fact, it is about one-tenth of 1 percent — .1 percent.

A national study by Dr. David Cavanagh for the National Institute of Justice and the Wisconsin study by professor John DiIulio at Princeton calculated the costs of crimes versus locking an individual up to prevent crimes. Both studies found the costs of incarceration were ⅓ (or less) the costs of turning offenders loose. A national study by Edwin Zedlewski focused calculations on more serious offenders and found that it was 17 times more expensive to release proven offenders than keep them off the streets.

Our critics claim that life without parole sentences would needlessly hold criminals long after they are a danger to society. They fail to mention that the initiative specifically retains the governor's powers for granting a pardon or clemency for an offender who is truly no longer a threat.

Undaunted, the opponents of 593 try to trivialize some of the crimes covered under the initiative. These allegations understate the seriousness of these crimes.

Assault in the second degree involves deadly weapons or serious bodily injuries, not your average "bar fights." Just ask the family of Matthew Parsons, who was beaten and shaken into a coma in 1991 over 10 consecutive days of abuse by his father. Matthew was sometimes tied up and was admittedly hit with his father's heavy belt, and a kitchen spoon more than 40 times. The attack was so vicious that the pupils of his eyes were blown out. The charge and conviction — only assault in the second degree.

Robbery in the second degree is not the simple theft of a purse, but a violent confrontation. Just ask Ann, a Federal Way woman beaten repeatedly on the head, neck and back i.. front of her young child in broad daylight in the parking lot of a local department store. Her attacker almost got away twice — first, when the system initially failed to pursue him except at her urging and, second, when he tried to plead down to a lesser crime of nonviolent theft.

Letting repeat offenders out merely because their sentence has been completed has proven to be far too expensive in additional crimes, human suffering and expensive civil lawsuits by victims. We have the opportunity to reduce the numbers of victims caused by habitual criminals this November by voting YES on Initiative 593.

Allowing more rapes, robberies, serious assaults, child molestations and homicides after the pattern of violence becomes clear is unjustifiable.

INSIDE POLITICS

Times 10.12.13

● **Giving Mike the business:** Publicly, Gov. Mike Lowry claims everything is hunky-dory between his administration and the business community.

Privately, it's a different story. Inviting bank and security lobbyists to his office a few weeks ago, he griped that they weren't telling their bosses about how well the industry fared during the last legislative session.

Lowry was particularly agitated because one CEO, Phyllis Campbell of US Bank, voted to recommend the Seattle Chamber of Commerce endorse Initiative 602. That's particularly galling since she is a Washington State University regent — and apparently not buying Lowry's argument that 602 will devastate higher education.

● **Trust us, we've been there:** Opponents of 602 are tugging on the provincial hearts of Washington voters pretty hard.

They harp on the evil influence of out-of-state tobacco companies that are bankrolling Initiative 602. And they keep predicting that passage will make our state vulnerable to the dire budget straits of California, brought on by the famous tax-rollback Proposition 13.

They should know. Two top staffers are both recent arrivals from Sacramento. Stephanie Bradfield, who took over as Committee for Washington's Future campaign manager last week, moved north about three years ago. Andy Grow, press secretary, was an aide to a county commissioner in California until moving here in the last few months.

The Dirty Little Secret About Our Crime Problem

Locking criminals up solves it

By Eugene H. Methvin

One of America's best-kept secrets is that our huge investment in building prisons—an estimated $30 billion in the last decade to double capacity—has produced a tremendous payoff: Americans are safer and, as the Justice Department reported in 1991, crime has fallen steadily.

Moreover, some pioneering research and police field testing suggest that if we again double the present federal and state prison population—to somewhere between 1 million and 1.5 million—and leave our city and county jail population at the present 400,000, we will break the back of America's 30-year crime wave.

Liberal opponents will howl, of course. They have convinced many Americans that imprisonment is a failed policy and don't want to hear otherwise. The Edna McConnell Clark Foundation bombards influential media, declaring: "Our prison population has gone up by more than 200 percent in the last 15 years with no resulting decrease in crime." The director of the American Civil Liberties Union's National Prison Project, Alvin Bronstein, writes that "no jurisdiction has ever . . . had an impact on crime rates by an expanded incarceration policy." Washington Post columnist Colman McCarthy insists that prisons don't succeed but "work-release or community-service programs, structured therapy, in-prison job training, restitution, house arrests with electric monitoring and halfway houses do."

Other pundits and experts will point out that a numerical correlation—between increased incarceration and decreased crime rates—does not prove a causation and that other demographic variables may be at least partly responsible for the trend. They are usually the same people who nonetheless find correlations between crime and joblessness, poverty and illiteracy and who argue that public money is better spent addressing these "root causes."

Despite our high prison population, punishment for crime is near an all-time low, Texas A&M University economist Morgan O. Reynolds observes. He did a 38-year comparison of serious crime and probable punishment—that is, the expected days in prison as determined by the median prison sentence for all serious crimes and weighted by probabilities of arrest, prosecution, conviction and imprisonment. He charted the two lines from 1950 to 1988. His chart shows a big horizontal "X."

Probable punishment turned sharply down in 1954, and crime soared. Thus, in 1950 we had 1.8 million serious crimes, and the average criminal risked 24 days in prison. By 1964 imprisonment risk dropped in half, to 12.1 days, and crimes had increased to 4.6 million. By 1974, the criminals risked a mere 5.5 days in prison and America had 10.3 million crimes. Finally, in 1975, punishment turned slightly up, and the crime increase slowed. In 1988, the prison risk was 8.5 days and the number of crimes was 13.9 million.

"We've spent an estimated $30 billion to double our prison population in the past decade, and yet today our prisons crowd in perhaps 140,000 more than they should."

"Why is there so much crime?" asks Reynolds. "The main reason is that crime pays for millions of criminals and potential criminals. Only 17 in 100 murders result in a prison sentence. The imprisonment rate for rape is 5.1 percent, for assault 1.5 percent and for auto theft only 0.3 percent . . . . Even though police make 13 million arrests each year, less than 2 percent of them result in a prison sentence."

(over)

A related analysis produces similar conclusions. During the 1960s, total prison population fell from a then-historical peak of about 219,000 in 1961 to about 195,000 in 1968. During the same decade, crimes soared from 3.4 million in 1960 to 8 million in 1970, according to the FBI's Uniform Crime Reports (UCR) based on incidents reported to police.

Only after 1972 did the prison population start upward, surpassing the 1961 peak in 1975, then soaring to 771,243 by last Jan. 1. And, wonder of wonders, crime declined significantly—whether measured by the FBI's long-standing UCR or by the Justice Department's National Crime Survey of households conducted by its Bureau of Justice Statistics (BJS). The distinction between the two surveys is important. The FBI's UCR, begun in 1929, includes only crimes reported to police; in 1973 Justice began its scientific BJS surveys to estimate actual victimization totals, including crimes not reported to police—which the department estimated at 62 percent in 1990 (and more than half of all violent crimes). The two sets of figures frequently produce seeming contradictions and must be interpreted carefully. For example, the latest BJS report shows that the percentage of assaults reported to police increased from 43 to 47 in 1989-90—which alone would produce an increase of almost 10 percent in the FBI's reported assaults even if there were no actual increase.

Moreover, there are differences in crimes. Half or more murders and aggravated assaults are once-in-a-lifetime crimes of passion that involve acquaintances; robbery and burglary are almost always crimes of deliberation by predators who repeat and repeat and repeat. I rely more heavily on the latter two categories than on others when measuring the effectiveness of imprisonment rates. There are other variables as well. The crack cocaine epidemic, which began in 1985, clearly has produced an increase in criminality since then—including murderous battles over turf. Rape and theft remain the most underreported crimes of all, though efforts by police and victims groups to encourage rape reporting are having some success. And much depends on what year is used as a baseline.

Given these caveats, it is not surprising that the FBI could report a few months ago that the number of reported crimes in the nation in the first half of 1991 increased 2 percent over the first half of 1990, continuing an upward trend evident since the mid-1980s—while the BJS could report at the same time that actual criminal victimization (reported and unreported) *decreased* 3.9 percent last year, continuing a "*downward* trend . . . that began a decade ago. [emphasis added]" Contradictory? Not really. They are describing different groups of crimes over different periods of time.

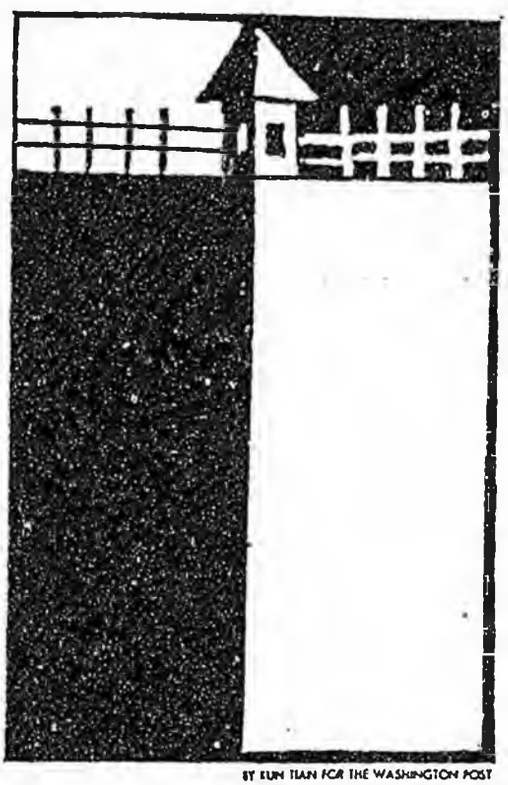
Both surveys, in fact, show a long-term downward trend. Even without adjusting for increased population, increased reporting to police or the crack phenomenon of the late 1980s, the FBI's reported murder rate for the 1981-90 decade declined 8 percent and the burglary rate 26 percent—though the robbery rate increased 5 percent. The broader BJS survey documents an overall 9.2 percent decline in violent crimes since its first survey in 1973; robbery is down 16 percent, burglary 41 percent and rape 33 percent. In sum, the BJS found, the rate of crimes against people was 25 percent lower in 1990 than in 1973 and the rate of household crimes 26 percent lower. The number of personal or household crimes, it added, fell from 41 million in 1981 to 34 million in 1990—a decline of 7 million in a decade.

Michigan, California and Texas in the 1980s have conducted revealing demonstrations of contrasting "deprisonization" and "lock 'em up" policies.

Case 1. Michigan tried it both ways. In the late 1970s, legislators and voters refused to build new prisons, and the state prison was forced to deal with severe overcrowding. The governor granted emergency releases to 20,000 inmates in four years, some more than two years early. Michigan became the only state to record a prison population decrease in 1981-85, dropping from 15,157 in 1981 to 14,604 in 1984 but then jumping sharply to 17,755 in late 1985 after a Detroit Free Press series on early release of prisoners.

The violent-crime rate for Michigan reported by the FBI soared 25 percent, and public outrage mounted. Starting in 1986, a crash prison-building program doubled inmate population in five years. And, wonder of wonders, Michigan's crime rate dropped. Robbery and burglary rates fell more than 25 percent; in Detroit the decline was even more impressive—burglaries down 32 percent, robberies 37 percent. (Murders increased at lesser rates—12 percent in the state and 4 percent in the city, an apparent anomaly probably explained by new and deadly warfare among crack cocaine gangs in Detroit, not in Washington.)

Success in Michigan wasn't cheap. The state voted $888 million to build and expand prisons by 1992, and operating them costs additional millions each year. But there were savings too. In 1988, U.S. Sentencing Commission criminologist Mark A. Cohen calculated the cost of 10 crimes to their victims by combining direct costs such as lost property and wages with estimates of pain, suffering and fear based on known jury awards. Cohen calculated the cost of a rape at $51,050, a robbery at $12,594, an assault at $12,028, a burglary at $1,372. By this measure, the decrease in just two prominent "fear" crimes—robberies and burglaries—saved Detroiters $113,546,000 in a single year.



BY KUN TIAN FOR THE WASHINGTON POST

- Case 2. Since 1982 Californians have approved $3.7 billion in bonds to build prisons. From 1980 to January 1991, inmate population quadrupled from 22,600 to 98,000. By the 1990s, murder, rape and burglary rates fell a whopping 24 percent to 37 percent from their 1980-82 peaks—which translates as an annual reduction of nearly a thousand murders, 16,000 robberies and a quarter of a million burglaries.
- Case 3. Conversely, Texas learned that skimping on prisons inflates crime disastrously. Prison costs had soared because of a burgeoning inmate population, a doubling of the guard/prisoner ratio and a federal judge's order to make costly changes—some indisputably necessary, such as better medical care, but others of dubious value, such as free college courses. The yearly cost per-prisoner would eventually rise from $2,920 to $14,000 in the '80s, but in an early effort to slow it, the legislature in 1983 adopted a turn-'em-loose-faster approach. Thus, while the imprisoned convict population grew by 2½ times, the average term served dropped from 55 percent of sentence to less than 15 percent and the number of convicts on parole increased by 21 times.

Texas A&M professor Reynolds calculated the consequences. The expected punishment for a serious crime dropped 43 percent (from 13 days to 7.4) from 1980 to 1989, though for the nation as a whole it rose by about 35 percent (from 5.5 days to 8.8) in roughly the same period. Factoring the probability of arrest, conviction and imprisonment, a potential criminal in Texas today risks little. Fewer than one out of every 100 serious crimes results in a prison term, and those who land in prison serve an average of only 10 months. For murder an offender risks 24 months, for rape 5.3 months, for robbery 2 months and for burglary 7 days.

Result: The crime rate soared 29 percent in the 1980-89 decade, though nationally it dropped 4 percent, making Texas the second most crime-prone state. In 1980 no Texas city had ranked in the 20 worst American cities in property crimes; in 1988, 13 of the nation's worst 20 cities were in Texas.

If increased incarceration cuts crime, how many convicts should we keep locked away in this "land of the free"? When can we stop? And how much can we afford? We've spent an estimated $30 billion to double our prison population in the past decade, and yet today our prisons crowd in perhaps 140,000 more than they should.

University of Pennsylvania criminologist Marvin Wolfgang compiled arrest records up to the 30th birthday for every male born and raised in Philadelphia in 1945 and 1958 and published a 1990 study comparing the two cohorts. In both, about 35 percent of the young men collected one arrest and most never tangled with the law again. The real hard-core predators were an astonishingly small group of repeaters who were rarely punished; just 7 percent of each age group committed two-thirds of all violent crime, including three-fourths of the rapes and robberies and virtually all the murders. Moreover, this 7 percent not only had five or more arrests by age 18 but went on committing felonies and, for every arrest made, got away with about a dozen crimes.

Incredibly, only 14 percent of the first five arrests resulted in punishment; in the other 86 percent, no charges were brought. Even the 14 killers among the 1945 cohort averaged an appallingly lenient four years behind bars. Yet when punishment was tried, it worked. The few who were imprisoned committed fewer and less serious crimes afterward.

What can be done? Wolfgang's studies suggest that about 75,000 new young, persistent criminal predators are added to our population every year. They hit their peak rate of offenses at about age 16. Locking up all of them from the time of a third felony conviction until, say, age 30 would almost double our present prison population to about 1,230,000. But such long-term imprisonments may not prove necessary if punishment is applied early and consistently.

Another measure of the size of our hard-core criminal population comes from a Justice Department program begun in 1983 and based on the Philadelphia findings. Justice persuaded 20 cities to have their police, prosecutors, schools and welfare and probation workers pool information and focus on the worst offenders, generally youngsters with three or more arrests by age 18. A "serious habitual offender" (SHO) gets priority attention from probation authorities, and if he is arrested anew, investigators and prosecutors throw the book at him with escalating penalties (coupled with rehabilitation efforts) in an effort to stop the revolving door.

In all 20 cities, SHOs consistently accounted for less than 2 percent of all juveniles arrested, or about 18 to 25 youngsters per 100,000 population. Thus, out of 250 million Americans, we would have a maximum of maybe 62,500 SHOs between their 14th and 18th birthdays at any one time. Putting them all behind bars until 30 after the third offense—or even permanently, as is the law in many states, though rarely enforced—would be a relatively inexpensive way to cut a huge chunk out of our still atrocious crime rates.

California's only participating city, Oxnard, began a concerted effort to get the city's active SHOs behind bars, and in 1987 violent crimes dropped 38 percent, more than double the drop in any other California city. By 1989 all 30 of Oxnard's identified active SHOs were behind bars—almost exactly the predictable total for a city of 130,000—and its citizens experienced the lowest crime of a decade. Murders declined 60 percent, robberies 41 percent and burglaries 29 percent.

Based on these social yardsticks, I'd hazard a guess that America's hard-core violent repeaters number upwards of a million. That in turn suggests that if we increase federal and state prison populations to between 1 million and 1.5 million and keep our jails (usually operated by cities and counties for misdemeanor sentences of a year or less) at the present level of about 400,000, we may see a sharp drop in our horrendous crime rates.

And what about those alternatives to imprisonment Colman McCarthy touts?

The American Institutes for Research in the Behavorial Sciences, a non-profit Washington think tank, studied 350 high-repeat Illinois delinquents and found imprisonment was significantly more effective in reducing subsequent arrests from their previous levels. Judges committed the 159 worst prospects to incarceration and sent another 191 to foster or group homes for community "treatment" programs; the latter recorded subsequent arrest reductions of 56 percent to 68 percent while those imprisoned registered 71 percent fewer. Moreover, those not imprisoned were free to continue committing untold crimes while in "treatment."

In short, lock 'em up and you slow 'em down. Turn 'em loose and you pay an awful price. ■

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Report to the Nation on Crime and Justice

Second edition

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Repeat offenders are responsible for much of the Nation's crime

Who are career criminals?

The term "career criminal" has been used to describe offenders who—
- have an extensive record of arrests and convictions
- commit crimes over a long period of time
- commit crimes at a very high rate
- commit relatively serious crimes
- use crimes as their principal source of income
- specialize (or are especially expert) in a certain type of crime
- have some combination of these characteristics.

Such criminals are often described as chronic, habitual, repeat, serious, high-rate, or professional offenders.

Some criminals exhibit all of the above characteristics, but most do not. Some high-rate offenders are arrested frequently and others rarely. In fact, some low-rate offenders are arrested more often than some high-rate ones. The frequency with which an offender commits crimes varies over time. Thus, an offender could be high-rate one month and low-rate the next. Similarly, the offender who commits a serious crime may or may not be committing serious or other crimes at a high rate. And some high-rate and/or serious offenders have no or almost no official prior record of involvement in crime.

A few criminals commit many crimes

Most offenders commit crimes at low rates, but a few do so at very high rates.

Studies in Philadelphia, Pennsylvania; Racine, Wisconsin; and Columbus, Ohio, show that 23 to 34% of the juveniles involved in crime are responsible for 61 to 68% of all the crimes committed by juveniles. In a national sample of U.S. youths age 11–17, the 7% who were the most active offenders committed about 125 crimes per year each, whereas the 55% who were the least active committed an average of fewer than 6 per year.

The same disproportionate pattern occurs with adults. The Chaikens' study of nearly 2,200 offenders coming into California, Michigan, and Texas jails and prisons found that 50% of the robbers committed an average of fewer than 5 robberies per year, but a robber in the most active 10% committed more than 85 per year. And, while 50% of the burglars averaged fewer than 6 burglaries per year, the most active 10% averaged more than 232 per year.

A Washington, D.C., study reported that 24% of all the adult arrests were attributable to just 7% of the adults arrested. Similarly, a 22-State study by BJS of young parolees revealed that about 10% of this group accounted for 40% of their later arrest offenses.

High-rate offenders seldom specialize in one type of crime

Instead, they tend to commit a variety of misdemeanors and felonies as well as both violent and property crimes. They also often engage in related crimes, such as property and drug offenses.

Few repeat offenders are full-time criminals

Most chronic offenders have irregular sources of income. And they usually commit crimes during the periods they are not employed. However, some prefer a "criminal career" to conventional employment.

Juvenile delinquency often foreshadows adult criminal activity

Most juvenile delinquents do not go on to become adult criminals, but many do continue to commit crimes.

- In Marion County, Oregon, 30% of the juvenile boys convicted of serious crime were later convicted of serious crimes as adults.

- In Chicago, 34% of the boys appearing in juvenile court later went to jail or prison as adults.

- The criminal records of 210 serious California juvenile offenders were examined to find out how many crimes they committed from age 18 to 26. Of this group, 173 (86%) were arrested for 1,507 crimes, including:

5	homicides
12	rapes
20	other sex offenses
40	weapon offenses
88	robberies
131	assaults
166	drug offenses
211	burglaries.

The more serious the juvenile career, the greater the chances of adult criminality

In New York City, 48% of the juveniles who had only 1 year of juvenile activity had one or more adult arrests and 15% were serious adult offenders. In contrast, 78% of those with lengthy juvenile careers were arrested as adults and 37% were serious adult offenders.

Long-term studies show that the more often a person is arrested, the greater the chances of being arrested again

For example, a study of Philadelphia males born in 1945 found that—
- 35% were arrested at least once
- 54% of those with one arrest had a second arrest
- 65% of those with two arrests had a third arrest
- 72% of those with three arrests had a fourth arrest.

A study of 539 former Illinois prison inmates showed that 53% of those with one incarceration were arrested within 29 months of their release date compared to a 76% recidivism rate among those with 3 or more incarcerations.

The more often an offender is arrested before going to prison, the more likely and the sooner that person will be arrested after his or her release

A BJS study of young parolees found that 69% were rearrested within 6 years of their release from prison. However, the rearrest rate was 93% among those with 6 or more prior arrests compared to 59% for those with one prior arrest. The median time between release from prison and the first subsequent arrest was 7 months for those with 6 or more prior arrests versus 17 months for those with one prior arrest. Similarly, the more often an offender was arrested before going to prison, the more likely and the sooner he or she was reconvicted and reincarcerated after being paroled.

Criminal history, age, and drug use are among the best correlates of future criminality

The combination of prior adult and juvenile record, age, and drug use provides a better than chance prediction of subsequent criminal activity. Hoffman found that when Federal inmates were placed into risk groups based on these factors, 94% of the persons predicted to be of least risk to society had a favorable 2-year parole outcome vs. 41% of those predicted to be among the worst risks.

The same variables also predict recidivism among State prisoners. For example, Klein and Caggiano found that 21% of a group of inmates in California who were forecast to have a relatively low likelihood of committing future crimes were back in jail or prison within 2 years of their release date vs. a 52% reincarceration rate in the predicted high-risk group.

After their release from custody, offenders continue to commit crimes and often serious crimes

Studies show that 10% to 20% of defendants on pretrial release are arrested while awaiting trial. A study of California offenders by Petersilia et al. found that more than 45% of the persons convicted of crimes such as robbery, burglary, assault, and theft were already on adult or juvenile probation or parole at the time of their conviction.

This study also found that 63% of those given felony probation were rearrested within 2 years of their release date. The recidivism rate was 72% among similar defendants who went to prison. In both groups more than 25% of the new filed charges were for violent crimes (homicide, rape, assault, and robbery).

Nationally, about half the inmates released from State prison will return to prison. And most of those who return will do so within 3 years of their release date. In 1979, 61% of the 153,465 males admitted to State prison had at least one prior incarceration.

The older the offender at the time of arrest, the longer he is likely to continue his criminal career

One study shows that an 18-year old who commits an Index crime usually stops committing crimes within 5 years of the arrest date but a 35-year old who has been committing crimes since age 18 usually goes on committing crimes for another 10 years. However, 18-year olds who commit murder or aggravated assault tend to have criminal careers of about 10 years duration.

Despite repeated convictions and incarcerations, many offenders continue to believe they can get away with committing crimes

The Chaikens asked inmates in three States, "Do you think you could do the same crime again without getting caught?" The answer "yes" was given by—
- 50% of the California inmates
- 34% of the Michigan inmates
- 23% of the Texas inmates.

Motivations for crime range from thrill-seeking to need for money

Juveniles who went on to have adult criminal careers have stated that their main motives for crime were thrill-seeking, status, attention-getting, or peer influence, according to a RAND Corporation study of habitual felons. As criminals approach adulthood, the reasons cited shift to financial needs, especially to money for drugs and alcohol.

THREE STRIKES- YOU'RE OUT

Q & A

The following questions are the ones most commonly asked and the appropriate responses follow.

Q. "Do signatures from last year count for this year?"

A. No. People who signed last year may sign again this year.

Q. "Who qualifies as an offender and what crimes count as 'most serious offenses'?"

A. An offender is a person who has committed a felony crime and is at least eighteen years old or is convicted as an adult. Juvenile crimes are not covered by "three strikes". Most serious offenses include all class A crimes (violent by definition), as well as other violent or serious sex crimes.

Q. "Could an offender who commits a crime spree involving three or more most serious offenses before being caught and convicted receive a life sentence under this law if he had <u>less than two</u> most serious priors already on his record?"

A. No. This law is specifically designed to affect only the criminals who work their way through the criminal justice system <u>twice</u> for most serious offenses and then they commit a third and separate most serious crime.

Q. "The initiative seems to mandate a life sentence without parole even after the offender may no longer be a threat to society. For example, if a three-time assaulter was locked up when he was 35 and he is now 65 and disabled, must he remain in prison until he dies?"

A. No. Sentencing an offender to life without parole is different than life without release. The initiative expressly retains the governor's power to grant clemency or pardon any offender in Section 4 of the Act. Therefore, the governor could release the offender in the above question. However, the governor would invariably be held accountable by the voters for the actions of any offenders he released. This fact would help ensure that only those offenders who are truly no longer a threat would be released.

Q. "Would a two-time most serious offender who remained crime-free in the community for 5 or 10 years get life if they re-offend again?"

A. It would depend on the prior offenses. The Sentencing Reform Act (SRA) already has a working model to allow offenders to "wash-out" Class B (10 years) and C felonies (5 years) from their criminal history. This initiative would adopt these guidelines and thus only Class A felony priors would count after the offender remained crime-free in the community for ten years.

(over)

Q. "Doesn't the addition of serious drug crimes and some of the other offenses increase the number of criminals that would be affected by this law into hundreds of people per year?"

A. No. Our findings indicate that very few offenders, only 40-70 per year, are ever convicted of these types of crimes at three separate and distinct times. But the number of offenders that are affected may be less important than what kind of message society should send offenders who might consider a career in crime.

Q. "Even at 40-70 offenders per year, won't the yearly costs at $20,000-25,000 each add up too quickly to make this idea feasible?"

A. While this initiative may cost more to house those prisoners sentenced to life in the future, the true costs and benefits must be considered before concluding that this law is too expensive.

1. Strong punishments can shape behavior and thus deter crime by scaring some offenders into early retirement and other offenders into leaving the state. Already, some offenders are leaving the state to avoid our tough sex offender laws.

2. Since the three-time criminals who would be sentenced under this proposed law are already receiving some long sentences, only the years <u>added</u> to what an offender would receive under current law could be included as the true costs. As such, there is no immediate fiscal impact and plenty of time to build new prison space and strive to reduce prison costs and/or recidivism rates.

3. Many studies have shown that the recidivism rates for three-time offenders let back into society are between 65-76%. What these studies show is that if these offenders are ever released, most of them would once again commit the same kinds of crimes against innocent people. In addition, the offenders would once again take up the justice system's limited time and money before going back to prison.

4. Police chronological conviction data shows that a certain number of murders, rapes, assaults, robberies, and other crimes would have been prevented over the last six fiscal years if a "three-strikes and you're out" policy had already been implemented. An offender cannot commit more crimes against people outside of prison if they are kept behind bars.

If there are additional questions or concerns, please don't hesitate to call Dave LaCourse at (206) 462-7353 or toll free at (800) 775-3201.

U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Statistics

Bureau of Justice Statistics Special Report

Federal Offenses and Offenders

Federal Sentencing in Transition, 1986-90

By
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Federal sentencing practices changed substantially during the last half of the 1980's. Before the 1986 and 1988 anti-drug abuse laws that stiffened sanctions, the Sentencing Reform Act of 1984 (Public Law 98-473, 98 Stat. 1837 [1984], called "the Act" in this report) had already set in motion alterations of Federal practices. Among other reforms, the Act established the U.S. Sentencing Commission to develop guidelines, which scale punishments to the gravity of the offense and the offender's criminal record. The guidelines apply to Federal prisoners who committed their crimes on or after November 1, 1987.

Under the guidelines Federal prisoners are no longer released from prison to parole by the U.S. Parole Commission. Instead, judges impose prison sentences that are served in full, except for time off that prisoners earn for good behavior. Offenders are supervised following their release from prison only if a judge requires it as a part of the sentence.

Cases subject to the Act ("guideline cases") began to appear in appreciable numbers in 1988, the year after the guidelines went into effect. During 1988, 17% of the offenders convicted in Federal district courts were guideline cases.[1] In 1989 the proportion increased to 51%, and in 1990, to 65%. This report summarizes the main trends in Federal sentencing. It compares sentences imposed before the Act in 1986-87 with those imposed between January 1988 and June 1990, when an increasing percentage of defendants were subject to the guidelines and faced stiffer mandatory sentences. The report also examines time actually served by offenders released from Federal prison between 1986 and 1990.

[1] See *Methodology*, page 10, for a discussion of which cases were included as guideline cases.

June 1992

The Sentencing Reform Act of 1984 introduced "truth in sentencing" to the Federal justice system. The act created a commission that specified sentencing guidelines, which went into effect in late 1987. Defendants convicted for crimes committed after the guidelines serve the actual amount of the sentence, minus a brief "good time" to enable authorities to manage inmates more easily. The guidelines take into account the gravity of the crime and the offender's criminal record. Released prisoners no longer serve time on parole unless judges expressly sentence them to supervision in the community.

This report on sentencing and time served is the first indepth analysis of these issues by the Federal Justice Statistics Program since 1987. It clearly traces changes in sentencing patterns and corresponding changes in time served in prison and supervision after incarceration.

Steven D. Dillingham, Ph.D.
Director

The main findings include:

- The percentage of convicted Federal offenders receiving a prison sentence, which may have included a period of probation, rose from 52% during 1986 to 60% in the first half of 1990.

- Offenders sentenced under the sentencing guidelines were more likely to go to prison than those sentenced before the guidelines went into effect: 74% of the guideline cases in 1990, compared to 52% of the pre-guideline cases in 1986.

- The number and percentage of Federal offenders sentenced to prison increased primarily after 1988. Among those sentenced in Federal district courts, the increased number of drug offenders accounted for most of the increase in sentences to prison.

- The average length of Federal sentences to incarceration decreased between 1986 and 1990 for crimes other than drug offenses. However, because offenders sentenced under the provisions of the Act are not eligible for release on parole, the more recently committed offenders were likely to be incarcerated longer than their predecessors.

- The use of probation sentences decreased from 63% in 1986 to 44% in the first half of 1990.

- Federal prisoners first released in 1990 served an average of 19 months (75% of their court-imposed sentences). This was 29% longer than the average term served by prisoners first released in 1986.

The Sentencing Reform Act of 1984

The Sentencing Reform Act of 1984 (Public Law 98-473, 98 Stat. 1837 [1984]), called "the Act" in this report, established the U.S. Sentencing Commission that had as one of its essential tasks the development of sentencing guidelines. This reform sought to reduce unwarranted disparities between the sentences imposed and the time in prison actually served.[1] The guidelines issued by the commission took effect on November 1, 1987, and applied to Federal offenses committed on that day or later. Sentencing of offenders convicted of crimes committed before that date was governed by the laws applicable before the Act's passage (called the "old law").

The report describes sentencing patterns which occurred during 1986-90. A variety of changes in criminal statutes, as well as shifts in prosecutorial priorities and composition of the offender pool, occurred during this period. Therefore, changes in sentencing patterns may not necessarily reflect the impact of any particular factor such as the guidelines or provisions of the Act.

[1]U.S. Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* (Washington, D.C.: June 18, 1987).

Persons sentenced to prison

The number of persons convicted in Federal district courts increased from 43,920 in 1986 to about 48,730 in 1990 — an average annual increase of about 2.6%.[2] Although this growth in the number of convictions had slowed from the 6.4% average annual rate for the period of 1980 to 1985, the likelihood of being sentenced to incarceration rose, from 52% in 1986 to 60% in 1990 (table 1).

The likelihood of receiving a sentence to prison varied according to offense category. Violent offenders were somewhat more likely to be incarcerated in 1990 than in 1986: 88% in 1990, compared to 83% in 1986. Convicted drug offenders were more likely to receive a prison sentence in 1990 than in 1986 — 86%, compared to 77%. The likelihood of incarceration increased slightly for public-order offenders (37% to 43%), and remained unchanged for property offenders (43% in 1986 and 1990).

As the number of convictions and the likelihood of being sentenced to prison increased, a substantially greater number of Federal offenders was sentenced to prison. From 1986 through 1988, the number of Federal offenders sentenced to prison remained between 23,000 and 23,600 per year. In 1989, the number increased to 27,377, and in 1990, to approximately 29,400.

This 1986-90 increase resulted largely from the growing number of persons sentenced to prison for drug offenses. The number of Federal drug offenders sentenced to prison rose 48%, while the number of persons sentenced to prison for all other types of crimes grew an average of 14%. By 1990 drug offenders accounted for nearly half (47%) of all persons sentenced to prison from Federal district courts, up from 40% in 1986 and 27% in 1980.

[2]*Federal Criminal Case Processing, 1980-89, with Preliminary Data for 1990*, BJS report, NCJ-130526, October 1991, table 9. Figures for 1990 are preliminary.

Table 1. Offenders convicted in cases terminated in U.S. district court: Number and percent sentenced to prison, by year and offense, 1986-89 and preliminary 1990

Most serious offense at conviction	Number of convicted offenders who were sentenced to prison[a]					Percent of convicted offenders who were sentenced to prison[a]				
	1986	1987	1988	1989	Preliminary 1990[b]	1986	1987	1988	1989	Preliminary 1990[b]
All offenses[c]	23,058	23,579	23,450	27,377	29,430	52.5%	53.0%	53.8%	58.5%	60.4%
Violent offenses	1,813	1,837	1,733	1,892	1,999	82.7	82.0	81.0	86.8	87.6
Property offenses	6,291	6,234	5,723	5,974	5,775	43.2	43.4	42.6	44.1	43.1
Fraudulent offenses	4,416	4,610	4,182	4,400	4,391	42.0	44.1	43.6	44.4	44.0
Other property offenses	1,875	1,624	1,541	1,574	1,384	46.6	41.6	40.0	43.3	40.5
Drug offenses	9,272	10,196	10,599	13,306	13,754	77.3	75.9	79.2	84.2	85.6
Public-order offenses	5,682	5,312	5,395	6,194	6,427	37.4	36.6	37.0	40.6	43.2
Regulatory offenses	688	601	640	746	757	34.2	32.5	32.6	36.9	38.3
Other public-order offenses	4,994	4,711	4,755	5,448	5,670	37.9	37.2	37.7	41.2	43.9

[a]Includes sentences to prison with or without probation.
[b]See *Methodology*, page 10.
[c]Total may include offenders for whom offense category could not be determined, but excludes offenders for whom sentence category could not be determined.

Comparing pre-guideline and guideline cases

Length of prison sentences

Between 1986 and 1990, the average length of imposed prison sentences decreased substantially for nearly all types of crimes (table 2). The average sentence to prison for all violent crimes was 32% less in 1990 than in 1986: 90 months in 1990 compared to 132 months in 1986. Sentences to prison for property offenses were 35% shorter, and for public-order offenses, 25% shorter.

Part of the reason for the shorter average sentence was that progressively larger proportions of cases during the period were subject to the Act. Despite this downward trend, the overall average length of prison sentences given to all Federal offenders increased from 53 months in 1986 to 57 months in 1990. This increase resulted from the longer sentences given to drug traffickers outweighing the decline in sentences imposed on others. The average prison sentence for drug trafficking was 64 months in 1986 and 84 months in 1990.[4]

Likelihood of offenders going to prison

Offenders sentenced under the guidelines during 1988, 1989, and the first 6 months of 1990 were more likely, on the whole, to be sentenced to prison than were offenders sentenced during 1986 and 1987 under the old law (table 3). In 1986, 52% of all offenders sentenced under the old law were given incarceration terms, as were 53% of those sentenced during 1987. In the following year, 77% of all guideline cases resulted in incarceration sentences. The proportion remained constant in 1989, and decreased slightly to 74% during the first half of 1990.

[4]*Federal Criminal Case Processing, 1980-89, with Preliminary Data for 1990*, table 17. The category for drug offenses in table 2 of this report includes drug trafficking, drug possession, and other drug crimes. The average prison sentence for nontrafficking offenses in 1986 was 41 months and in 1990 was 13 months.

Within all offense categories, offenders sentenced under the guidelines were more likely to be sentenced to prison than those receiving pre-guideline sentences. During 1986 and 1987, 82% of those convicted of violent crimes were sentenced to incarceration; 91% to 92% of violent offenders were sentenced to prison in guideline cases disposed in 1988-90. Of offenders convicted of Federal drug crimes in 1986 and 1987 under the old law, more than 75% received sentences to prison; under the Act, those rates rose to around 86% to 90%.

Persons charged with public-order offenses — regulatory, weapons, racketeering, immigration offenses, or tax law violations — were more likely to be given prison terms after the guidelines went to effect. During 1986-87, 37% of convicted public-order offenders received prison sentences; from 1988 through the first half of 1990, about 71% to 75% of these offenders were incarcerated (table 3).

Not all of these changes can be attributed to the sentencing guidelines. Beginning in 1984, and every 2 years thereafter, Congress enacted laws that mandated minimum imprisonment terms for offenders convicted of drug or violent crimes. Although over 60 statutes in the Federal Criminal Code prescribe mandatory minimum penalties for Federal offenses, nearly all mandatory prison sentences imposed (94% during 1984-90) were for drug-law and weapons violations specified in 4 statutes.[5] Because a growing proportion of offenders sentenced after 1984 had violated these statutes, some of the increased rate of sentencing to prison, especially for drug crimes, resulted from these mandatory sentencing provisions rather than the guidelines alone.

For all offenses other than Federal drug crimes, the guidelines brought shorter maximum imprisonment sentences, on average (table 4). For example, the average sentence for violent offenses decreased from 132 months in 1986 and 126 months in 1987 to 87 months in 1990.

[5]U.S. Sentencing Commission, *Mandatory Minimum Penalties in the Federal Criminal Justice System* (Washington, D.C., August 1991) p.10.

Table 2. Offenders convicted in cases terminated in U.S. district court: Average length of sentence to prison, by year and offense, 1986-89 and preliminary 1990

Most serious offense at conviction	Average length of sentence to prison				
	1986	1987	1988	1989	Preliminary 1990[a]
All offenses[b]	52.7 mos.	55.2 mos.	55.1 mos.	54.5 mos.	57.4 mos.
Violent offenses	132.0	126.2	110.7	90.6	89.8
Property offenses	34.3	32.5	31.5	26.0	22.3
Fraudulent offenses	32.8	31.1	31.0	26.1	22.3
Other property offenses	37.9	36.5	32.7	25.7	22.5
Drug offenses	62.2	67.8	71.3	74.9	81.2
Public-order offenses	36.9	35.5	30.7	27.6	27.7
Regulatory offenses	47.2	42.1	30.4	24.0	26.3
Other public-order offenses	30.8	32.2	30.7	28.1	27.8

[a]Includes preliminary count of all cases terminated during 1990.
[b]Total may include offenders for whom offense category could not be determined.

Table 3. Offenders sentenced to Federal prison: Pre-guideline and guideline cases, by year and offense, 1986-89 and the first half of 1990

Most serious offense at conviction	Percent of convicted offenders who were sentenced to prison[a]				
	Pre-guideline		Guideline		
	1986	1987	1988	1989	1990[b]
All offenses	52.5%	53.0%	76.5%	76.9%	73.6%
Violent offenses	82.7	82.0	91.0	92.3	91.8
Property offenses	43.2	43.4	53.8	53.3	46.7
Fraudulent offenses	42.0	44.1	60.4	54.0	46.2
Other property	46.6	41.6	43.6	51.8	48.0
Drug offenses	77.3	75.9	85.8	89.5	89.0
Public-order offenses	37.4	36.6	74.7	71.2	71.4
Regulatory offenses	34.2	32.5	42.0	48.6	49.5

Note: Data for "other public-order offenses" are not presented because certain offenses included in that category are not covered by the guidelines. "Public-order offenses," however, reflects all cases. Overall, among guideline cases, 7,197 defendants were convicted in 1988; 22,898 in 1989; and 14,075 in the first half of 1990. The guideline status could not be determined for 1,571 in 1988; 584 in 1989; and 113 in 1990.
[a]Includes sentences to prison with or without probation.
[b]Includes only cases terminated January 1 through June 30, 1990.

Under provisions of the Act, judges were to impose sentences to be served in full, minus a small amount of good-time credits that offenders could receive for good behavior.[6] For most offenses, the guidelines were designed to approximate the time that prisoners actually served in confinement under the old law.[7]

Sentences for Federal drug offenders departed from the pattern for other types of offenders. Drug offenders convicted under the guidelines received a longer, not shorter, prison sentence on average: from 62 months in 1986 and 68 months in 1987 (pre-guideline), to 71 months in 1989 and 77 months in the first half of 1990. (See the box on this page.)

[6]Such credits are accumulated at the maximum rate of 54 days per year for all persons serving imprisonment terms longer than 12 months.

[7]Michael K. Block and William M. Rhodes, "The impact of the Federal sentencing guidelines," *NIJ Reports* (Sept/Oct 1987) 205, p. 2.

Table 4. Average sentences to Federal prison: Pre-guideline and guideline cases, by year and offense, 1986-89 and the first half of 1990

Most serious offense at conviction	Average length of imposed prison sentences				
	Pre-guideline		Guideline[a]		
	1986	1987	1988	1989	1990[c]
All offenses	52.7 mos.	55.2 mos.	42.1 mos.	53.1 mos.	56.9 mos.
Violent offenses	132.0	126.2	83.0	83.2	86.7
Property offenses	34.3	32.5	14.5	15.5	16.4
Fraudulent offenses	32.8	31.1	13.1	13.3	13.4
Other property	37.9	36.5	17.7	20.5	23.5
Drug offenses	62.2	67.8	56.8	70.7	77.4
Public-order offenses	36.9	35.5	19.0	24.7	26.1
Regulatory offenses	47.2	42.1	23.4	22.3	21.1
Other public-order	30.8	32.2	18.6	25.0	26.8

Note: The number of guideline cases in 1988 was 5,500; in 1989, 17,608; and in the first half of 1990, 10,361. The number of cases missing guideline designation in 1988 was 1,256; in 1989, 452; and in 1990, 95.
[a]Excludes nonguideline cases in 1988-90. See table 2 for average sentences of all cases.
[b]Includes a small number of cases sentenced under guidelines.
[c]Includes only cases terminated between January 1 and June 30, 1990.

Sentences for Federal drug offenders departed from the pattern for other types of offenders. Drug offenders convicted under the guidelines received a longer, not shorter, prison sentence on average: from 62 months in 1986 and 68 months in 1987 (pre-guideline), to 71 months in 1989 and 77 months in the first half of 1990. (See the box on this page.)

Sentences to probation

From 1986 through the first half of 1990, the proportion of offenders sentenced to probation (whether combined with prison terms or not) declined from 63% to 44% (table 5).[8] The sharpest decrease occurred after 1988 and was especially pronounced for offenders convicted of violent or drug crimes. In 1988, 33% of violent criminals were sentenced to some type of probation sentence; in 1990, 19%. Over the same span of time, the percentage of convicted drug offenders sentenced to probation went from 30% to 17%.

The proportion of all offenders sentenced to "straight" probation, without any term of confinement, changed relatively little for the population as a whole from 1986 to

[8]The offenders include only those sentenced by the Federal district courts, excluding petty offenses.

Sentences imposed on offenders of Federal drug laws and the prison time the offenders serve

Congress and the Federal criminal justice system have placed a high priority on the enforcement of the Federal drug laws. This emphasis is evident in prosecution and sentencing patterns, as well as time served in prison. Between 1980 and 1990, the number of drug law offenders convicted in Federal district courts more than tripled, while the number of nondrug convictions increased by 32%. The proportion of convicted offenders sentenced to incarceration for drug crimes also rose over this period, from 72% in 1980, to 77% in 1986, to 88% in 1990. For drug traffickers, the likelihood of imprisonment increased from 77% in 1980 to 83% in 1986, and to 91% in 1990.[9]

The length of imposed incarceration sentences increased even more dramatically. The average sentence imposed on those convicted of drug crimes in 1980 was 47 months. By 1986, the average had risen to 62 months, and by 1990, to 81 months.

The 1986 and 1988 anti-drug abuse laws prescribed stiffer sentences and mandatory minimum incarceration terms for Federal drug law offenders, especially traffickers. The combined effect of these laws and the sentencing guidelines has been to increase the length of incarceration sentences actually served by offenders.

Drug law offenders sentenced during 1990 under the guidelines will serve at least 66 months in prison, on average, and perhaps even more if they lose good-time credits for not complying with prison regulations. This represents a sharp increase in time served. Drug offenders released from Federal prison in 1986 served an average of 22 months; those released in 1990 served 30 months, on average. Dispositions and sentences reported for guideline cases reflect only cases disposed of during the study period. No guideline cases requiring more than 2½ years from charge to final disposition were included.

The courts are also imposing terms of supervised release on most drug law offenders sentenced under the guidelines. During the first half of 1990, 87% of all offenders sentenced for Federal drug crimes were required to be supervised upon release from prison. Ninety-one percent of those convicted of trafficking offenses were so required. The average number of months to be served was 49 for all drug offenders combined, and 50 months for those convicted of trafficking.

[9]*Federal Criminal Case Processing, 1980-1989, with Preliminary Data for 1990*, NCJ-130526.

1990. In 1986, 44% of all offenders were given straight probation sentences; in the first half of 1990, the proportion had declined to 38%.

A more dramatic change characterized the use of probation sentences in combination with incarceration in guideline cases. Whereas about a third of all offenders convicted of violent crimes received some kind of sentence to probation in the pre-guideline 1986-87 period, the proportion declined to less than a tenth of guideline cases sentenced for violent offenses during the first 6 months of 1990 (table 6).

Similar large declines occurred for sentences to probation for drug offenders (from 40% in 1986 and 35% in 1987 to 11% in 1990) and public-order offenders (from 72% in 1986 and 68% in 1987 to 28% in 1990). The decline in the percentage of property offenders sentenced to probation was somewhat less, from 76% and 73% in 1986-87 to 56% in 1990. This reduced frequency of sentences to probation reflects in part change in Federal law. The Act prohibited judges from sentencing to both prison and probation except when the guidelines recommend imprisonment of at least 1 month but not more than 6.

Time served in prison

Most of the prisoners released during 1986-90 were sentenced to prison under the laws in force before the Act's provisions took effect. Consequently, the U.S. Parole Commission determined the time of their release. After the U.S. Sentencing Commission promulgated its guidelines, the Parole Commission adopted release policies that reflected the sanctions recommended by the guidelines. The discussion that follows describes the time served by prisoners released under this transitional policy.

Table 5. Offenders sentenced to Federal probation: Type of sentence, by year and offense, 1986-89 and the first half of 1990

Most serious offense at conviction	Percent of offenders sentenced to: Any probation[a] 1986	1987	1988	1989	1990[b]	Straight probation only 1986	1987	1988	1989	1990[b]
All offenses	62.5%	56.9%	54.6%	45.7%	43.9%	44.4%	38.5%	40.1%	37.3%	37.5%
Violent offenses	34.9	33.3	32.9	21.3	19.0	19.9	18.5	20.8	16.5	15.5
Property offenses	75.8	73.0	72.9	65.5	65.8	55.4	50.6	52.6	52.4	55.0
Fraudulent offenses	78.8	76.1	75.7	68.1	67.3	57.6	51.9	53.3	53.4	55.2
Other property offenses	68.0	65.1	65.5	58.6	61.7	49.7	47.0	50.6	48.6	54.5
Drug offenses	40.0	35.3	29.6	19.5	16.8	22.4	19.4	19.3	15.1	14.2
Public-order offenses	72.2	68.4	65.9	60.3	58.4	55.5	51.0	52.5	51.3	51.2
Regulatory offenses	77.7	76.1	74.0	68.7	67.3	63.8	60.6	61.7	60.2	60.6
Other public-order offenses	71.2	67.0	64.4	58.8	56.8	53.9	49.1	50.7	49.7	49.6
Number of offenders sentenced to probation	26,236	26,015	23,659	20,488	9,513	18,621	17,614	17,375	16,728	8,124

[a]Includes straight probation and any combination of incarceration with probation.
[b]Includes only cases terminated between January 1 and June 30, 1990.

Table 6. Offenders sentenced to any type of Federal probation: Pre-guideline and guideline cases, by year and offense, 1986-89 and the first half of 1990

Most serious offense at conviction	Percent of offenders sentenced to probation[a] Pre-guideline 1986	1987	Guideline[b] 1988	1989	1990[c]
Violent offenses	35%	33%	16%	9%	9%
Property offenses	76	73	49	47	56
Fraudulent offenses	79	76	46	48	57
Other property offenses	68	65	54	46	53
Drug offenses	40	35	16	11	11
Public-order offenses	72	68	29	29	28
Regulatory offenses	78	76	61	52	52
Number of offenders sentenced to probation	26,236	26,007	1,684	5,410	3,821

Note: Data for "other public-order offenses" are not presented because certain offenses included in that category are not covered by the guidelines. "Public-order offenses," however, reflects all cases. Overall, among guideline cases, 7,197 defendants were convicted in 1988; 22,898 in 1989; and 14,075 in the first half of 1990. The guideline status could not be determined for 1,591 cases in 1988; 584 in 1989; and 113 in 1990.
[a]Includes straight, mixed, and split probation sentences.
[b]Excludes nonguideline cases in 1988-90.
[c]Includes only cases terminated between January 1 and June 30, 1990.

In calendar year 1990 Federal offenders who were released from prison for the first time on a sentence imposed in a U.S. district court had served an average (mean) of 19 months, which amounted to 75% of the court-imposed sentence (table 7). Prisoners sentenced for violent offenses served an average time of more than 4 years, substantially longer than offenders sentenced for property, drug, or public-order crimes. Convicted murderers who were released served an average of over 7 years. Kidnapers served an average of more than 8 years.

While violent offenders served longer in prison than other Federal offenders, on average they served smaller fractions of their sentences in prison. Overall, violent offenders were released from prison after serving less than two-thirds of their maximum sentences; murderers and kidnapers were released after serving about half of their sentences.

When offenders are categorized by length of sentence imposed, within each category violent offenders spent slightly longer in prison than offenders convicted of other kinds of offenses (table 8). For example, violent offenders who were sentenced to a maximum prison term of 2 years served an average of 23 months before release, while other offenders with the same maximum sentence served about 10% less, 18 to 21 months.

On average, prisoners sentenced to less than 1 year served nearly all of their terms. A few exceeded their initial terms because they received sentences for crimes committed while in prison or for convictions following the original sentence. Those with 2-year sentences served 83% of the imposed term, those with 3-year sentences served 72%, and those with terms of 8 years served 53% of the imposed term. Persons sentenced to 10 years served an average of 48% of the maximum term imposed.[a]

[a]These numbers may differ from those reported by the Bureau of Prisons because they refer only to first releases of prisoners sentenced in Federal district courts for violations of the U.S. Code. The Bureau of Prisons typically counts all persons in its custody, including those returned to its custody for probation and parole violations, as well as some State, military, and District of Columbia prisoners.

Table 7. Prisoners released from Federal prison in 1990: Average time served to first release and percent of sentence served, by offense

Most serious offense at conviction[a]	Number of prisoners released	Average time served	Percent of sentence served
All offenses[b]	25,591	19.2 mos.	75.0%
Violent offenses	1,458	54.2 mos.	64.8%
Murder	43	92.3	53.2
Negligent manslaughter	28	23.0	78.4
Assault	401	45.0	69.1
Robbery	826	58.4	62.2
Rape	19	64.6	51.8
Other sex offenses	87	34.0	72.3
Kidnaping	31	106.3	50.5
Threats against the President	23	25.8	89.2
Property offenses	5,354	16.3 mos.	76.2%
Fraudulent property	3,899	15.1	76.7
Embezzlement	400	11.6	82.9
Fraud	2,797	15.2	76.0
Forgery	323	14.6	73.5
Counterfeiting	379	19.0	78.0
Other property	1,455	19.6 mos.	74.8%
Burglary	79	27.2	73.3
Larceny	867	16.8	77.0
Motor vehicle theft	204	22.6	69.1
Arson	39	38.8	66.8
Transportation of stolen property	168	28.3	68.7
Other	98	8.5	82.0
Drug offenses	7,685	29.7 mos.	67.6%
Trafficking	7,279	30.7	66.6
Possession and other	394	10.6	87.7
Public-order offenses	10,899	8.6 mos.	81.0%
Regulatory offenses	477	18.2	78.7
Weapons	1,192	20.9	78.6
Immigration offenses	7,329	4.1	82.0
Tax law violations	449	12.0	73.1
Bribery	79	11.5	78.5
Perjury	67	13.2	80.2
National defense	24	20.7	83.6
Escape	157	18.4	92.8
Racketeering and extortion	475	31.2	64.3
Gambling	2	8.3	86.6
Liquor	2	11.2	91.7
Mail or transport of obscene materials	69	24.8	75.7
Traffic offenses	434	2.0	91.6
Migratory birds	34	7.3	94.1
Other[c]	109	13.9	100.5

Note: Includes prisoners first released after serving terms imposed by Federal district courts.
[a]Excludes prisoners with life sentences and others whose sentence could not be determined.
[b]Includes 195 prisoners whose offense category could not be determined.
[c]Average time served exceeded the average sentence because the sentence was the longest single sentence imposed but the time-served average includes time for all sentences.

Offender characteristics and time served

In general, offenders who were convicted at age 19 or 20 served shorter prison terms than offenders over age 20 (table 9). This difference may reflect a number of separate factors. Younger offenders are less likely to have prior convictions, and for that reason judges may impose shorter sentences on them. The law also allows special sentences for some youthful offenders. Female prisoners generally served shorter terms than males because they were convicted of less serious offenses and tended to have fewer prior convictions.

Among offenders convicted of drug offenses, foreign nationals served slightly longer sentences than U.S. citizens. In contrast, noncitizens served much shorter sentences than U.S. citizens for "other" public-order offenses, including immigration offenses. Foreigners can violate immigration laws simply by illegal entry, whereas U.S. citizens convicted of immigration violations are often involved in more serious crimes.

For assault, robbery, immigration offenses, and tax law violations, black offenders served longer prison terms than white offenders (table 10). In counterfeiting, motor vehicle theft, regulatory offenses, and racketeering and extortion, white offenders served more time incarcerated than black offenders. Racial differences in time served might be mostly or entirely explained by differences in sentences or other legal factors. For example, the 2-year difference for assault primarily stemmed from a larger percentage of blacks (55%) than whites (29%) having a sentence of 10 or more years.

Table 8. Prisoners released from Federal prison in 1990: Average time served to first release, by offense and sentence length

Sentence imposed*	Average number of months served in prison: All offenses	Violent offenses	Property: Fraud	Property: Other	Drug offenses	Public-order: Regulatory	Public-order: Other
6 mos.	6 mos.	7 mos.	6 mos.	7 mos.	7 mos.	6 mos.	7 mos.
12	13	13	11	12	14	13	14
24	20	23	18	21	21	20	21
36	26	30	22	23	27	25	26
48	31	36	28	29	32	...	33
60	38	42	33	38	39	40	39
72	43	51	37	41	43	...	41
84	48	58	40	...	46	...	...
96	51	65	40	49	49	...	51
120	58	70	51	56	55	...	57

Note: Includes prisoners first released after serving terms imposed by Federal district courts. Excludes prisoners with life sentences, those whose sentence could not be determined, and prisoners for whom offense category could not be determined. The number of missing cases was 3,769.
.. Fewer than 20 cases.
*Average time served exceeded the average sentence in some offense categories because "sentence imposed" refers to the longest single sentence imposed, but time-served averages include time for all sentences.

Table 9. Prisoners released from Federal prison in 1990: Average time served to first release, by offense and offender characteristics

Offender characteristic	Average number of months served in prison: Violent offenses	Property: Fraud	Property: Other	Drug offenses	Public-order: Regulatory	Public-order: Other
All offenders	54.2 mos.	5.1 mos.	19.6 mos.	29.7 mos.	18.2 mos.	8.1 mos.
Age						
19-20	40.7	9.3	12.4	21.3	...	3.5
21-30	56.4	13.6	17.5	26.8	19.8	6.0
31-40	52.9	15.5	20.3	30.6	18.4	10.1
Over 40	54.6	16.0	22.2	33.9	16.8	14.4
Sex						
Male	55.1	15.9	20.9	30.5	18.7	8.3
Female	39.0	11.2	11.8	23.2	13.3	6.2
Ethnicity						
Hispanic	52.9	12.0	20.8	32.3	16.2	4.7
Other	54.3	15.5	19.5	28.4	18.6	16.4
Nationality						
U.S.	55.5	15.7	19.8	27.7	19.0	16.6
Other	33.9	12.3	17.0	34.4	15.3	4.8

Note: Includes prisoners first released after serving terms imposed by Federal district courts. Includes prisoners with life sentences and others whose sentence could not be determined. Excludes prisoners for whom offense category could not be determined. The number of cases missing data on average time served in 1990 was 195.
... Fewer than 20 cases.

Table 10. Offenders released from Federal prison in 1990: Average time served to first release, by race and selected offenses

Offense	Average number of months served in prison: White	Black
Violent offenses		
Assault	37.1 mos.	60.5 mos.
Robbery	55.6	65.0
Kidnaping	98.3	...
Property offenses		
Embezzlement	10.9 mos.	10.3 mos.
Fraud	14.5	14.5
Forgery	17.6	16.2
Counterfeiting	19.9	18.6
Burglary	24.7	25.4
Larceny	17.1	18.3
Motor vehicle theft	29.2	23.6
Arson	28.7	...
Transport of stolen property	28.6	28.3
Other property	9.9	8.8
Drug offenses		
Trafficking	25.9 mos.	26.1 mos.
Possession	10.1	10.9
Public-order offenses		
Regulatory offenses	19.2 mos.	17.6 mos.
Weapons	20.8	20.1
Immigration	4.8	10.6
Tax law	10.7	13.7
Bribery	10.7	...
Perjury	11.2	...
Escape	15.9	18.1
Racketeering and extortion	29.1	23.6
Mail or transport of obscene material	13.4	...
Traffic	2.3	2.1
Migratory birds	2.7	...
Other	1.8	...

Note: Includes prisoners first released after serving terms imposed by Federal district courts. Excludes prisoners with life sentences and others whose sentence could not be determined. Excludes prisoners for whom offense category could not be determined. In 1990, 186 cases were missing race or offense of offender.
... Too few cases for reliable estimate.

Hispanic offenders, who could be of any race, served prison terms similar to non-Hispanics in all categories except immigration law violations, for which Hispanics had a shorter average sentence.

Trends in time served

Offenders first released from prison in 1990 had served on average 29% more time than those released in 1984 (table 11). Although the time served in prison increased for every offense category, the largest increases were for regulatory offenses (from 13 months in 1984 to 18 months in 1990) and for drug offenses (from 22 months to more than 29 months). The proportion of the sentence served prior to first release from prison increased from 69% in 1984 to 75% in 1990 (table 12). Overall, and for most individual offenses, the percentage of sentence served increased the most in 1989 and 1990, as the earliest offenders sentenced under the provisions of the Act left prison. As mentioned above, these offenders were not eligible for release to parole supervision.

Time served in nonguideline and guideline cases

It is too early to determine the precise effect of the sentencing guidelines on time served in Federal prison. Relatively few offenders sentenced to prison in guideline cases have completed their terms, and those released in 1990 who were sentenced under the guidelines had received a sentence of less than 3 years.

The effect of the sentencing guidelines can be estimated, however, using the assumption that the prisoners earn the maximum permitted time off for good behavior. Prisoners sentenced under the guidelines to imprisonment longer than 1 year are awarded good-time credits. For each year of the sentence a prisoner can receive a credit of 54 days, unless the Bureau of Prisons determines that the prisoner has not complied satisfactorily with institutional regulations during the preceding year.

Table 11. Offenders released from Federal prison: Average time served to first release, by offense and year of release, 1984-90

Year of first release	Number of releases*	Average time served until first release: All offenses	Violent offenses	Property: Fraudulent	Property: Other	Drug offenses	Public order: Regulatory	Public order: Other
1984	16,758	14.9 mos.	49.9 mos.	12.6 mos.	16.5 mos.	21.9 mos.	12.6 mos.	6.5 mos.
1985	16,606	14.9	49.9	12.3	17.3	21.2	14.9	6.4
1986	22,122	14.9	49.6	13.5	19.3	22.1	15.9	6.0
1987	22,315	16.3	48.8	13.3	18.8	23.0	16.3	7.1
1988	22,022	18.7	54.2	14.8	21.0	25.2	18.3	8.5
1989	23,749	18.7	52.6	15.5	18.4	27.7	17.7	8.0
1990	25,591	19.2	54.1	15.1	19.6	29.6	18.2	8.1

Note: Includes only prisoners first released after serving terms imposed by Federal district courts.
*Includes prisoners with life sentences, those whose sentence could not be determined, and the following number of prisoners for whom offense category could not be determined:
1984 (403), 1985 (609), 1986 (522), 1987 (355), 1988 (220), 1989 (179), and 1990 (195).

Table 12. Offenders released from Federal prison: Percent of sentence served to first release, by offense and year of release, 1984-90

Year of first release	Number of releases	Average percent of sentence served until first release: All offenses	Violent offenses	Property: Fraudulent	Property: Other	Drug offenses	Public order: Regulatory	Public order: Other
1984	16,751	68.6%	49.2%	67.3%	65.6%	58.4%	69.5%	78.2%
1985	16,581	69.3	56.1	68.4	68.2	59.9	68.0	77.2
1986	22,117	67.5	53.8	65.8	64.0	59.0	66.9	75.2
1987	22,312	67.9	56.8	68.3	64.7	59.9	68.9	76.1
1988	22,013	66.9	57.6	67.7	65.6	58.3	67.6	76.1
1989	23,725	70.8	59.0	69.8	69.7	61.9	73.4	79.9
1990	25,574	75.0	64.8	76.7	74.8	67.6	78.7	81.1

Note: Includes only prisoners first released after serving terms imposed by Federal district courts.
Excludes prisoners with a life sentence and those whose sentence could not be determined.

f prisoners sentenced under the guidelines during 1990 receive full good-time credit, they will serve substantially more time, on average, than prisoners who were released during 1990 (table 13). Offenders sentenced under the guidelines for violent offenses in 1990 will serve 74 months in prison on average, compared to 54 months for offenders released in 1990. Federal drug offenders sentenced under the guidelines will serve 66 months in prison, compared to 30 months for prisoners released in 1990. Those convicted of nonfraud-related property offenses and regulatory public-order offenses will serve the same time as their counterparts in the past, on average, while those convicted of fraud crimes will serve slightly shorter terms (12 months as opposed to 15 months served by those released in 1990).

These differences between the time served by those released in 1990 and the time expected to be served by those sentenced under the guidelines in 1990 may reflect not only changes in the sentencing laws but also differences in offense and offender characteristics of the two populations.

Supervised release

As part of the broader reform of Federal sentencing procedures, the Sentencing Reform Act of 1984 eliminated the U.S. Parole Commission's authority to release prisoners in advance of the time imposed by the court. The Act did provide for "supervised release," a period of time during which prisoners would be under supervision in the community. The sentencing judges must specify the length of supervision for such a release, if it is part of a sentence. Under the old system of parole supervision, released prisoners were required to be supervised in the community by Federal parole officers until the expiration of the court-imposed maximum sentence.

Judges are not required to impose supervised release. If they choose to do so, judges can sentence offenders to a term within a permitted maximum — up to 5 years for those convicted of the most serious felonies. The declared purpose of this change in law was to have the courts allocate resources for community supervision to only those offenders who were thought to require supervision, rather than to all persons who were released before their sentences expired.

Sixty-nine percent of all persons sentenced under the guidelines during the first half of 1990 were required to serve terms of supervised release after prison (table 14). Violent offenders (89%) and drug offenders (87%) were the most likely to have a supervised release; public-order regulatory offenders (64%) and property offenders (40%) were the least likely.

The average time to be served under supervision in the community after release from prison, by all offenders so sentenced, was 42 months. The longest average supervision terms were imposed on persons convicted of violent crimes, especially murder (39 months), robbery (44 months), kidnaping (52 months), and drug trafficking (50 months).

Congress gave Federal courts the authority to extend terms of supervised release up to the statutory maximum number of months and to terminate supervision early. The courts may also revoke supervision for violations of the terms and conditions of release and send offenders back to prison.

Table 13. Time served by prisoners first released in 1990 and estimated time to be served by prisoners sentenced in guideline cases during the first half of 1990, by offense

Most serious offense at conviction	Time served by prisoners released during 1990	Estimated time that prisoners sentenced during the first half of 1990 are expected to serve*
Violent offenses	54.1 mos.	74.0 mos.
Property offenses	16.3	14.6
Fraudulent offenses	15.1	12.0
Other property offenses	19.6	20.5
Drug offenses	29.9	66.1
Public-order offenses	8.6	22.8
Regulatory offenses	18.2	18.5
Other public-order offenses	8.1	23.4
Number of prisoners	25,591	10,361

Note: The number of prisoners released during 1990 for whom offenses could not be classified was 195.
*Assumes that all prisoners sentenced under the provisions of the Sentencing Reform Act of 1984 will earn the maximum amount of time off for good behavior.

Table 14. Offenders sentenced in guideline cases during the first half of 1990: Percent sentenced to supervised release and time to serve under supervision, by offense

Most serious offense at conviction	Prisoners sentenced in guideline cases, 1990	
	Percent sentenced to supervised release	Average length of supervision
All offenses	68.9%	42.1 mos
Violent offenses	88.7	40.6
Property offenses	40.0	31.8
Fraudulent offenses	39.1	31.2
Other property offenses	42.1	33.1
Drug offenses	86.5	49.2
Public-order offenses	63.9	30.5
Regulatory offenses	41.4	28.3
Other public-order offenses	68.7	30.8
Number of cases sentenced to supervised release	9,967	9,967

Methodology

Abt Associates Inc. calculated the tables in this report for the BJS Federal Justice Statistics Program (FJSP), based on data provided to the FJSP by Federal agencies. The Administrative Office of the U.S. Courts and the Bureau of Prisons provided the source files for this report.

Because some judges contested the constitutionality of the Act, a small proportion of cases that were eligible for sentencing under the guidelines were sentenced under the old law. In January 1989 the Supreme Court upheld the Act's constitutionality in *Mistretta* v. *U.S.*, Mo. 1989, 109 S.Ct. 647,448 U.S. 361.

Offenders sentenced under the old law prior to *Mistretta* are excluded from tables of guideline cases. Also excluded are offenders whose cases combined offenses committed both before and after the effective date of the Act. The term *guideline cases* refers to all other offenders whose offenses were committed after the effective date of the Act, regardless of whether the imposed sentence actually fall within the guideline range.

The classification of offenses is based primarily upon offense codes established by the Administrative Office of the U.S. Courts. Offenders are classified according to their most serious charge at conviction.

Sentences to incarceration include all imprisonment terms of longer than 4 days, regardless of whether this term was concurrent or consecutive with a period of probation, a fine, or any other condition.

The average length of imprisonment sentences for tables 2 and 4 includes only offenders who received sentences limited by an imposed maximum term and excludes offenders given a life sentence or a death sentence. The statistic tabulated is the mean value of the maximum term to be served, considering all consecutive and concurrent sentences.

In tables 1 and 2 preliminary data for 1990 are based only on transactions recorded prior to April 1, 1991.

In tables 3 and 4, data from the Federal Probation Sentencing and Supervision System files are used for the 1988-90 period because they indicate whether offenders were sentenced under the guidelines.

In tables 5 and 6, data from Federal Probation Sentencing and Supervision System files are used because they indicate whether offenders were sentenced under the guidelines. The tables may not correspond to those in other Federal Justice Statistics Program (FJSP) publications, which present the same categories from other source files.

Tables 7 through 12 are computed from data that the Bureau of Prisons supplied to the FJSP. Prisoners are classified according to the offense associated with the longest sentence actually imposed. Offense categories are based on combinations of offense designations used by the Bureau of Prisons. They are similar to the categories in other tables, but may not be directly comparable.

Tables 7 through 12 include only prisoners committed by U.S. district courts for violations of the U.S. Code. Other prisoners, such as probation and parole violators, and other types of offenders, such as those from the military, District of Columbia, or States, are excluded. Unlike BJS publications concerning State prisoners, which exclude prisoners serving sentences under 1 year, tables 7 through 12 include Federal prisoners who received sentences of any length. Offenses for a few offenders could not be classified; these offenders are excluded from the tables.

Time served is the number of months from the prisoner's arrival into custody of the Bureau of Prisons until first release from prison, plus any jail time served and credited. The calculation is the same as that currently used by the Bureau of Prisons, but the population to which the calculation is applied differs, as discussed above.

In table 13, estimates of average incarceration time to be served by those sentenced during the first half of 1990 were computed by assuming that offenders sentenced to a term of 1 year or less would serve their full court-imposed term, while those given a sentence that exceeded 1 year would receive the maximum amount of time off permitted for good behavior (good time) and would thereby serve 85% of their imposed term.

This Bureau of Justice Statistics Special Report was prepared by Douglas McDonald and Kenneth Carlson of Abt Associates Inc. They were assisted by Jan Chaiken, Frederick DeFriesse, Karen Rich, Irma Rivera-Veve, Laura Evers, Paul Scheiman, and Mila Ghosh. Carol Kaplan, assistant deputy director, reviewed this report, and Tom Hester edited it. Marilyn Marbrook, Tina Dorsey, Jayne Pugh and Yvonne Boston produced the report.

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Special Report

It is not an abuse of the court's discretion to revoke probation solely for the commission of a crime in the absence of formal charges and conviction. Snyder v. State, 496 P.2d 62 (Alaska 1972).

The probationer may not complain if he has been given ample opportunity to appear before the court imposing the sentence, and he has been permitted to combat the accusation or charges against him and there has been no abuse of discretion on the part of the court. Snyder v. State, 496 P.2d 62 (Alaska 1972).

Where the grounds for the revocation of the sentence is based upon the violation of conditions of the probation which amount, in themselves, to a crime, is it necessary, before a hearing on the revocation of the suspended sentence may be held, that the probationer must be tried and convicted of the crime alleged? Summary hearings upon the revocation of a suspended sentence have been upheld. What is required in such hearings is the exercise of conscientious judgment, and not arbitrary action; that the discretion of the court has not been abused; and that the facts revealed at the hearing satisfy the court that the modification or revocation of the sentence, or a part thereof, will serve the ends of justice. Snyder v. State, 496 P.2d 62 (Alaska 1972).

Where the grounds for the revocation of the sentence is based upon the violation of conditions of the probation which amount, in themselves, to a crime, it is not necessary before a hearing on the revocation of the suspended sentence may be held that the probationer must be tried and convicted of the crime alleged. State v. DeVoe, 560 P.2d 12 (Alaska 1977).

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

A conviction, with the attendant constitutional safeguards, constitutes sufficient "good cause" to find that conditions of probation have been violated and that probation should be revoked. Alexander v. State, 578 P.2d 591 (Alaska 1978).

Collateral references. — Appealability of order suspending imposition or execution of sentence. 51 A.L.R.4th 939.

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

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

(1) violating the conditions of probation;

(2) engaging in criminal practices; or

(3) violating an order of the court to participate in or comply the treatment plan of a rehabilitation program under 12.55.015(a)(16).

(c) Upon the revocation and termination of the probation, the may pronounce sentence at any time after the suspension of the tence within the longest period for which the defendant might been sentenced, subject to the limitation specified in AS 12.55.0

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

(e) Upon the discharge by the court without imposition of sent the court may set aside the conviction and issue to the person a c cate to that effect.

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

(1) is convicted of a violation of AS 11.41.410 — 11.41.455

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

(3) is convicted of a violation of AS 11.41.210 — 11.41.2 11.41.510 — 11.41.530, and the person has, within the 10 years ceding the commission of the offense for which the person has convicted, one or more prior convictions for a violation of AS 11. for a violation of a law in this or another jurisdiction having sub. tially similar elements to an offense defined in AS 11.41; for the poses of this paragraph, a person sh ll be considered to have a conviction even if that conviction has been set aside under (e) o section or under the equivalent provision of the laws of another j diction. (§ 1 ch 50 SLA 1965; am § 2 ch 32 SLA 1979; am §§ 1, 2 SLA 1988; am § 2 ch 188 SLA 1990; am § 1 ch 196 SLA 19

Cross references. — For restrictions on suspending imposition of sentence, see AS 12.55.125(f) and (g).

Effect of amendments. — The 1988 amendment added subsection (f) and, in subsection (a), added "Except as provided in (f) of this section" at the beginning and substituted "that" for "which" twice.

The first 1990 amendment, effective June 23, 1990, divided subsection (f two sentences and in the present s sentence, added the paragraph (1) a designations, substituted paragrap for "or has become abandoned to im associates, or a vicious life," and grammatical changes.

The second 1990 amendment re subsection (f).

A probationer cannot claim bail under the probation statutes, this section and AS 12.55.110, since they fail to mention bail. Martin v. State, 517 P.2d 1389 (Alaska 1974).

Applied in Hoffman v. State, 404 P.2d 644 (Alaska 1965); Speas v. State, 511 P.2d 130 (Alaska 1973); Cull v. State, 511 P.2d 135 (Alaska 1973); White v. State, 523 P.2d 428 (Alaska 1974); Jones v. State, 548 P.2d 958 (Alaska 1976); Andrews v. State, 552 P.2d 150 (Alaska 1976); Thomas v. State, 566 P.2d 630 (Alaska 1977); Honeycutt v. State, 583 P.2d 805 (Alaska 1978); Deal v. State, 587 P.2d 740 (Alaska 1978); Gilbert v. State, 598 P.2d 87 (Alaska 1979); Loulo v. State, 608 P.2d 36 (Alaska 1980); Druck v. State, 616 P.2d 15 (Alaska 1980); Edwin v. State, 762 P.2d 499 (Alaska Ct. App. 1988).

Quoted in Hollines v. State, 511 P.2d 1292 (Alaska 1973); Charles v. State, 606 P.2d 390 (Alaska 1980).

Cited in Wacek v. State, 530 P.2d 761 (Alaska 1975); Taylor v. State, 561 P.2d 1219 (Alaska 1977); Szentics v. State, 572 P.2d 63 (Alaska 1977); Rice v. State, 589 P.2d 419 (Alaska 1979); Gilbert v. State, 598 P.2d 87 (Alaska 1979); Lack v. State, 609 P.2d 539 (Alaska 1980); Nielsen v. State, 627 P.2d 1077 (Alaska 1981); Morris v. State, 630 P.2d 13 (Alaska 1981); Miller v. State, 629 P.2d 546 (Alaska Ct. App. 1981); Lacquement v. State, 644 P.2d 856 (Alaska Ct. App. 1982).

II. AMENDMENT OF SENTENCE.

Severity of original punishment may not be increased. — A court does not have the power to amend a sentence in a manner which would increase the severity of the punishment originally imposed. Chase v. State, 479 P.2d 337 (Alaska 1971).

There is no authority under Alaska law which permits a court, when probation is revoked, to impose a fixed sentence, require the defendant to serve that sentence, and then place the defendant on an additional period of probation following service of the sentence. Franzen v. State, 573 P.2d 55 (Alaska 1978).

Increase in minimum period of incarceration. — An increase in the minimum period of incarceration required before becoming eligible for parole is an increase in the sentence. Nelson v. State, 617 P.2d 502 (Alaska 1981).

A probation revocation order which increased the minimum period that a defendant must spend in jail violated his double jeopardy rights as well as the command of AS 33.05.070(b) that the court upon revocation of probation may order the defendant to serve the sentence originally imposed, or a lesser sentence, but not a greater one. Nelson v. State, 617 P.2d 502 (Alaska 1981).

An amended sentence replacing the initial term of imprisonment with employment as a fire fighter, so that each day spent working would be considered the equivalent of a day spent in jail, would have been well within the power accorded to a sentencing magistrate under Alaska law. Chase v. State, 479 P.2d 337 (Alaska 1971).

An amended sentence construed to have replaced the initial term of imprisonment by employment as a fire fighter would have been in effect similar to a work release. Thus, the amended sentence would have meant that each day spent working would be considered the equivalent of a day spent in jail. Chase v. State, 479 P.2d 337 (Alaska 1971).

An amended sentence which merely defers imprisonment while the defendant is in the custody of a person named in the amended sentence, would be unlawful and void under the rule that a court does not have the power to amend a sentence in a manner which would increase the severity of the punishment originally imposed. Chase v. State, 479 P.2d 337 (Alaska 1971).

Judge's modification of sentence not violative of double jeopardy provision. — Judge's oversight in not imposing suspended time in conjunction with the two-year probation was an obvious error and modification of the sentence, moments after imposition, to include suspended time, did not violate constitutional prohibition of double jeopardy. Dentler v. State, 661 P.2d 1098 (Alaska Ct. App. 1983).

Correction of oral sentence permissible. — Where no oral sentence as originally pronounced suspended two years of imprisonment without providing for any period of probation whatsoever, the oral sentence was obviously incomplete when first pronounced and therefore not meaningfully imposed; correction of the original sentence was permissible under the circumstances. Figueroa v. State, 689 P.2d 512 (Alaska 1984).

III. CONDITIONS OF PROBATION.

This section provides for the imposition of conditions of probation. Snyder v. State, 496 P.2d 62 (Alaska 1972).

Fines. — Sentencing court may impose a fine as a condition of probation upon a defendant's conviction of a crime which is not directly punishable by a fine. Brown v. State, 559 P.2d 107 (Alaska 1977).

Given the specific authorization emanating from AS 12.55.100(a)(1) which permits the trial court to impose a fine as a condition of probation, together with the need for flexibility on the part of the sentencing court in fashioning appropriate conditions of probation, where probation is warranted, a rational harmonization and construction of AS 12.55.090(a) and AS 12.55.100(a)(1) leads to the conclusion that a sentencing court is empowered to make payment of a fine a condition of probation even in the circumstance where the crime is only punishable by imprisonment, or by imprisonment or fine. Brown v. State, 559 P.2d 107 (Alaska 1977).

Authority to impose term of imprisonment as condition of probation prior to enactment of AS 12.55.086. — See Boyne v. State, 586 P.2d 1250 (Alaska 1978).

Imposition of jail time as condition of probation. — Imposition of jail time as a special condition of probation is not authorized under the Alaska statutes governing probation generally. Alaska law does, however, permit the imposition of jail time as a special condition of probation when the imposition of sentence is suspended under AS 12.55.085, as provided by AS 12.55.086(a). Whittlesey v. State, 626 P.2d 1066 (Alaska 1980).

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

Condition of probation vacated. — A probation condition that prohibited a defendant from part of the Anchorage downtown area, the city's "high crime district," effectively prohibited the defendant from maintaining his residence and employment and was vacated because he was no clear nexus between the area and the defendant's misconduct; the condition was unnecessarily severe and restrictive, encompassing an area of 45 blocks; and the condition was not reasonably related to the defendant's rehabilitation. Jones v. State, 727 P.2d 6 (Alaska Ct. App. 1986).

IV. REVOCATION OF PROBATION.

Period during which suspended sentence may be revoked. — When the Alaska legislature provided that a court "may suspend the imposition or execution . . . of the sentence . . . and place the defendant on probation . . ." the period during which a suspended sentence may be revoked is subject to the same five-year restriction as the period of probation. Jackson v. State, 541 P.2d 23 (Alaska 1975).

Suspension of sentence for 14 years falls under the five-year maximum provision. Jackson v. State, 541 P.2d 23 (Alaska 1975).

Summary hearings upon the revocation of a suspended sentence have been upheld. State v. DeVoe, 560 P.2d 12 (Alaska 1977).

What is required in such hearings is the exercise of conscientious judgment, and not arbitrary action; that the discretion of the court has not been abused; and that the facts revealed at the hearing satisfy the court that the modification or revocation of the sentence, or a part thereof, will serve the ends of justice. State v. DeVoe, 560 P.2d 12 (Alaska 1977).

Trial judge who imposes the sentence has broad discretionary powers to revoke probation. Snyder v. State, 496 P.2d 62 (Alaska 1972).

The trial judge who imposed the sentence has certain broad discretionary powers to revoke probation, and the probationer may not complain if he has been given ample opportunity to appear before the court imposing the sentence, and he has been permitted to combat the accusation or charges against him and there has been no abuse of discretion on the part of the court. State v. DeVoe, 560 P.2d 12 (Alaska 1977).

Independent determination of good cause required. — The requirement of an independent determination of good cause beyond mere proof of a probation violation for revocation of probation applies to cases involving suspended impositions of sentence under this section and AS 12.55.085(a) as well as to cases involving suspended executions of sentence under this section. Rich v. State, 640 P.2d 159 (Alaska Ct. App. 1982).

Conviction of a crime is not a prerequisite to finding a violation of probation and revoking that probation. Snyder v. State, 496 P.2d 62 (Alaska 1972).

NOTES TO DECISIONS

Community work replacing jail time altogether. — 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. State v. Jackson, 776 P.2d 320 (Alaska Ct. App. 1989).

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).

Discussion of disparate sentences for similar sexual assault offenses, see Langton v. State, 662 P.2d 954 (Alaska Ct. App. 1983).

Secs. 12.55.060 -- 12.55.075. Prior convictions; sentencing reports; imposition of sentence. [Repealed, § 21 ch 166 SLA 1978.]

Sec. 12.55.080. Suspension of sentence and probation. Upon entering a judgment of conviction of a crime, or at any time within 60 days from the date of entry of that judgment of conviction, a court, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution or balance of the sentence or a portion thereof, and place the defendant on probation for a period and upon the terms and conditions as the court considers best. (§ 8.08 ch 34 SLA 1962; am § 20 ch 43 SLA 1964; am § 8 ch 68 SLA 1966)

Cross references. — For modification of sentences, see AS 12.55.089.

NOTES TO DECISIONS

I General Consideration.
II Amendment of Sentence.
III Conditions of Probation.
IV Revocation of Probation.

I. GENERAL CONSIDERATION.

The power to suspend sentence is not inherent in the judicial branch of government. Pete v. State, 379 P.2d 625 (Alaska 1963).

Such power must be conferred by the legislature. -- The power to suspend sentences exists only when conferred upon the judiciary by the legislature. Pete v. State, 379 P.2d 625 (Alaska 1963).

Parallels 18 U.S.C. § 3651. — Alaska's probation statutes, this section, AS 12.55.090 and AS 12.55.100 closely parallel the federal statute, 18 U.S.C. § 3651, which empowers federal district courts to grant probation. Brown v. State, 569 P.2d 107 (Alaska 1977).

This section and AS 12.55.090 appear to have been modeled after the federal statute, 18 U.S.C. § 3651. Tiedeman v. State, 576 P.2d 114 (Alaska 1978).

The Alaska probation statutes, this section, AS 12.55.090 and 12.55.100, use much of the same language as 18 U.S.C. § 3651, and were apparently derived from the federal law. Gonzales v. State, 608 P.2d 23 (Alaska 1980).

This section and AS 12.55.090 construed in pari materia. -- Since both essentially identical sections were enacted together in § 1, ch. 195, SLA 1955, this section and AS 12.55.090 must be construed with reference to each other as in pari materia. Jackson v. State, 541 P.2d 23 (Alaska 1976).

This section and AS 12.55.085(a) now apply to Title 17. Stonefield v. State, 635 P.2d 494 (Alaska Ct. App. 1981).

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

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

The mandatory aspects of the sentencing provisions of an ordinance providing for a mandatory minimum sentence on conviction of an assault of a police officer were irreconcilable with this section and AS 12.55.085, in that the former could not be given its substantive effect if the latter were to be accorded the weight of law. Such being the case, the city was prohibited by Alaska Const., art. X, § 11, from requiring the imposition and execution of mandatory minimum sentences for violations of the ordinance. City of Kodiak v. Jackson, 584 P.2d 1130 (Alaska 1978).

The fact that the state itself has the power to enact specific exceptions to this section and AS 12.55.085 fails to prove that a home rule city possesses the same power. City of Kodiak v. Jackson, 584 P.2d 1130 (Alaska 1978).

With suspended sentence probation is mandatory. — Under this section whenever a sentencing judge suspends a sentence of imprisonment, the judge is required to place the defendant on probation; while the initial decision whether to suspend a sentence of imprisonment is a discretionary one, once all or part of a sentence is suspended, the statute makes probation mandatory. Figueroa v. State, 689 P.2d 512 (Alaska 1984).

No review of own sentence after 60 days. — There is no authority which would sanction the expansion of the superior court's jurisdiction to pass sentence into a realm of review and modification which is statutorily vested in either the supreme court or the executive branch of government. Therefore, the superior court lacks jurisdiction to review its own sentence, after it has entered a judgment on the matter, more than 60 days after it has imposed sentence. Davenport v. State, 543 P.2d 1204 (Alaska 1975).

The court has no power to order probation more than 60 days after a sentence is imposed. Shaglook v. State, 582 P.2d 1034 (Alaska 1978).

However, a recommendation regarding probation does not contravene that prohibition. Shaglook v. State, 582 P.2d 1034 (Alaska 1978).

Different limitations of probation period. — Under this section, a court may suspend the execution of all or a portion of a sentence and place the defendant on probation "for a period and upon the terms and conditions as the court considers best." That period of probation, however, is specifically limited by AS 12.55.090(c) to a maximum of 5 years. This differs from probation granted after the court suspends the imposition of any sentence under AS 12.55.085(c). Tiedeman v. State, 576 P.2d 114 (Alaska 1978).

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

Where a court suspends the execution of all or a portion of a sentence and places the defendant on probation under this section, the length of that period of probation is specifically limited by AS 12.55.090(c) to a maximum of five years. Elstad v. State, 599 P.2d 137 (Alaska 1979).

Where probation is granted after the court suspends the imposition of any sentence, the legislature has specifically limited the period of probation to a term not to exceed the maximum sentence which could be imposed for the particular offense. Tiedeman v. State, 576 P.2d 114 (Alaska 1978).

The five-year limitation contained in AS 12.55.090(c) applies only to the period of probation to be served after the imposition of a sentence and suspension of all or a portion thereof pursuant to this section. Thus, the superior court is not bound to credit the period already served under its original order suspending imposition of sentence pursuant to AS 12.55.085(a), when considering the maximum sentence or period of probation it can impose under AS 12.55.085(c) upon violation of the original probation conditions. Rice v. State, 603 P.2d 913 (Alaska 1979).

Quoted in Fresneda v. State, 458 P.2d 134 (Alaska 1969); Edinger v. State, 598 P.2d 943 (Alaska 1979); Mangold v. State, 613 P.2d 272 (Alaska 1980); Benbow v. State, 738 P.2d 356 (Alaska Ct. App. 1987).

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

II. CONDITIONS OF PROBATION.

Authority to impose period of incarceration as condition of probation prior to enactment of AS 12.55.086. — See Boyne v. State, 586 P.2d 250 (Alaska 1978); Sprague v. State, 590 P.2d 410 (Alaska 1979).

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

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

III. REVOCATION OF PROBATION.

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

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

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

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

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

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

A conviction, with the attendant constitutional safeguards, constitutes sufficient "good cause" to find that conditions of probation have been violated and that probation should be revoked. Alexander v. State, 578 P.2d 591 (Alaska 1978).

Prior notice of charges required. — Constitutional due process does require that a probationer accused of violating a condition of his probation receive prior notice of the charges against him and that he be given an opportunity to meet and refute the charges. Burrell v. State, 626 P.2d 1087 (Alaska Ct. App. 1981).

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

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

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

IV. SETTING CONVICTION ASIDE.

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

Where the judge had already rescinded defendant's suspended imposition of sentence and had formally imposed sentence and defendant was never discharged from probation under AS 12.55.085(d), the judge had no authority to set aside his conviction under AS 12.55.085(e). Richey v. State, 717 P.2d 407 (Alaska Ct. App. 1986).

Granting set-aside as matter of right. — No affirmative showing or finding of rehabilitation need be made before a set-aside is granted; rather, a set-aside should be granted as a matter of right unless some specific reason for denial is established. Wickham v. State, 770 P.2d 767 (Alaska Ct. App. 1989).

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

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

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

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

Collateral references. — Propriety of considering acts because of which probation was revoked in imposing sentence for original offense after revocation of probation. 65 A.L.R.3d 1100.

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

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

NOTES TO DECISIONS

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

I. GENERAL CONSIDERATION.

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

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

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

The fact that the state itself has the power to enact specific exceptions to AS 12.55.080 and this section fails to prove that a home rule city possesses the same power. City of Kodiak v. Jackson, 584 P.2d 1130 (Alaska 1978).

The mandatory aspects of the sentencing provisions of an ordinance providing for a mandatory minimum sentence on conviction of an assault of a police officer were irreconcilable with AS 12.55.080 and this section, in that the former could not be given its substantive effect if the latter were to be accorded the weight of law. Such being the case, the city was prohibited by Alaska Const., art. X, § 11, from requiring the imposition and execution of mandatory minimum sentences for violations of the ordinance. City of Kodiak v. Jackson, 584 P.2d 1130 (Alaska 1978).

Different limitations of probation period. — Under AS 12.55.080, a court may suspend the execution of all or a portion of a sentence and place the defendant on probation "for a period and upon the terms and conditions as the court considers best." That period of probation, however, is specifically limited by AS 12.55.090(c) to a maximum of 5 years. This differs from probation granted after the court suspends the imposition of any sentence under subsection (a). Tiedeman v. State, 576 P.2d 114 (Alaska 1978).

Where probation is granted after the court suspends the imposition of any sentence, the legislature has specifically limited the period of probation to a term not to exceed the maximum sentence which could be imposed for the particular offense. Tiedeman v. State, 576 P.2d 114 (Alaska 1978).

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

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

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

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

The five-year limitation contained in AS 12.55.090(c) applies only to the period of probation to be served after the imposition of a sentence and suspension of all or a portion thereof pursuant to AS 12.55.080. Thus, the superior court is not bound to credit the period already served under its original order suspending imposition of sentence pursuant to subsection (a), when considering the maximum sentence or period of probation it can impose under subsection (c) upon violation of the original probation conditions. Rice v. State, 603 P.2d 913 (Alaska 1979).

Period of suspension must begin when order entered. — The trial court was not clearly mistaken in imposing a

sentence of six years' imprisonment for a forgery count, with three years suspended, and in suspending imposition of sentence for a count of uttering a check with insufficient funds for a stated period of five years the period of suspension to run consecutively to the sentence for forgery, except to the extent that the trial court appeared to have suspended the imposition of sentence for the uttering count for a period of time one year in excess of that permitted by this section. Cochran v. State, 586 P.2d 176 (Alaska 1978).

Since there was no logical way that the trial court could cause the period of suspension to begin several years in the future, i.e., at the end of the six-year term for forgery, and the period of suspension and probationary term had to begin when the trial court's order was entered, the supreme court held that what the judgment meant was that the imposition of sentence on the charge of uttering a check with insufficient funds was suspended, and defendant placed on probation, from the date of its entry until five years after Cochran's six-year term of imprisonment expired. Cochran v. State, 586 P.2d 176 (Alaska 1978).

Discretion of sentencing court. — Whether or not a sentencing court should impose a suspended imposition of sentence in a given case is, by subsection (a), left to the discretion of the sentencing court. Nattrass v. State, 554 P.2d 399 (Alaska 1976).

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

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

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

Youthful, first-time offender, convicted on a plea of guilty to one count of possession of cocaine, should have received a suspended imposition of sentence, inst of one year's imprisonment with no ti suspended. Wharton v. State, 590 I 427 (Alaska 1979).

Where probation revocation petition leged the violation of probation as constituting a violation of former 11.25.020(1) (forgery), whereas at the vocation hearing the state sought to pr violations of former AS 11.25.020(2) tering) and former AS 11.20.360 (obt lng money by false pretenses), the t court's proposed continuance amounte an alternative which was the substant equivalent to de novo revocation proc lings upon a properly amended petit and defendant's refusal to accept the fered continuance was a voluntary calculated strategic decision on his p made with advice of counsel which m any error in failing to notify the def dant of the precise charges which wo be proved against him harmless beyon reasonable doubt. Burrell v. State, P.2d 1087 (Alaska Ct. App. 1981).

Superior court did not abuse discr tion in failing to impose suspended position of sentence. — See Nattras State, 554 P.2d 399 (Alaska 1976).

Where at the time of sentencing for crime of embezzlement by an employe property worth more than $100, def dant was 22 years old, had been work several years and had spent two semest in college, and other than minor tra violations he had no previous crimi record, the trial court was not clearly n taken in failing to order a suspended position of sentence, instead of actu imposing a sentence of three years four months, with the entire period suspended upon the condition that he ent twelve month period of public serv Mullins v. State, 573 P.2d 860 (Ala 1978).

Alaska's trial judges totally barr from engaging in either charge or s tencing bargaining. — See State Bucknlew, 561 P.2d 289 (Alaska 197

Applied in Spear v. State, 511 P.2d (Alaska 1973); Call v. State, 511 P.2d (Alaska 1973); White v. State, 523 P 428 (Alaska 1974); Andrews v. State, P.2d 160 (Alaska 1976); Franzen v. St 573 P.2d 65 (Alaska 1978); Wharton State, 590 P.2d 427 (Alaska 1979); And son v. State, 621 P.2d 1345 (Alaska 19 Lowry v. State, 656 P.2d 780 (Alaska App. 1982); Davis v. State, 706 P.2d 1 (Alaska Ct. App. 1985); Owings v. St 771 P.2d 465 (Alaska Ct. App. 1989)

It is not an abuse of the court's discretion to revoke probation solely for the commission of a crime in the absence of formal charges and conviction. Snyder v. State, 496 P.2d 62 (Alaska 1972).

The probationer may not complain if he has been given ample opportunity to appear before the court imposing the sentence, and he has been permitted to combat the accusation or charges against him and there has been no abuse of discretion on the part of the court. Snyder v. State, 496 P.2d 62 (Alaska 1972).

Where the grounds for the revocation of the sentence is based upon the violation of conditions of the probation which amount, in themselves, to a crime, is it necessary, before a hearing on the revocation of the suspended sentence may be held, that the probationer must be tried and convicted of the crime alleged? Summary hearings upon the revocation of a suspended sentence have been upheld. What is required in such hearings is the exercise of conscientious judgment, and not arbitrary action; that the discretion of the court has not been abused; and that the facts revealed at the hearing satisfy the court that the modification or revocation of the sentence, or a part thereof, will serve the ends of justice. Snyder v. State, 496 P.2d 62 (Alaska 1972).

Where the grounds for the revocation of the sentence is based upon the violation of conditions of the probation which amount, in themselves, to a crime, it is not necessary before a hearing on the revocation of the suspended sentence may be held that the probationer must be tried and convicted of the crime alleged. State v. DeVoe, 560 P.2d 12 (Alaska 1977).

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

A conviction, with the attendant constitutional safeguards, constitutes sufficient "good cause" to find that conditions of probation have been violated and that probation should be revoked. Alexander v. State, 578 P.2d 591 (Alaska 1978).

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

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

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

(1) violating the conditions of probation;

(2) engaging in criminal practices; or

(3) violating an order of the court to participate in or comply with the treatment plan of a rehabilitation program under AS 12.55.015(a)(10).

(c) Upon the revocation and termination of the probation, the court may pronounce sentence at any time after the suspension of the sentence within the longest period for which the defendant might have been sentenced, subject to the limitation specified in AS 12.55.086(c).

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

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

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

(1) is convicted of a violation of AS 11.41.410 — 11.41.465;

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

(3) is convicted of a violation of AS 11.41.210 — 11.41.250 or 11.41.510 — 11.41.530, and the person has, within the 10 years preceding the commission of the offense for which the person has been convicted, one or more prior convictions for a violation of AS 11.41 or for a violation of a law in this or another jurisdiction having substantially similar elements to an offense defined in AS 11.41; for the purposes of this paragraph, a person shall be considered to have a prior conviction even if that conviction has been set aside under (e) of this section or under the equivalent provision of the laws of another jurisdiction. (§ 1 ch 50 SLA 1966; am § 2 ch 32 SLA 1979; am §§ 1, 2 ch 36 SLA 1988; am § 2 ch 188 SLA 1990; am § 1 ch 196 SLA 1990)

Cross references. — For restrictions on suspending imposition of sentence, see AS 12.55.125(f) and (g).

Effect of amendments. — The 1988 amendment added subsection (f) and, in subsection (a), added "Except as provided in (f) of this section" at the beginning and substituted "that" for "which" twice.

The first 1990 amendment, effective June 23, 1990, divided subsection (b) into two sentences and in the present second sentence, added the paragraph (1) and (2) designations, substituted paragraph (3) for "or has become abandoned to improper associates, or a vicious life," and made grammatical changes.

The second 1990 amendment rewrote subsection (f).

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. Bayne v. State, 799 P.2d 1347 (Alaska Ct. App. 1990).

Decision to increase presumptive sentence upheld. — The sentencing court did not err in increasing, pursuant to AS 12.55.155(c)(9), the defendant's presumptive term of imprisonment due to aggravating factors. Given that the plea agreement authorized the court to broaden its consideration from the specific criminal act for which the defendant was convicted to the totality of the defendant's criminal misconduct when imposing a sentence, and because the defendant's acts were closely related in time and circumstances, the court's decision to find that the defendant knew that the offense involved more than one victim was permissible as a matter of law. Mills v. State, 839 P.2d 417 (Alaska Ct. App. 1992).

B. First Offenders.

Election to impose consecutive term. — Where judge understood that he had discretion to impose first felony offender's sentences either consecutively or concurrently and explained his decision to impose consecutive terms, the decision established good cause. Jerrel v. State, 851 P.2d 1365 (Alaska Ct. App. 1993).

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 1/16 or 1/8 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).

Justification not to suspend. — One-year unsuspended portion of composite sentence for first felony offender was justified where defendant's separate acts of perjury were not particularly mitigated, since they exposed an officer to potential harm and defendant's motivation might have been characterized as vindictiveness or spite. Jerrel v. State, 851 P.2d 1366 (Alaska Ct. App. 1993).

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. Buoy 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 circumstances, 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 second offender) is imposed. Andrew v. State, 835 P.2d 1251 (Alaska Ct. App. 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, 835 P.2d 1251 (Alaska Ct. App. 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).

NOTES TO DECISIONS

Sentence disapproved. — Trial court's sentencing decision was clearly mistaken where the sentence fell near the bottom of the authorized range of sentences for fourth-degree assault and the evidence concerning defendant's background and personal characteristics provided little basis for characterizing his case as particularly mitigated, including two prior misdemeanor convictions. State v. Huletz, 838 P.2d 1257 (Alaska Ct. App. 1992).

Sec. 12.55.145. Prior convictions.

NOTES TO DECISIONS

Applicability. — Section applied in defining what a "prior felony conviction" is for purposes of AS 12.55.155(c)(15). Mancini v. State, 841 P.2d 184 (Alaska Ct. App. 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 (1) to (3); added the second sentence in subsection (b); and added subsections (j) and (k).

NOTES TO DECISIONS

I. GENERAL CONSIDERATION.

Applied in Machado v. State, 797 P.2d 677 (Alaska Ct. App. 1990); McGahan v. State, 807 P.2d 506 (Alaska Ct. App. 1991); Noblit v. State, 808 P.2d 280 (Alaska Ct. App. 1991); Looney v. State, 826 P.2d 775 (Alaska Ct. App. 1992); Marker v. State, 829 P.2d 1191 (Alaska Ct. App. 1992); Wesolic v. State, 837 P.2d 130 (Alaska Ct. App. 1992); Curl v. State, 843 P.2d 1244 (Alaska Ct. App. 1992).

Cited in Lepley v. State, 807 P.2d 1095 (Alaska Ct. App. 1991); Collins v. State, 816 P.2d 1383 (Alaska Ct. App. 1991); Bessie v. State, 835 P.2d 1257 (Alaska Ct. App. 1992); Beauvois v. State, 837 P.2d 1118 (Alaska Ct. App. 1992); Sam v. State, 842 P.2d 596 (Alaska Ct. App. 1992); Boerma v. State, 843 P.2d 1246 (Alaska Ct. App. 1992); Bland v. State, 846 P.2d 816 (Alaska Ct. App. 1993).

II. SENTENCING.

A. In General.

ABA 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 ABA Standards unless the offender is particularly dangerous. Neff v. State, 799 P.2d 782 (Alaska Ct. App. 1990).

Sentencing of "worst offender."

Sentence of 169 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. Weitz v. State, 794 P.2d 962 (Alaska Ct. App. 1990).

Sentencing for comparable crimes as point of reference. — It is appropriate 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 1208 (Alaska Ct. App. 1990).

Imposition of sentence upon revocation for violation of probation. — Where a convicted criminal's original sentence on his first felony offenses 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. Bayne 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).

Arbitrary sentencing not necessarily excessive. — A benchmark sentence of 20 to 25 years set in an arbitrary manner and without a supporting rationale was not necessarily excessive where the crime provided for a sentence of five to 99 years and the facts supported the sentence. State v. McPherson, Sup. Ct. Op. No. 3970 (File No. S-4294), P.2d (1993).

B. 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. Vasquez-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 19th 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. Lenvitt v. State, 806 P.2d 342 (Alaska Ct. App. 1991); Erickson v. State, 824 P.2d 726 (Alaska Ct. App. 1992); Wiley v. State, 822 P.2d 940 (Alaska Ct. App. 1991); Peratti v. State, 843 P.2d 649 (Alaska Ct. App. 1992).

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, 796 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 12.55.025(h) have no integral relation to Alaska's presumptive sentencing scheme, AS 12.55.125 — 12.55.175. The legislature enacted the consecutive sentencing statute independently of the presumptive sentencing statutes, and application of the provision does not turn on the applicability of presumptive sentencing. State v. Wagner, 835 P.2d 454 (Alaska Ct. App. 1992).

Second-degree murder terms not presumptive. — Amendment needed for written judgement which provided that defendant's term of imprisonment be all or partially presumptive, and that defendant was ineligible for parole, except as provided in AS 33.16.090(b) and (c); sentences for second-degree murder are not presumptive terms and defendant's eligibility for parole is governed by AS 33.16.100(d). Gustafson v. State, 854 P.2d 761 (Alaska Ct. App. 1993).

Deviation from presumptive sentence.

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

sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 — 12.55.175:

(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 12.55.155 — 12.55.175:

(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 12.55.155 — 12.55.175:

(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 12.55.155 — 12.55.175,

(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 12.55.155 — 12.55.175:

(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, 25 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 1982; 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)

length of residential treatment at 90 days constituted an increase in the defendant's sentence violating the constitutional prohibition against double jeopardy. An illegal sentence should not be increased unless absolutely necessary to correct the illegality. In this case the illegality should have been corrected by striking the flawed portion of the probation order, i.e., the requirement of residential treatment. Christensen v. State, 844 P.2d 557 (Alaska Ct. App. 1993).

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

III. RESTITUTION.

Restitution order violative of double jeopardy. — A trial judge who imposed restitution as a special condition of probation under this section and not as an independent portion of the defendant's sentence under AS 12.55.045, could not terminate the defendant's probation and order her to serve the unserved time remaining on her original sentence while at the same time enforcing the restitution order without violating the constitutional protection against double jeopardy. If the judge wished to order the defendant to pay restitution independent of her conditions of probation, this had to be done at the time she originally imposed sentence. Kelly v. State, 842 P.2d 612 (Alaska Ct. App. 1992).

Sec. 12.55.115. Fixing eligibility for discretionary parole at sentencing.

NOTES TO DECISIONS

Presumption that questions of discretionary release are better left to parole board is rebuttable. — Because the legislature has affirmatively given sentencing judges the power to restrict or deny parole eligibility, the presumption that the parole eligibility of defendants sentenced to lengthy prison terms should normally be evaluated after the defendant has established an institutional history and not at sentencing must remain rebuttable. Accordingly, the trial court did not err in restricting the defendant's parole through the entire 99-year term he was given for committing first degree murder where the record established that he had minimal potential for rehabilitation. Colgan v. State, 838 P.2d 276 (Alaska Ct. App. 1992).

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 33.16.090 and AS 33.16.100(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 showed 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).

Defendant's history of prior assaultive conduct, particularly his sexually assaultive conduct, which escalated to the offense for which he was being sentenced, supported that sentence which required him to spend the rest of his life in prison without any possibility of parole. Alexander v. State, 838 P.2d 269 (Alaska Ct. App. 1992).

Applied in Monroe v. State, 847 P.2d 84 (Alaska Ct. App. 1993).

Cited in Weitz v. State, 794 P.2d 952 (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.

Applied in State v. Huletz, 838 P.2d 1257 (Alaska Ct. App. 1992).

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 1159 (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 at least 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

See Supplement

Sec. 33.16.030. Selection criteria for board members. (a) The governor shall appoint board members on the basis of their qualifications to make decisions that are compatible with the welfare of the community and of individual offenders. The governor shall appoint members who are able to consider the character and background of offenders and the circumstances under which offenses were committed.

(b) At least one person appointed to the board must have experience in the field of criminal justice.

(c) Officers or employees of the state may not be appointed to the board. (§ 2 ch 88 SLA 1985)

Sec. 33.16.040. Compensation and expenses. A board member is entitled to compensation at an amount to be set by the governor for each day the member is participating in business of the board, and is also entitled to the per diem and travel allowances provided under AS 39.20.180. (§ 2 ch 88 SLA 1985)

Sec. 33.16.050. Meetings of the board. (a) The board may meet as often as it considers necessary to carry out its responsibilities, but shall meet at least four times a year.

(b) Three members of the board constituted a quorum for the conduct of business.

(c) Decisions and orders of the board require the affirmative votes of a majority of the members present.

(d) The board may conduct meetings by the use of teleconferencing facilities. (§ 2 ch 88 SLA 1985)

Sec. 33.16.060. Duties of the board. (a) The board shall

(1) serve as the parole authority for the state;

(2) upon receipt of an application, consider the suitability for parole of a prisoner who is eligible for discretionary parole;

(3) impose parole conditions on all prisoners released under discretionary or mandatory parole;

(4) under AS 33.16.210, discharge a person from parole when custody is no longer required;

(5) maintain records of the meetings and proceedings of the board;

(6) recommend to the governor and the legislature changes in the law administered by the board;

(7) recommend to the governor or the commissioner changes in the practices of the department and of other departments of the executive branch necessary to facilitate the purposes and practices of parole;

(8) upon request of the governor, review and recommend applicants for executive clemency; and

(9) execute other responsibilities prescribed by law.

(b) The board shall adopt regulations under the Administrative Procedure Act (AS 44.62)

(1) establishing standards under which the suitability of a prisoner for discretionary parole shall be determined;

(2) providing for the supervision of parolees and for recommitment of parolees; and

(3) governing procedures of the board. (§ 2 ch 88 SLA 1985)

NOTES TO DECISIONS

No rules promulgated by the parole board regarding eligibility of prisoners for parole have been brought to the attention of the supreme court. Robinson v. State, Sup. Ct. Op. No. 691 (File No. 1344), 484 P.2d 686 (1971), decided under former AS 33.15.100.

Rules should be adopted as soon as practicable. — Concerning sentencing, sentence appeals, and parole matters in general, the supreme court believed it would be of benefit to all concerned if, as soon as practicable, the parole board, in conformity with former AS 33.15.100, adopted rules regarding eligibility of prisoners for parole, the conduct of parole hearings, and conditions of release to be imposed on parolees. Robinson v. State, Sup. Ct. Op. No. 691 (File No. 1344), 484 P.2d 636 (1971).

Parole board urged to prescribe specific rules to govern situations where searches of parolees are permissible. — See Roman v. State, Sup. Ct. Op. No. 1621 (File No. 2856), 570 P.2d 1236 (1977), decided under former AS 33.15.100.

Due process requirements. — There is no difference between parole and probation revocations as regards due process requirements. Avery v. State, Sup. Ct. Op. No. 2175 (File No. 4440), 616 P.2d 872 (1980), decided under former AS 33.15.100.

It was not error for a parole board to apply the preponderance of the evidence standard in a parole revocation hearing. Avery v. State, Sup. Ct. Op. No. 2175 (File No. 4440), 616 P.2d 872 (1980), decided under former AS 33.15.100.

Sec. 33.16.070. Process. The board or a member of the board may issue subpoenas and subpoenas duces tecum in the performance of board duties under AS 33.16.060(a). Subpoenas issued under this section are enforceable in Superior Court. (§ 2 ch 88 SLA 1985)

Sec. 33.16.080. Executive director. The board shall hire an executive director to serve the board in the discharge of its duties. The executive director must have had training and experience in the field of criminal justice. The executive director may employ additional staff to assist the board. (§ 2 ch 88 SLA 1985)

Sec. 33.16.090. Eligibility for discretionary parole. (a) A prisoner who is serving a term of at least 181 days, and who is not otherwise ineligible under (b) of this section, may, in the discretion of the board, be released on discretionary parole subject to AS 12.55.086(b), 12.55.115, and AS 33.16.100(c) and (d).

(b) A prisoner is not eligible for discretionary parole during the term of a presumptive sentence; however, a prisoner is eligible for discretionary parole during a term of sentence enhancement imposed

(d) Sentencing of a defendant or remanding of a case under this section shall be by a majority of the three-judge panel. (§ 12 ch 166 SLA 1978)

NOTES TO DECISIONS

Constitutionality of presumptive sentencing provisions. — See notes under same heading, AS 12.55.125. Nell v. State, 642 P.2d 1361 (Alaska Ct. App. 1982).

Sentencing authority. — The fact that a matter is referred back to the original sentencing judge when the three-judge panel disagrees with the original sentencing judge indicates that the legislature wanted the original sentencing judge to maintain control of the sentencing process. Heathcock v. State, 670 P.2d 1155 (Alaska Ct. App. 1983).

When a trial judge referred a case to a three-judge panel, the panel did not have statutory authority to impose a sentence greater than the two-year presumptive sentence on the ground that the two-year presumptive sentence was manifestly unjust because it was too severe; rather the panel was required to remand the case to the trial judge for further proceedings since it disagreed with the trial judge's conclusion. Heathcock v. State, 670 P.2d 1155 (Alaska Ct. App. 1983).

Under the provisions of the revised Criminal Code and the decision in Heathcock v. State, 670 P.2d 1155 (Alaska Ct. App. 1983), the three-judge panel does not have authority to sentence until it agreed with the trial judge that his application of the provisions of the revised Criminal Code would result in a sentence which was manifestly unjust; the panel was not free to assume that defendant could be sentenced to concurrent sentences and then go forward and sentence him. Winfree v. State, 683 P.2d 284 (Alaska Ct. App. 1984).

For purposes of future cases, when a case involving a presumptive term in excess of four years is referred to the three-judge panel on the sole basis of a nonstatutory mitigating factor, imposition by the panel of a sentence below 50% of the presumptive term will normally be deemed inappropriate and clearly mistaken unless the panel expressly concludes that such a sentence is required to avoid manifest injustice, although the panel has jurisdiction to impose a sentence of less than 50% of the presumptive sentence. State v. Price, 740 P.2d 476 (Alaska Ct. App. 1987) (not applying rule in present case).

Under subsection (c), the three-judge panel is expressly empowered to impose any sentence authorized for the offense. State v. Ridgway, 760 P.2d 362 (Alaska Ct. App. 1988).

Discretion to modify presumptive sentence. — The statutory scheme gives the three-judge panel substantial discretion in determining whether to modify presumptive sentences in light of nonstatutory aggravating or mitigating factors. That discretion will be disturbed only where the panel's exercise of that discretion was clearly mistaken. Winther v. State, 749 P.2d 1356 (Alaska Ct. App. 1988).

The presumptive one-year term imposed by AS 12.55.125(e)(3), and by extension (d)(3), are subject to modification because of aggravating or mitigating factors as well as possible referral to a three-judge panel like all other presumptive sentences. Edwin v. State, 762 P.2d 499 (Alaska Ct. App. 1988).

Sentencing powers are not subject to restriction under AS 12.55.155(a)(2). State v. Price, 730 P.2d 169 (Alaska Ct. App. 1986).

Denial of defendant's request for referral to three-judge sentencing panel not error. — See Bartholomew v. State, 720 P.2d 64 (Alaska Ct. App. 1986).

Remedy for manifest injustice. — Where an individual sentencing judge is precluded by the absence of statutory aggravating and mitigating factors from any adjustment of the presumptive terms, imposition of the seven-year presumptive term for first degree assault constitutes a manifest injustice. Thus, the appropriate remedy for this is referral to the three-judge panel. New v. State, 714 P.2d 378 (Alaska Ct. App. 1986).

Consideration of evidence of rehabilitation. — Where the sentencing record contained unusually strong evidence that a youthful first offender has a particularly favorable potential for rehabilitation, and where the absence of statutory aggravating or mitigating factors would have precluded the sentencing court from giving any consideration to that evidence in imposing a sentence, the Alaska Court of Appeals thought referral to the three-judge panel was expressly authorized under AS 12.55.165 and this section. Smith v. State, 711 P.2d 561 (Alaska Ct. App. 1985).

Consideration of defendant's prior felony conviction. — The three-judge sentencing panel may consider the mitigated nature of a defendant's prior felony conviction as a factor in the overall determination of whether imposition of the presumptive term for a subsequent felony conviction would be manifestly unjust. The nature and seriousness of an offender's prior criminal misconduct are a legitimate part of the totality of the circumstances; as such, they may be considered in the overall determination of manifest injustice. Duncan v. State, 782 P.2d 301 (Alaska Ct. App. 1989).

Panel not bound by trial court's evaluation. — The three-judge panel is not bound by the trial court's evaluation of the facts or determination of the law. Winther v. State, 749 P.2d 1356 (Alaska Ct. App. 1988).

Trial court should not propose a nonstatutory mitigating factor to the three-judge panel where the legislature specifically rejected that factor for inclusion in AS 12.55.155(d). Where the legislature has expressly addressed a consideration, such as the relationship between a defendant's past conduct and his present offense, and imposed limitations on the trial court's power to consider that relationship in mitigation of sentence, the trial court should not propose the same mitigating factor to the three-judge panel without complying with the limitations; to do so is to suggest a common-law development inconsistent with legislation. Totemoff v. State, 739 P.2d 769 (Alaska Ct. App. 1987).

Applied in McMannera v. State, 66 P.2d 414 (Alaska Ct. App. 1982); Shaw v. State, 673 P.2d 781 (Alaska Ct. App. 1983); Degler v. State, 741 P.2d 65 (Alaska Ct. App. 1987); Totemoff v. State, 739 P.2d 769 (Alaska Ct. App. 1987).

Quoted in Kirby v. State, 748 P.2d 75 (Alaska Ct. App. 1987).

Stated in Erhart v. State, 656 P.2d 1109 (Alaska Ct. App. 1982); State v. Rostopoff, 669 P.2d 630 (Alaska Ct. App. 1983); Maldonado v. State, 676 P.2d 109 (Alaska Ct. App. 1984); Tulowetzke v. State, Dep't of Pub. Safety, 743 P.2d 36 (Alaska 1987).

Cited in Juneby v. State, 641 P.2d 82 (Alaska Ct. App. 1982); Griffith v. State 653 P.2d 1057 (Alaska Ct. App. 1982) Nenkok v. State, 663 P.2d 668 (Alaska Ct App. 1982); Wright v. State, 656 P.2d 1226 (Alaska Ct. App. 1983); Langton v. State, 662 P.2d 964 (Alaska Ct. App. 1983); State v. LaPorte, 672 P.2d 46 (Alaska Ct. App. 1983); Walsh v. State 677 P.2d 912 (Alaska Ct. App. 1984) State v. Brinkley, 681 P.2d 361 (Alaska Ct. App. 1984); Flink v. State, 683 P.2d 726 (Alaska Ct. App. 1984); Dancer v. State, 715 P.2d 1174 (Alaska Ct. App. 1986); Kuvaas v. State, 717 P.2d 855 (Alaska Ct. App. 1986); James v. State, 739 P.2d 1314 (Alaska Ct. App. 1987); Schnecker v. State, 739 P.2d 1310 (Alaska Ct. App. 1987); Comegys v. State, 747 P.2d 564 (Alaska Ct. App. 1987); James v. State, 764 P.2d 1330 (Alaska Ct. App. 1988); Russell v. State, 762 P.2d 1022 (Alaska Ct. App. 1988).

Sec. 12.55.180. Designation of representative. If more than one person who qualifies as a victim under AS 12.55.185 desires notice under AS 12.55.088, the prosecuting attorney shall designate one person to represent all victims for purposes of receiving the notice required and exercising the rights granted under this chapter. (§ 6 ch 59 SLA 1989)

Revisor's notes. — Formerly AS 12.55.172. Renumbered in 1990.

prime sentence in the same way it would evaluate a statutory mitigating factor that had been established by clear and convincing evidence. The court should deny referral to the three-judge panel only when it concludes that no adjustment to the presumptive term is appropriate in light of the factor. Kirby v. State, 748 P.2d 767 (Alaska Ct. App. 1987).

Trial court should not propose a nonstatutory mitigating factor where the legislature specifically rejected that factor for inclusion in AS 12.55.155(d). Where the legislature has expressly addressed a consideration, such as the relationship between a defendant's past conduct and his present offense, and imposed limitations on the trial court's power to consider that relationship in mitigation of sentence, the trial court should not propose the same mitigating factor to the three-judge panel without complying with the limitations; to do so is to suggest a common-law development inconsistent with legislation. Tetemoff v. State, 739 P.2d 769 (Alaska Ct. App. 1987).

Referrals involving presumptive term over four years solely on basis of nonstatutory mitigator. — For purposes of future cases, when a case involving a presumptive term in excess of four years is referred to the three judge panel on the sole basis of a nonstatutory mitigating factor, imposition by the panel of a sentence below 60% of the presumptive term will normally be deemed inappropriate and clearly mistaken unless the panel expressly concludes that such a sentence is required to avoid manifest injustice, although the panel has jurisdiction to impose a sentence of less than 50% of the presumptive sentence. State v. Price, 740 P.2d 476 (Alaska Ct. App. 1987) (not applying rule in present cases).

Manifest injustice. — Manifest injustice is basically a subjective standard because of the purpose that the standard serves in recognizing cases that will inevitably arise in which the subjective judgment of the sentencing court should take precedence over the objective limits imposed by statute. Lloyd v. State, 672 P.2d 152 (Alaska Ct. App. 1983).

The judge did not commit error by refusing to find manifest injustice based on imposition of the adjusted presumptive term in light of the totality of the circumstances. Lloyd v. State, 672 P.2d 152 (Alaska Ct. App. 1983).

Judge did not err in failing to refer defendant's case to the three-judge panel to allow further reduction of defendant's sentence based on his lack of prior criminal convictions. Lloyd v. State, 672 P.2d 152 (Alaska Ct. App. 1983).

Judge did not apply an incorrect standard in determining the question of manifest injustice when he defined the term as "something that's shocking to the conscience," and remand for application of the obvious unfairness standard proposed by defendant was unwarranted. Lloyd v. State, 672 P.2d 152 (Alaska Ct. App. 1983).

It was not manifestly unjust to impose a five-year presumptive term upon defendant's conviction of attempted sexual assault of a minor, and he was not automatically entitled as a matter of law to have his case referred to a three-judge panel for sentencing. Aveogamona v. State, 757 P.2d 76 (Alaska Ct. App. 1988).

Consideration of defendant's prior felony conviction. — The three-judge sentencing panel may consider the mitigated nature of a defendant's prior felony conviction as a factor in the overall determination of whether imposition of the presumptive term for a subsequent felony conviction would be manifestly unjust. The nature and seriousness of an offender's prior criminal misconduct are a legitimate part of the totality of the circumstances; as such, they may be considered in the overall determination of manifest injustice. Duncan v. State, 782 P.2d 301 (Alaska Ct. App. 1989).

Denial of defendant's request for referral to three-judge sentencing panel not error. — See Bartholomew v. State, 720 P.2d 54 (Alaska Ct. App. 1986); Abdulhaqq v. State, 728 P.2d 1211 (Alaska Ct. App. 1986).

Applied in McManners v. State, 650 P.2d 414 (Alaska Ct. App. 1982); Sears v. State, 663 P.2d 949 (Alaska Ct. App. 1982); Peetook v. State, 655 P.2d 1308 (Alaska Ct. App. 1982); Seymore v. State, 655 P.2d 786 (Alaska Ct. App. 1982); Shaw v. State, 673 P.2d 781 (Alaska Ct. App. 1983); Walsh v. State, 677 P.2d 912 (Alaska Ct. App. 1984); Degler v. State, 741 P.2d 659 (Alaska Ct. App. 1987); Winther v. State, 749 P.2d 1356 (Alaska Ct. App. 1988); Burton v. State, 768 P.2d 628 (Alaska Ct. App. 1989).

Stated in Erhart v. State, 666 P.2d 1199 (Alaska Ct. App. 1982); State v. Rastopsoff, 659 P.2d 630 (Alaska Ct. App. 1983); Maldonado v. State, 676 P.2d 1093 (Alaska Ct. App. 1984); Tulowetzke v. State, Dep't of Pub. Safety, 743 P.2d 368 (Alaska 1987).

Cited in Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982); Lacquement v. State, 644 P.2d 860 (Alaska Ct. App. 1982); Wolf v. State, 647 P.2d 609 (Alaska Ct. App. 1982); Griffith v. State, 653 P.2d 1057 (Alaska Ct. App. 1982); Nenkok v. State, 663 P.2d 958 (Alaska Ct. App. 1982); Wright v. State, 666 P.2d 1226 (Alaska Ct. App. 1983); Katelea v. State, 660 P.2d 1199 (Alaska Ct. App. 1983); Langton v. State, 662 P.2d 954 (Alaska Ct. App. 1983); Woods v. State, 667 P.2d 184 (Alaska 1983); Maal v. State, 670 P.2d 708 (Alaska Ct. App. 1983); State v. LaPorte, 672 P.2d 466 (Alaska Ct. App. 1983); Flink v. State, 683 P.2d 726 (Alaska Ct. App. 1984); Benbow v. State, 698 P.2d 1230 (Alaska Ct. App. 1985); [illegible]odes v. State, 717 P.2d 422 (Alaska Ct. App. 1986); James v. State, 739 P.2d 1314 (Alaska Ct. App. 1987); Schnecker v. State, 739 P.2d 1310 (Alaska Ct. App. 1987); Bond v. State, 747 P.2d 546 (Alaska Ct. App. 1987); Comegys v. State, 747 P.2d 564 (Alaska Ct. App. 1987); Stewart v. State, 766 P.2d 900 (Alaska Ct. App. 1988); James v. State, 764 P.2d 1336 (Alaska Ct. App. 1988); Gabrielloff v. State, 768 P.2d 128 (Alaska Ct. App. 1988); Juelson v. State, 768 P.2d 1294 (Alaska Ct. App. 1988); Sledge v. State, 763 P.2d 1364 (Alaska Ct. App. 1988); Luepke v. State, 765 P.2d 988 (Alaska Ct. App. 1988); Hilburn v. State, 765 P.2d 1382 (Alaska Ct. App. 1988); Fowler v. State, 706 P.2d 688 (Alaska Ct. App. 1988); DeHart v. State, 781 P.2d 989 (Alaska Ct. App. 1989).

Sec. 12.55.172. [Renumbered as AS 12.55.180.]

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 12.55.155 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.

641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

Remarks must be specific. — Subsection (f) of this section, which requires that findings "be set out with specificity," calls for sentencing judges to include, in their remarks on the record, the following specific information: (1) the specific factors in aggravation and in mitigation found to have been established by clear and convincing evidence; (2) the evidence upon which the court has relied in finding the existence of aggravating or mitigating factors; (3) an explanation of the weight given by the court to each aggravating or mitigating factor, and the relative importance of each factor in comparison with other aggravating or mitigating factors established; and (4) an evaluation of the totality of the aggravating and mitigating factors in light of the State v. Chaney, 477 P.2d 441 (Alaska 1970) criteria, as expressed in AS 12.55.005, in order to determine the amount by which the presumptive sentence for the particular offense should be adjusted. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

Conclusory finding not sufficient. — Compliance with the statutory directive to set forth all findings with specificity requires more than a conclusory finding that aggravating or mitigating factors have been established by the requisite standard of proof. DeGross v. State, 768 P.2d 134 (Alaska Ct. App. 1989).

Presentence report prepared by probation office does not satisfy state's obligation under subsection (f) of this section. Nukapigak v. State, 646 P.2d 215 (Alaska Ct. App. 1982), aff'd, 663 P.2d 943 (Alaska 1983).

Lack of express findings as to aggravating factors. — In the absence of a presentence hearing to permit resolution of disputed facts pertaining to alleged aggravating factors and in the absence of express findings by the sentencing court as to the existence of aggravating factors, the three-year increase of the presumptive six-year term specified for defendant's assault conviction could not be sustained. Dunn v. State, 653 P.2d 1071 (Alaska Ct. App. 1982).

The lack of any express finding by the sentencing court as to the aggravating factors that were actually considered in imposing a nine-year sentence on the assault charge required remand of the case for resentencing in order to permit specific findings as to aggravation to be made. Dunn v. State, 653 P.2d 1071 (Alaska Ct. App. 1982).

Remand for resentencing. — Because the requirement of specific findings relates not only to the adequacy of the appellate record, but also to the appropriateness of the trial court's sentencing decision, a lack of adequate findings required a remand for resentencing, rather than merely a remand for additional findings. DeGross v. State, 768 P.2d 134 (Alaska Ct. App. 1989).

V. NOTICE.

Notice to parties of factors in question. — The parties may rely upon evidence introduced during trial to sustain their respective burdens of proving aggravating and mitigating factors, but they are entitled to notice in advance of the sentencing hearing regarding the aggravating and mitigating factors in question since this enables them to conduct orderly preparation, and gives them an opportunity to rebut trial evidence at the sentencing hearing. Hartley v. State, 653 P.2d 1052 (Alaska Ct. App. 1982).

In a prosecution for first-degree sexual assault, where the trial judge found an aggravating factor which he mentioned to the parties for the first time in the context of his closing sentencing remarks and then sentenced defendant to 15 years, the court of appeals remanded for resentencing since defendant was entitled to notice and an opportunity to be heard. Hartley v. State, 653 P.2d 1052 (Alaska Ct. App. 1982).

The trial court has the power sua sponte to alert the parties to possible aggravating and mitigating factors present in the record so long as the parties are given an opportunity to marshal the relevant evidence, pro and con, and make their arguments accordingly. Hartley v. State, 653 P.2d 1052 (Alaska Ct. App. 1982).

When a party has had insufficient time to comply with the notice requirements relating to proof of prior convictions or aggravating and mitigating factors, the appropriate remedy should normally be a continuance of the sentencing proceedings; and failure to consider prior crimes for presumptive sentencing purposes can be condoned only in those cases where the state, after exercising due diligence, is unable to meet the statutory requirements for proof of a prior conviction. Kelly v. State, 663 P.2d 967 (Alaska Ct. App. 1983).

Sec. 12.55.165. Extraordinary circumstances. If the defendant is subject to sentencing under AS 12.55.125(c), (d), (e), or (i) 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. (§ 12 ch 166 SLA 1978; am § 37 ch 143 SLA 1982; am § 2 ch 168 SLA 1990)

Effect of amendments. — The 1990 amendment, effective June 22, 1990, substituted "AS 12.55.125(c), (d), (e), or (i)" for "AS 12.55.125(c), (d)(1), (d)(2), (e)(1), (e)(2), or (i)" near the beginning of the section.

NOTES TO DECISIONS

Legislature intended that this section establish two separate bases for referral of a case from a trial court to a three-judge panel for sentencing. First, referral is warranted in situations where manifest injustice would result from failure to consider relevant, nonstatutory aggravating or mitigating factors in sentencing; and, second, where manifest injustice would result from imposition of a presumptive sentence, whether or not adjusted for statutory aggravating or mitigating factors. Dancer v. State, 716 P.2d 1174 (Alaska Ct. App. 1986).

This section establishes two distinct grounds for referral of a case to a three-judge panel: (1) if the presumptive term, adjusted for aggravating or mitigating factors, would be manifestly unjust or plainly unfair and, (2) if manifest injustice will result from failure to consider a nonstatutory aggravating or mitigating factor. Kirby v. State, 748 P.2d 767 (Alaska Ct. App. 1987).

Modification of presumptive term. — The presumptive one-year term imposed by AS 12.55.125(e)(3), and by extension (d)(3), are subject to modification because of aggravating or mitigating factors as well as possible referral to a three-judge panel like all other presumptive sentences. Edwin v. State, 762 P.2d 499 (Alaska Ct. App. 1988).

Constitutionality of presumptive sentencing provisions. — See notes under same heading, AS 12.55.125. Nell v. State, 642 P.2d 1361 (Alaska Ct. App. 1982).

Authority to sentence defendant. — See notes to AS 12.55.175 under catchline "Sentencing authority." Heathcock v. State, 670 P.2d 1166 (Alaska Ct. App. 1983). See also Winfree v. State, 683 P.2d 284 (Alaska Ct. App. 1984).

Authority to create new factors. — It appears that the legislature, in adopting this section, in effect delegated to the three-judge panel the authority to create new aggravating and mitigating factors under the common law, which would be available for consideration in subsequent cases. Dancer v. State, 716 P.2d 1174 (Alaska Ct. App. 1986).

Consideration of evidence of rehabilitation. — Where the sentencing record contained unusually strong evidence that a youthful first offender has a particularly favorable potential for rehabilitation, and where the absence of statutory aggravating or mitigating factors would have precluded the sentencing court from giving any consideration to that evidence in imposing a sentence, the Alaska Court of Appeals thought referral to the three-judge panel was expressly authorized under this section and AS 12.55.175. Smith v. State, 711 P.2d 561 (Alaska Ct. App. 1985).

Once the court finds the mitigating factor of unusual prospects for rehabilitation in the case of a first offender, it should evaluate the factor's impact on an appro-

causal sense, to the commission of a crime. Ronik v. State, 760 P.2d 644 (Alaska Ct. App. 1988).

Applicability of (d)(9). — Mitigating factor in (d)(9) of this section, that the offense was one of the least serious included in the offense, applies to the offense of possession of a concealable firearm by a felon. State v. LaPorte, 672 P.2d 466 (Alaska Ct. App. 1983).

Pointing an unloaded functioning .44 caliber replica cap-and-ball pistol, at another person and pulling the trigger three times is not among the "least serious" within the definition of third-degree assault. Weston v. State, 656 P.2d 1186 (Alaska Ct. App. 1982), rev'd on other grounds, 682 P.2d 1119 (Alaska 1984).

For purposes of establishing the mitigating factor specified in paragraph (d)(9), reckless conduct is not per se less serious than knowing or intentional conduct. Adams v. State, 718 P.2d 164 (Alaska Ct. App. 1986).

Where the defendant argued the mitigator of "least serious conduct" should apply, since his conduct would have constituted an attempted robbery under the former statute although AS 11.41.510 includes "attempting to take property" as robbery, it was held that since the defendant had pointed a loaded gun at the victim, the potential harm created by his conduct was not lessened because he received no property, and, therefore, the judge was not clearly erroneous in rejecting this mitigator. Degler v. State, 741 P.2d 659 (Alaska Ct. App. 1987).

The mitigating factor in (d)(9) where "the conduct constituting the offense was among the least serious conduct included in the definition of the offense" compares the defendant's conduct in committing the offense with the conduct of others committing the same offense. It does not compare classes of offenses. Aveoganna v. State, 757 P.2d 75 (Alaska Ct. App. 1988).

Paragraph (d)(9) would almost never be appropriate for consideration in a case of sexual abuse where the victim is a 10-year-old child. Johnson v. State, 762 P.2d 493 (Alaska Ct. App. 1988).

Merger of mitigating factors. — Where the defendant is a first felony offender, the mitigating factor that the conduct is among the least serious within the definition of the offense tends to merge with the mitigating factor that the harm caused by the defendant's conduct is consistently minor and inconsistent with imposition of a substantial period of imprisonment. Allen v. State, 769 P.2d 467 (Alaska Ct. App. 1989).

No error in rejecting proposed mitigating factor. — Trial judge did not err in rejecting the defendant's argument that his conduct was among the least serious within the definition of first-degree robbery, where the robberies appeared to have been well planned, were executed in a manner calculated to render the victims relatively helpless and under circumstances that tended to minimize the possibility of a report by the victims to the police; where the defendant clearly created the impression that he had a firearm that he was prepared to use; where the defendant inflicted physical injury upon one victim; and where a substantial amount of cash was taken. Davis v. State, 706 P.2d 1198 (Alaska Ct. App. 1985).

When considering whether or not the conduct of one convicted of issuing a bad check was among the least serious within the definition of the offense, the monetary value of the bad check was by no means the only relevant factor; the planned and professional manner in which he committed the offense also reflected on its seriousness. The sentencing judge did not abuse his discretion in rejecting the proposed mitigating factor. Gaul v. State, 712 P.2d 906 (Alaska Ct. App. 1986).

"Least serious" finding not error. — In robbery prosecution, finding the "least serious" mitigating factor was not error given the fact that the weapon used was inoperable; the apparent lack of planning of the robbery on defendant's part; the age of the defendant; and his lack of a prior record. State v. Richards, 720 P.2d 47 (Alaska Ct. App. 1986).

Applicability of (d)(11). — Paragraph (d)(11) contemplates necessities such as food or water; it does not include the desire to attend a future court proceeding, such as an out-of-state custody hearing. Degler v. State, 741 P.2d 659 (Alaska Ct. App. 1987).

Applicability of (d)(13). — Paragraph (d)(13) requires that the trial court look not only at the defendant's past conduct but also at the relationship between that past conduct and his present offense. Totemoff v. State, 739 P.2d 769 (Alaska Ct. App. 1987).

Applicability of (d)(14). — A trial judge was clearly erroneous in rejecting the mitigating factor that an offense involved small quantities of a controlled substance where the defendant sold one-half gram of heroin on one occasion and one-quarter gram on another occasion and was in possession of two to four similar packets. Solitaire v. State, 709 P.2d 1334 (Alaska Ct. App. 1985).

Familiarity with victim. — In prosecution for first-degree sexual assault, defendant's familiarity with his victim (his 12-year-old daughter) was not a mitigating factor. Hodges v. State, 660 P.2d 1203 (Alaska Ct. App. 1983).

C. Alcohol or Drug Intoxication.

Constitutionality. — In preventing the court from considering as a mitigating factor defendant's problems with alcohol abuse as they related to his rehabilitation, subsection (g) does not violate Alaska Const., art. I, § 12, or infringe upon the separation of powers. Koteles v. State, 660 P.2d 1199 (Alaska Ct. App. 1983).

The exclusion of voluntary intoxication and chronic alcoholism as mitigating factors in determining appropriate sentences for those subject to presumptive sentencing is not a denial of equal protection because the legislative rejection of these conditions as mitigating circumstances is consistent throughout the criminal code and there are sufficient reasons to justify the exclusion. Wright v. State, 656 P.2d 1226 (Alaska Ct. App. 1983).

Alcoholism as consideration for sentencing. — While voluntary intoxication or a history of alcoholism cannot be considered an aggravating or mitigating factor for the purposes of presumptive sentencing, when a violent crime is committed under the influence of alcohol by a person with a background of alcohol-related violence, his background should be considered by the court in determining the extent to which rehabilitation will realistically be accomplished by the sentence which it intends to impose. State v. Ahwinona, 635 P.2d 488 (Alaska Ct. App. 1981).

Increased sentence upheld. — The addition of five years suspended imprisonment to a five-year presumptive term for drunk-driving manslaughter was not clearly mistaken, where the aggravating factor for increasing the sentence was defendant's decision to operate a motor vehicle after having consumed enough intoxicating liquor to raise his blood-alcohol level to almost twice the legal maximum. Krasovich v. State, 731 P.2d 598 (Alaska Ct. App. 1987).

D. Elements of Offense as Factors.

Subsection (e) construed. — Subsection (e) does not purport to deal with limitations on the applicability of presumptive sentencing under AS 12.55.125 and does not preclude the use of a prior conviction to invoke presumptive sentencing under AS 12.55.125 when that prior conviction is a necessary element of the present offense. F y v. State, 655 P.2d 789 (Alaska Ct. App. 1983).

The underlying policy of subsection (e) of this section is to avoid double punishment for the same conduct. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

Where violence and injury are characteristic of an offense defined by statute, the mere fact of some physical injury to the victim as a result of the defendant's conduct, though technically an aggravating factor under subsection (c)(1) of this section, will not justify a significant increase in the presumptive term. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

Since presumptive terms are intended to be applicable in typical cases, and not in aggravated or mitigated cases, the presumptive 10-year term applicable to defendant must be deemed to take into account the potential for violence and the likelihood of some degree of physical injury which is typical of the offense for which he was convicted, first-degree sexual assault. Juneby v. State, 665 P.2d 30 (Alaska Ct. App. 1983).

Merger of aggravating and mitigating factors based on same intent and conduct of accused. — See Juneby v. State, 665 P.2d 30 (Alaska Ct. App. 1983).

Conduct leading to prior conviction as a factor. — Consideration as an aggravating factor of conduct by the defendant for which a separate conviction has been entered and a separate sentence imposed is prohibited. Juneby v. State, 665 P.2d 30 (Alaska Ct. App. 1983).

IV. FINDINGS OF COURT.

The provisions of subsection (f) of this section must be read to require more than a pro forma, conclusory statement that an aggravating or mitigating factor has or has not been shown by clear and convincing evidence. Juneby v. State,

tion of the offense to which he pled no contest. Schneeker v. State, 739 P.2d 1310 (Alaska Ct. App. 1987).

Paragraph (c)(13) reflects at least two distinct legislative interests: There is a public interest in having the duties of public safety officers carried out efficiently and free from hindrance; there is a separate interest in avoiding the additional possibility of public danger generated whenever a safety officer is challenged or hindered in the execution of his duties. Gilbreath v. State, 668 P.2d 1354 (Alaska Ct. App. 1983).

Paragraph (c)(13) construed. — Nothing in the legislative history supports the suggestion that paragraph (c)(13) is to be applied only when the offense for which the defendant is being sentenced is itself susceptible to the characterization of being "directed at" someone; rather this paragraph plainly states only that the conduct constituting the offense must be directed at a public safety officer. Gilbreath v. State, 668 P.2d 1354 (Alaska Ct. App. 1983).

The court rejected the argument that defendant's offense was "complete" when the police officer first saw defendant with the gun, before defendant was even aware of the officer's presence, so that defendant's subsequent conduct could not be considered under paragraph (c)(13) of this section. Gilbreath v. State, 668 P.2d 1354 (Alaska Ct. App. 1983).

Living situation covered by (c)(18). — Paragraph (c)(18) covers a living situation such as that where three men are living together in the house one of them owns. Kunakluk v. State, 719 P.2d 1045 (Alaska Ct. App. 1986).

Applicability of (c)(18). — That defendant's minor sexual abuse victims were members of the social unit comprised of those living together in the same dwelling as the defendant serves to aggravate the offense slightly; but this aggravating factor, standing alone, would not justify imposing a sentence on a first-felony offender equal to the presumptive term for a second-felony offender; it certainly would not justify a more severe sentence than a second-felony offender would receive. Ojo v. State, 738 P.2d 1117 (Alaska Ct. App. 1987) (decided prior to 1988 amendment).

Errors in applying paragraph (c)(20). — The sentencing judge erred in applying paragraph (c)(20) as an aggravating factor where the defendant was on probation for offenses that were felonies Alaska law; AS 12.55.145 applies in defining what a "felony charge or conviction" is for purposes of paragraph (c)(20). Kuvaas v. State, 696 P.2d 684 (Alaska Ct. App. 1985).

Paragraph (c)(21) construed. — The term "criminal history" in subsection (c)(21) does not connote or denote past criminal convictions, but merely past conduct violative of criminal laws. Fagan v. State, 779 P.2d 1258 (Alaska Ct. App. 1989).

Incidents of misconduct "similar in nature". — Incidents of misconduct may fairly be said to be "similar in nature" if they involve the same type of crime. The statutory requirement of similarity is satisfied when a defendant who currently stands convicted of theft is shown to have been formerly convicted of other thefts. No additional factual showing is needed. Kelley v. State, 785 P.2d 567 (Alaska Ct. App. 1990).

Finding of aggravating factor not erroneous. — Finding of an aggravating factor, that defendant's assault was knowingly directed at a law enforcement officer, was not clearly erroneous. Smith v. State, 682 P.2d 1125 (Alaska Ct. App. 1984).

Defendant convicted as principal not minor role player. — The mitigating factor specified in subsection (d)(2) of this section, that "the defendant, although an accomplice, played only a minor role in the commission of the offense," is inapplicable to defendants convicted as principals. McReynolds v. State, 739 P.2d 176 (Alaska Ct. App. 1987).

Sentence for terroristic bombing. — Sentence of four years, with one year suspended, for terroristic bombing was excessive, where the aggravating factors of deliberate cruelty and prior repeated instances of assaultive behavior were not supported by the record. Allen v. State, 769 P.2d 441 (Alaska Ct. App. 1988).

II. Mitigating Factors Generally.

Mitigating factors must be established by clear and convincing evidence, and the trial court's rejection of a mitigating factor will be affirmed unless clearly erroneous. Degler v. State, 741 P.2d 659 (Alaska Ct. App. 1987).

Trial court should not propose non-statutory mitigating factor to three-judge panel where legislature specifically rejected that factor for inclusion in subsection (d). Where the legislature

such as the relationship between a defendant's past conduct and his present offense, and imposed limitations on the trial court's power to consider that relationship in mitigation of sentence, the trial court should not propose the same mitigating factor to the three-judge panel without complying with the limitations; to do so is to suggest a common-law development inconsistent with legislation. Totemoff v. State, 739 P.2d 769 (Alaska Ct. App. 1987).

Applicability of (d)(2) and (d)(9). — Sentencing court did not err in denying the defendant's request for consideration of (d)(2) and (d)(9) where the record supported the inference that the defendant acted as a lookout for a robbery. Abdulbaqui v. State, 728 P.2d 1211 (Alaska Ct. App. 1986).

Legislative intent in (d)(3). — Legislature intended mitigating factor provided in paragraph (d)(3) of this section to be interpreted more broadly than the defense of duress. The defense of duress and the related defense of necessity have been narrowly defined at common law to excuse criminal behavior only in very limited circumstances. Bell v. State, 668 P.2d 787 (Alaska Ct. App. 1983).

This section provides an alleviation of the code's treatment of imperfect defenses, in that evidence that defendant in good faith subjectively believed facts which if true would have established a defense justifying his conduct, but which the judge or jury concludes would have been unreasonable under circumstances, may warrant mitigation of presumptive sentence. Bell v. State, 668 P.2d 787 (Alaska Ct. App. 1983).

Acting under compulsion. — In order for a defendant to establish the mitigating factor that he acted under compulsion, the compulsion must be of a sufficiently extraordinary nature that it approaches being a defense to the crime; a trial judge could properly conclude that to the extent a stepfather convicted of having sexual relations with his stepdaughter over five years acted under compulsion, it was the sort of compulsion which would be ordinary and expected in the commission of this kind of offense. Bynum v. State, 708 P.2d 1293 (Alaska Ct. App. 1986).

Conduct influenced by serious marital problem was not action under duress or compulsion of a sufficiently extraordinary nature to approach being a defense. Nashoonlook v. State, 744 P.2d 420 (Alaska

Imperfect defense test under (d)(3) met. — Where state thought enough of appellant inmate's concern over family matters to give him an eight-hour pass, and where appellant allegedly panicked and left correctional facility a few hours before his pass was scheduled to commence, under such circumstances, it could be found that appellant's criminal conduct — anticipating pass by a few hours — balanced against harm he subjectively believed would occur — permanent separation from his children — met the test of an "imperfect" defense under AS 12.55.155(d)(3) so as to reduce presumptive sentence. Bell v. State, 668 P.2d 787 (Alaska Ct. App. 1983).

Imperfect defense test not met. — In prosecution for escape in the second degree, defendant's evidence of homosexual advances toward him, by another inmate, and of his concerns about family matters failed to establish mitigating factor as would justify reduction of his sentence under AS 12.55.155(d)(3). Whitmore v. State, 657 P.2d 869 (Alaska Ct. App. 1983).

Where defendant offered to show that he had attempted to obtain money through robbery because he was desperate for money to attend an out-of-state custody hearing, it was held that the judge was not clearly erroneous in rejecting this mitigator. Degler v. State, 741 P.2d 659 (Alaska Ct. App. 1987).

Consideration of mental state and mental illness. — A trial court, in imposing a presumptive sentence, may consider the interplay between the defendant's mental state and any mental illness he may have in determining whether the defendant has proved by clear and convincing evidence the requirements of paragraph (d)(3). Hart v. State, 702 P.2d 661 (Alaska Ct. App. 1985), declining to overrule Bell v. State, 668 P.2d 787 (Alaska Ct. App. 1983).

Applicability of (d)(7). — Sentencing courts should apply the statutory language of paragraph (d)(7) on a case-by-case basis, guided by the plain and ordinary meaning of its terms, rather than applying a restrictive interpretation of the mitigating factor of provocation. Roark v. State, 768 P.2d 614 (Alaska Ct. App. 1988).

Trial court did not err in rejecting as a matter of law defendant's contention that "provocation" may be found for purposes of paragraph (d)(7) whenever the victim's

perjury at trial. — A sentencing judge may take into account his belief that the defendant committed perjury at his trial, but the judge may do so only to the extent that the alleged perjury is used by him as indicia to determine the defendant's potential for rehabilitation, thus it is improper to enhance the sentence as punishment for the alleged perjury. Pyrdol v. State, 617 P.2d 513 (Alaska 1980); Coleman v. State, 621 P.2d 869 (Alaska 1980), cert. denied, 454 U.S. 1090, 102 S. Ct. 653, 70 L. Ed. 2d 628 (1981).

State without discretion to suppress factors. — Although the state has discretion whether or not to institute a prosecution, the state has no discretion to suppress evidence of past convictions or aggravating or mitigating factors. Hartley v. State, 653 P.2d 1052 (Alaska Ct. App. 1982).

Suspension of erroneously increased sentence immaterial. — Where the court did not find aggravating circumstances, increasing of the presumptive sentence was error even though the increased sentence was suspended. McMannera v. State, 650 P.2d 414 (Alaska Ct. App. 1982).

Increased sentence upheld. — See Langton v. State, 662 P.2d 954 (Alaska Ct. App. 1983); Willard v. State, 662 P.2d 971 (Alaska Ct. App. 1983); Roberts v. State, 680 P.2d 503 (Alaska Ct. App. 1984).

Where a defendant was a first-felony offender for presumptive sentencing purposes but he had been convicted of several serious misdemeanors, and incestuous conduct with his daughter had gone on for several years and involved full intercourse, a sentence of five years with two years suspended was not excessive though his sentence exceeded two years, the presumptive sentence for a second-felony offender convicted of a class C felony, because the case could be termed exceptional. Theodore v. State, 692 P.2d 987 (Alaska Ct. App. 1985).

Scope of review. — See notes under heading "Review of presumptively imposed sentences," AS 12.55.120. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

III. AGGRAVATING AND MITIGATING FACTORS.

A. Aggravating Factors Generally.

tion (c). — Superior court erred in taking into consideration aggravating factors which were not enumerated in subsection (c) of this section at the time of sentencing. Wouda v. State, 667 P.2d 184 (Alaska 1983).

Victim's physical injuries. — Since the victim's physical injury is not a necessary element of the crime of sexual assault in the first degree, the superior court properly considered the victim's physical injuries as an aggravating factor in sentencing the defendant. Wouda v. State, 667 P.2d 184 (Alaska 1983).

Manner in which crime committed. — In evaluating a defendant as a worst offender for the purpose of imposing a maximum sentence, the manner in which the crime was committed as well as the defendant's character and background are significant. Napayonak v. State, Ct. App. Op. No. 1041 (File No. A-2672), P.2d (1990).

The term "deliberate cruelty," as used in subsection (c)(2) of this section must be restricted to instances in which pain, whether physical, psychological, or emotional, is inflicted gratuitously or as an end in itself. Conversely, when the infliction of pain or injury is merely a direct means to accomplish the crime charged, the test for establishing the aggravating factor of deliberate cruelty will not be met. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982).

Deliberate cruelty is conduct which involves gratuitously inflicted torture or violence. Jones v. State, 766 P.2d 107 (Alaska Ct. App. 1988).

Finding that defendant convicted of second-degree murder acted with deliberate cruelty was not clearly mistaken. Komakhuk v. State, 719 P.2d 1046 (Alaska Ct. App. 1986).

Applicability of (c)(4). — Mere possession of a dangerous instrument does not satisfy the requirements of (c)(4). Abdulbaqui v. State, 720 P.2d 1211 (Alaska Ct. App. 1986).

The trial court erred in concluding that the aggravator in paragraph (c)(5) had been established where the finding of vulnerability was based solely upon an environmental factor, that the victim was in her own apartment where she had a right to be protected. Braaten v. State, 705 P.2d 1311 (Alaska Ct. App. 1986).

Paragraph (c)(8) construed. — While it appears that the legislature wanted the aggravating factor in paragraph (c)(8)

prior criminal behavior other than convictions, there is no indication that the legislature intended to further broaden the aggravating factor to include a single prior incident of aggravated assaultive behavior. Nashoniook v. State, 744 P.2d 420 (Alaska Ct. App. 1987).

Applicability of (c)(8). — The state court of appeals interpreted the current version of paragraph (c)(8) as applying only to criminal conduct which arose after the effective date of the 1982 amendment of the paragraph to avoid an ex post facto law problem. Newsom v. State, 726 P.2d 661 (Alaska Ct. App. 1986).

Inordinate weight given to seriousness of prior conviction. — Composite term of sixty years upon conviction of two counts of sexual abuse of a minor in the first degree was clearly mistaken, and the case was remanded for imposition of a total sentence not to exceed sixty years with ten years suspended, where the sentencing court's reliance upon the seriousness of defendant's prior murder conviction placed inordinate and disproportionate weight on a single aggravating factor. Murray v. State, 770 P.2d 1131 (Alaska Ct. App. 1989).

Prior assaultive conduct considered. — Trial court, in imposing sentence upon a conviction for sexual assault in the first degree, did not err in considering the assaultive conduct which occurred during defendant's prior felony (burglary) in determining that the state established the aggravating factor set forth in subsection (c)(8). Kankanton v. State, 766 P.2d 101 (Alaska Ct. App. 1988).

"Most serious conduct included." — The legislative history of paragraph (c)(10) of this section makes it clear that the drafters of this provision intended that the determination of whether an offender's conduct "was among the most serious conduct included in the definition of that offense" was to be based on an assessment of the specific facts of each case, viewed in relation to the most serious potential conduct constituting the offense charged. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), aff'd in part, 665 P.2d 30 (Alaska Ct. App. 1983).

In order to find an aggravating factor under subsection (c)(10) of this section, it is not necessary to establish that there are no other cases involving more serious conduct; it is sufficient if the offense falls within the general class of the most serious offenses. Peetook v. State, 656 P.2d

Since a finding of "most serious conduct" under paragraph(c)(10) of this section would be based partly on other specified aggravating factors, this factor should properly be viewed as subsuming the aggravating factors on which it is based. Peetook v. State, 656 P.2d 1308 (Alaska Ct. App. 1982).

AS 12.55.155(c)(10) stresses conduct involved in specific offense under consideration rather than personal characteristics of offender and requires comparison of conduct constituting crime in question with other conduct which would satisfy elements of the offense. Brezenoff v. State, 658 P.2d 1359 (Alaska Ct. App. 1983).

Defendant's repeated acts over a five-year period of sexual molestation of 12-year-old adopted daughter and resultant psychological damage to child could be considered as being "among the most serious conduct" under AS 12.55.155(c)(10) and thus may justify a sentence equal to one that could have been imposed on an offender who used a firearm or caused serious physical injury to an older victim as a result of a single isolated assault. Ecker v. State, 666 P.2d 577 (Alaska Ct. App. 1982).

While no violence was involved, trial court properly found that appellant's embezzlement of $140,000 from her employer over a one-year period was among the most serious conduct prescribed by the statute and served to distinguish it from prior cases in which substantial sentences for embezzlement were disapproved, and eight-year sentence with four years suspended was not excessive. Brezenoff v. State, 658 P.2d 1359 (Alaska Ct. App. 1983).

The court could properly consider the amount of damage caused to a commercial building, the value of the tractor-trailer the defendant took after entering the building, and the fact of its use and abandonment as circumstances constituting the "most serious conduct" for burglary in the second degree. Martin v. State, 704 P.2d 1341 (Alaska Ct. App. 1985).

In imposing sentence for attempted assault in the first degree since the trial court could find that defendant's actions were in part premeditated (i.e., that at the least he foresaw physical injury, if not serious physical injury, to victim), increasing the presumptive term by one year of incarceration was not clearly mistaken, nor was the court clearly mistaken in concluding that defendant's conduct was

1177 (Alaska Ct. App. 1989); Mauney v. State, 771 P.2d 1131 (Alaska Ct. App. 1989); Palmer v. State, 770 P.2d 296 (Alaska Ct. App. 1989); Harrell v. State, 772 P.2d 559 (Alaska Ct. App. 1989); Charles v. State, 780 P.2d 377 (Alaska Ct. App. 1989); Schuenemann v. State, 781 P.2d 1005 (Alaska Ct. App. 1989); Hayes v. State, 785 P.2d 33 (Alaska Ct. App. 1990); Harris v. State, 790 P.2d 1379 (Alaska Ct. App. 1990).

Quoted in Lounsberry v. State, 693 P.2d 887 (Alaska Ct. App. 1985); Martin v. State, 699 P.2d 886 (Alaska Ct. App. 1985); Hancock v. State, 706 P.2d 1164 (Alaska Ct. App. 1985).

Stated in Tuckfield v. State, 621 P.2d 1350 (Alaska 1981); Born v. State, 633 P.2d 1021 (Alaska Ct. App. 1981); Linn v. State, 658 P.2d 160 (Alaska Ct. App. 1983); State v. Rastopsoff, 659 P.2d 630 (Alaska Ct. App. 1983); State v. Brinkley, 681 P.2d 351 (Alaska Ct. App. 1984); Bynum v. State, 708 P.2d 1293 (Alaska Ct. App. 1985); Thomas v. State, 710 P.2d 1017 (Alaska Ct. App. 1985); Tulowetzke v. State, Dep't of Pub. Safety, 743 P.2d 368 (Alaska 1987); Ortberg v. State, 751 P.2d 1368 (Alaska Ct. App. 1988); Stewart v. State, 756 P.2d 900 (Alaska Ct. App. 1988).

Cited in Whittlesey v. State, 626 P.2d 1066 (Alaska 1980); Law v. State, 624 P.2d 284 (Alaska 1981); Leuch v. State, 633 P.2d 1006 (Alaska 1981); Tritt v. State, 626 P.2d 882 (Alaska Ct. App. 1981); Nenkok v. State, 653 P.2d 658 (Alaska Ct. App. 1982); Karr v. State, 660 P.2d 460 (Alaska Ct. App. 1983); Howard v. State, 664 P.2d 603 (Alaska Ct. App. 1983); Martin v. State, 664 P.2d 612 (Alaska Ct. App. 1983); Heathcock v. State, 670 P.2d 1165 (Alaska Ct. App. 1983); Maal v. State, 670 P.2d 708 (Alaska Ct. App. 1983); Lloyd v. State, 672 P.2d 152 (Alaska Ct. App. 1983); Shaw v. State, 677 P.2d 269 (Alaska Ct. App. 1984); Cordes v. State, 676 P.2d 611 (Alaska Ct. App. 1984); Flink v. State, 683 P.2d 725 (Alaska Ct. App. 1984); Atkinson v. State, 690 P.2d 681 (Alaska Ct. App. 1985); Richey v. State, 717 P.2d 407 (Alaska Ct. App. 1986); Kuvana v. State, 717 P.2d 855 (Alaska Ct. App. 1986); Whitlow v. State, 719 P.2d 267 (Alaska Ct. App. 1986); Gibson v. State, 719 P.2d 687 (Alaska Ct. App. 1986); Ewell v. State, 730 P.2d 164 (Alaska Ct. App. 1986); State v. Krieger, 731 P.2d 592 (Alaska Ct. App. 1987); Folsom v. State, Sweetin v. State, 744 P.2d 424 (Alaska Ct. App. 1987); Bond v. State, 747 P.2d 546 (Alaska Ct. App. 1987); Comegys v. State, 747 P.2d 554 (Alaska Ct. App. 1987); Kirby v. State, 748 P.2d 757 (Alaska Ct. App. 1987); Winther v. State, 749 P.2d 1366 (Alaska Ct. App. 1988); Monroe v. State, 752 P.2d 1017 (Alaska Ct. App. 1988); Howell v. State, 756 P.2d 103 (Alaska Ct. App. 1988); Gabrielsoff v. State, 760 P.2d 128 (Alaska Ct. App. 1988); Jansen v. State, 764 P.2d 308 (Alaska Ct. App. 1988); Lawrence v. State, 764 P.2d 318 (Alaska Ct. App. 1988); Luepke v. State, 766 P.2d 988 (Alaska Ct. App. 1988); Fowler v. State, 766 P.2d 688 (Alaska Ct. App. 1988); Newell v. State, 771 P.2d 873 (Alaska Ct. App. 1989); Hamilton v. State, 771 P.2d 1368 (Alaska Ct. App. 1989); Dellart v. State, 781 P.2d 989 (Alaska Ct. App. 1989).

II. ADJUSTMENT OF PRESUMPTIVE SENTENCES GENERALLY.

Term subject to modification. — The presumptive one-year term imposed by AS 12.55.125(e)(3), and by extension (d)(3), are subject to modification because of aggravating or mitigating factors as well as possible referral to a three-judge panel like all other presumptive sentences. Edwin v. State, 762 P.2d 499 (Alaska Ct. App. 1988).

Two-step process. — The adjustment of a presumptive sentence for aggravating or mitigating factors essentially involves a two-step process: The first step, an evidentiary one, is comprised of establishing existence of specially alleged factors, and under subsection (f) of this section each alleged factor must be proved by clear and convincing evidence, and the proponent of the factor bears the burden of proof. The second step, however, involves a judgmental element rather than an evidentiary one and requires an evaluation by the court of factors that have been established, and a determination of the extent to which the factors will justify an upward or downward adjustment of the applicable presumptive term. Juneby v. State, 666 P.2d 30 (Alaska Ct. App. 1983).

Adjustment on basis of nonstatutory mitigating factor. — For purposes of future cases, when a case involving a presumptive term in excess of four years is referred to the three-judge panel on the sole basis of a nonstatutory mitigating

factor, a sentence below 50% of the presumptive term will normally be deemed inappropriate and clearly mistaken unless the panel expressly concludes that such a sentence is required to avoid manifest injustice, although the panel has jurisdiction to impose a sentence of less than 50% of the presumptive sentence. State v. Price, 740 P.2d 476 (Alaska Ct. App. 1987) (not applying rule in present cases).

Adjustment a judicial function. — The task of determining the amount by which a presumptive sentence should be increased upon proof of an aggravating factor is not an evidentiary one for which the state is responsible, but a judicial one for which the court is responsible. Juneby v. State, 666 P.2d 30 (Alaska Ct. App. 1983).

Sentencing powers of three-judge panel are not subject to restriction under subsection (n)(2). State v. Price, 730 P.2d 169 (Alaska Ct. App. 1986).

Deviation from presumptive sentence not automatic. — It is apparent from the language contained at the beginning of subsections (c) and (d) of this section that increases or decreases of presumptive terms should not be the automatic consequence when aggravating or mitigating factors are proved. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 666 P.2d 30 (Alaska Ct. App. 1983).

Nature of crime charged. — In order to determine the realistic impact that proof of an aggravating or mitigating circumstance should have on adjustment of a presumptive sentence in any given case, it is essential to consider not only the specific conduct constituting the aggravating or mitigating factor, but also the nature of the crime charged. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 666 P.2d 30 (Alaska Ct. App. 1983).

Application of Chaney criteria. — When the presumptive sentencing provisions of AS 12.55.125 and this section apply, the criteria of State v. Chaney, 477 P.2d 441 (Alaska 1970), are no longer of primary importance in determining the sentence. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 666 P.2d 30 (Alaska Ct. App. 1983).

When applied to the adjustment of a presumptive sentence, the State v. Chaney, 477 P.2d 441 (Alaska 1970),

should not be broadened into a consideration of all circumstances of the offense, as if the sentence were being imposed anew, without regard for the presumptive term. Instead, consideration of the Chaney criteria should focus specifically on the aggravating and mitigating conduct in the particular case. The presumptive term should remain as the starting point of the analysis, and the Chaney criteria should be employed for the limited purpose of determining the extent to which the totality of the aggravating and mitigating factors will justify deviation from the presumptive term. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 666 P.2d 30 (Alaska Ct. App. 1983).

When a defendant violates probation, the court must apply the Chaney criteria, emphasizing the original offense, the offender, and the defendant's intervening conduct. The fact that the probationer violated probation or broke an agreement, standing alone, cannot be given primary consideration. Batzner v. State, 768 P.2d 1160 (Alaska Ct. App. 1989).

Extent of physical injury. — In order to justify a substantial increase in the presumptive term the prosecution must bear the burden of making a clear and convincing showing that the injuries were unusual in nature or uncharacteristically severe. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 666 P.2d 30 (Alaska Ct. App. 1983).

Progressively greater increases in the presumptive term will be justified as the injuries inflicted increase in severity; more substantial increases should be reserved for the most severe category of injuries which are those included within the definition of "serious physical injury" under the provisions of AS 11.81.900. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 666 P.2d 30 (Alaska Ct. App. 1983).

Evidence introduced at trial may be considered. — A trial court, in conducting a hearing pursuant to Cr. R. 32 to determine whether mitigating and aggravating factors have been established, may consider evidence previously introduced at trial that resulted in conviction for which sentencing is being imposed. Wolf v. State, 647 P.2d 609 (Alaska Ct. App. 1982).

Relief that defendant

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.
C. Alcohol or Drug Intoxication.
D. Elements of Offense as Factors.
IV. Findings of Court.
V. Notice.

I. GENERAL CONSIDERATION.

Constitutionality of presumptive sentencing provisions. — See notes under same heading, AS 12.55.125. Nell v. State, 642 P.2d 1361 (Alaska Ct. App. 1982).

Legislative intent reflected. — The presumptive sentencing provisions contained in AS 12.55.125 and this section reflect the legislature's intent to assure predictability and uniformity in sentencing by the use of fixed and relatively inflexible sentences, statutorily prescribed, for persons convicted of second or subsequent felony offenses. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

Sentencing generally. — It is not fundamentally unfair for the trial court to sentence for a lesser offense based upon an assumption, supported by verified facts, that the defendant committed a higher offense. Schnecker v. State, 739 P.2d 1310 (Alaska Ct. App. 1987).

Comparison of purposes of AS 12.55.125 and this section. — The purpose of applying presumptive sentencing to a second or subsequent felony offender under AS 12.55.125 cannot properly be equated with the purpose served by the provisions of this section relating to enhancement of presumptive sentences upon proof of specified aggravating factors. Fry v. State, 665 P.2d 789 (Alaska Ct. App. 1983).

Limited use of both suspended jail time and probation is permitted under this section. Lacquement v. State, 644 P.2d 856 (Alaska Ct. App. 1982). See also Friedberg v. State, 663 P.2d 568 (Alaska Ct. App. 1983).

Sentences for sexual assaults. — Review of cases which address sexual assaults involving both adult and child victims supports a sentencing range for ag- [illegible] use of Atkinson and Depp as benchmarks for determining the kind of conduct warranting a sentence within that range. These benchmarks are applicable to all aggravated cases because of: (1) multiple victims; (2) multiple assaults on a single victim; or, (3) serious injuries to one or more victims. State v. Andrews, 707 P.2d 900 (Alaska Ct. App. 1985), aff'd, 723 P.2d 85 (Alaska 1986).

Sentence upheld. — See Montes v. State, 669 P.2d 961 (Alaska Ct. App. 1983).

Where defendant received a ten-year presumptive sentence for attempted first-degree murder as a second felony offender and appealed on the ground that the trial court gave insufficient consideration to former paragraph (d)(8) of this section, the mitigating factor that his prior felony of burglary was a less serious crime than the present offense, the court of appeals held that the trial judge's decision to give the mitigator little weight because he stressed general deterrence and affirmation of community norms was appropriate and the sentence was not clearly mistaken. Stancl v. State, 697 P.2d 1050 (Alaska Ct. App. 1985), aff'd, 718 P.2d 948 (Alaska 1986).

Sentence of eight-year presumptive term for first-degree sexual abuse of a minor and concurrent sentences of three years for two counts of second-degree sexual abuse of a minor to run concurrently with the eight-year term were upheld. The defendant's continued efforts to justify his conduct as "sex education" and his only limited acceptance and understanding of the grave risks of psychological damage to children that his conduct presented led the court of appeals to conclude the trial judge was not clearly erroneous in concluding that the mitigating factor of conduct among the least serious in the definition of the offense was not established by clear and convincing evidence. S.B. v. State, 706 P.2d 695 (Alaska Ct. [illegible]

Where a trial judge found, based upon substantial evidence in the form of defendant's past proven criminal record, that defendant would remain a danger to the community for the remainder of his life, a sentence of 97 years with 32 years suspended was not clearly mistaken. Contreras v. State, 767 P.2d 1169 (Alaska Ct. App. 1989).

Imposition of an aggravated presumptive term of ten years for nonalcohol-related vehicular manslaughter and a consecutive suspended four-year sentence for assault in the second degree was not clearly mistaken, where defendant's callousness and irresponsibility were evidenced by his conduct in eluding police officers, racing down a highway, and running red lights before colliding with another vehicle. Barney v. State, 780 P.2d 925 (Alaska Ct. App. 1990).

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, 780 P.2d 1037 (Alaska Ct. App. 1990).

Three-year sentence for failure to appear was not clearly mistaken, where defendant had been convicted of three or more prior felonies and the sentencing judge was entitled to take into account defendant's long history of alcohol abuse and record of offenses in concluding that his prospects for rehabilitation were guarded. Hayes v. State, 790 P.2d 713 (Alaska Ct. App. 1990).

Sentence not upheld. — Where a defendant was sentenced to consecutive sentences of 10 years for burglary in the first degree, 20 years for robbery in the first degree and 10 years for assault in the second degree made consecutive to a previously imposed eight-year sentence for shooting with intent to wound, the case was remanded for resentencing of the defendant as a second-felony offender with a total sentence, including the unserved portion of the previous sentence, not to exceed 40 years. Larson v. State, 688 P.2d 592 (Alaska Ct. App. 1984).

A sentence of twenty-four years with four years suspended, upon conviction of three counts of sexual abuse of a minor in the first degree, was clearly mistaken, where the trial court did not address the ten- to fifteen-year benchmark established in prior decisions concerning [illegible] vated cases of sexual assault, and nothing in the record established that a sentence in excess of fifteen years was necessary to protect the public. Mosier v. State, 747 P.2d 548 (Alaska Ct. App. 1987).

Imposition of consecutive terms totaling 23 years of unsuspended imprisonment was clearly mistaken, where, although defendant was convicted for multiple burglaries, the record failed to support the inference that he was incapable of being deterred or rehabilitated, or that the protection of the community required his isolation for a period of 23 years. Dumpus v. State, 776 P.2d 329 (Alaska Ct. App. 1989).

Applied in Kimbrell v. State, 647 P.2d 618 (Alaska Ct. App. 1982); Sears v. State, 663 P.2d 349 (Alaska Ct. App. 1982); Erhart v. State, 668 P.2d 1109 (Alaska Ct. App. 1982); Seymore v. State, 666 P.2d 786 (Alaska Ct. App. 1982); Goulden v. State, 656 P.2d 1218 (Alaska Ct. App. 1983); Hansen v. State, 657 P.2d 862 (Alaska Ct. App. 1983); Reynolds v. State, 664 P.2d 621 (Alaska Ct. App. 1983); Hanslon v. State, 667 P.2d 732 (Alaska Ct. App. 1983); State v. Coats, 669 P.2d 1329 (Alaska Ct. App. 1983); Shaw v. State, 673 P.2d 761 (Alaska Ct. App. 1983); Lee v. State, 673 P.2d 802 (Alaska Ct. App. 1983); Contreras v. State, 675 P.2d 654 (Alaska Ct. App. 1984); Walsh v. State, 677 P.2d 912 (Alaska Ct. App. 1984); Depp v. State, 686 P.2d 712 (Alaska Ct. App. 1984); Wells v. State, 687 P.2d 917 (Alaska Ct. App. 1984); Travelstead v. State, 689 P.2d 494 (Alaska 1984); Gregory v. State, 689 P.2d 508 (Alaska 1984); Wortham v. State, 689 P.2d 1133 (Alaska 1984); Carlson v. State, 696 P.2d 178 (Alaska Ct. App. 1985); Benboe v. State, 698 P.2d 1230 (Alaska Ct. App. 1985); Hart v. State, 702 P.2d 651 (Alaska Ct. App. 1985); Thomas v. State, 710 P.2d 1017 (Alaska Ct. App. 1985); Resek v. State, 715 P.2d 1188 (Alaska Ct. App. 1986); Dymenstein v. State, 726 P.2d 42 (Alaska Ct. App. 1986); Ecklund v. State, 730 P.2d 161 (Alaska Ct. App. 1986); Parks v. State, 731 P.2d 597 (Alaska Ct. App. 1987); Smith v. State, 745 P.2d 1376 (Alaska Ct. App. 1987); Covington v. State, 747 P.2d 560 (Alaska Ct. App. 1987); Upton v. State, 749 P.2d 386 (Alaska Ct. App. 1988); Clarvo v. State, 750 P.2d 807 (Alaska Ct. App. 1988); Robison v. State, 763 P.2d 1357 (Alaska Ct. App. 1988); Hale v. State, 764 P.2d 313 (Alaska Ct. App. 1988); Holtzheimer v. State, 768 P.2d [illegible]

(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 12.55.125:

(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 — 11.41.230, 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 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.

(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.

(f) 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 46 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)

Revisor's notes. — Paragraphs (23)-(26) of subsection (c) were enacted as (19)-(22). Renumbered in 1992.

Cross references. — For considerations in imposing sentence, see AS 12.55.005 and note to AS 12.55.120; for legislative purpose of ch. 46, SLA 1982, see § 1, ch. 46, SLA 1982, in the Temporary and Special Acts.

Effect of amendments. — The 1986 amendment added "that would be considered a prior felony conviction under AS 12.55.145(a)(2)" at the end of paragraph (c)(20).

The first 1987 amendment in paragraph (c)(22) inserted "physical or mental disability."

The second 1987 amendment substituted the present language of paragraph (d)(12) for "the defendant assisted authorities to detect or apprehend other persons who committed the offense with the defendant."

The 1988 amendment, in paragraph (c)(18), divided the formerly undivided language into an introductory paragraph and subparagraph (A), added "or" at the end of subparagraph (A), and added subparagraph (B).

The 1990 amendment added paragraphs (c)(27) and (c)(28).

Legislative history reports. — For report on ch. 102, SLA 1980 (HCS CSSB 511), see 1980 Senate Journal Supplement, No. 44, May 29, 1980 or 1980 House Journal Supplement, No. 79, May 29, 1980.

For House letter of intent on ch. 66, SLA 1988 (CSHB 237 (Jud)), which amended this section, see 1988 House Journal 2330-2337.

(2) the presumptive term of imprisonment is more than four years, ie court may decrease the presumptive term by an amount as great 150 percent of the presumptive term for factors in mitigation or may ncrease the presumptive term up to the maximum term of imprisonent for factors in aggravation.

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

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

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

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

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

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

(5) the defendant knew or reasonably should have known that the ictim of the offense was particularly vulnerable or incapable of resisance due to advanced age, disability, ill health, or extreme youth or vas for any other reason substantially incapable of exercising normal hysical 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 he 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 involv- g 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

hulance 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; or

(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;

(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 12.55.145(a)(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,

ended or enlarged by allegations in the indictment. Walsh v. State, 677 P.2d 912 (Alaska Ct. App. 1984).

Comparison of former and current statutes. — It was the elements of the offense as established in the statute under which the defendant was convicted which had to be compared with the current Alaska statute in determining whether the two offenses had substantially identical elements. Walsh v. State, 677 P.2d 912 (Alaska Ct. App. 1984).

Prior conviction under former law. — Under paragraph (a)(2) of this section, a criminal conviction entered under prior Alaska law or under the law of another jurisdiction may be deemed to be a prior felony conviction for presumptive sentencing purposes only if the offense for which the prior conviction was entered had elements substantially identical to those of a felony under current Alaska law. Lee v. State, 673 P.2d 892 (Alaska Ct. App. 1983); Garroutte v. State, 683 P.2d 262 (Alaska Ct. App. 1984).

The trial court erred in using a violation in former grand larceny statute as a prior felony to enhance defendant's sentence for burglary in the first degree since under the criminal code in effect since January 1, 1980, the prior offense would be a misdemeanor. Wasson v. State, 662 P.2d 117 (Alaska Ct. App. 1982).

Since the elements of the receiving and concealing statute under which defendant was convicted in 1972 did not require proof of value, that offense differed substantially from current law and did not qualify as a prior felony conviction. Garroutte v. State, 683 P.2d 262 (Alaska Ct. App. 1984).

Prior conviction out of state. — Felony conviction in Missouri was a prior conviction under subsection (a)(2) where defendant at age 17 was treated as an adult even though defendant would have been treated as a juvenile under Alaska law. McManners v. State, 650 P.2d 414 (Alaska Ct. App. 1982).

Paragraph (a)(2) of this section has consistently been interpreted to apply to the statute establishing the elements of the offense for which the defendant was previously convicted, which was an Oregon statute that is a class C felony in Oregon as it is in Alaska. Thus, it was not error to consider the previous conviction a felony even though the defendant was sentenced under an Oregon statute providing for the reduction of certain felonies to misdemeanors. Wasson v. State, 662 P.2d 117 (Alaska Ct. App. 1984) (decided prior to the 1982 amendment).

A 1983 Oklahoma conviction for a felony escape while on work release from a Department of Corrections treatment facility was a prior conviction for purposes of presumptive sentencing, for the Oklahoma escape statute had elements "substantially similar" to AS 11.56.310, a class B felony. Martin v. State, 704 P.2d 1341 (Alaska Ct. App. 1985).

The legislature intended to treat convictions under prior codes and convictions under the codes of sister states identically, allowing their use as prior convictions only where their elements were substantially identical (now "similar") to the elements of crimes established in the current code. Wasson v. State, 662 P.2d 117 (Alaska Ct. App. 1982).

Conviction in New York for larceny was not a prior conviction for presumptive sentencing purposes where the New York statute involved theft of $50 — $500 and the current Alaska law required theft from $500 — $25,000. Walsh v. State, 677 P.2d 912 (Alaska Ct. App. 1984).

Presumptive sentence convictions must be consecutive. -- Under the plain terms of AS 12.55.145(a)(3) and 12.55.185(6), (7), and (8), one conviction must precede the next for a presumptive sentencing can apply. State v. Rastopsoff, 669 P.2d 630 (Alaska Ct. App. 1983).

Where defendant's three separate criminal episodes occurred in close proximity and his convictions were entered after all of the offenses had been committed, he cannot be deemed to be a second felony offender under AS 12.55.125 and AS 12.55.185. State v. Rastopsoff, 669 P.2d 630 (Alaska Ct. App. 1983).

The forgery of two checks on the same day involved two separate criminal episodes and convictions based on those episodes were not convictions arising out of a single, continuous criminal episode to be treated as a single conviction for purposes of considering prior convictions in imposing sentence. Linn v. State, 658 P.2d 150 (Alaska Ct. App. 1983).

Burglaries of three different residences owned by three separate victims are separate offenses. Lacquement v. State, 644 P.2d 866 (Alaska Ct. App. 1982).

Sufficient evidence of prior conviction. — An authenticated copy of a foreign docket abstract constituted sufficient

State, 712 P.2d 900 (Alaska Ct. App. 1986).

Failure to prove prior convictions. — When a party has had insufficient time to comply with the notice requirements relating to proof of prior convictions or aggravating and mitigating factors, the appropriate remedy should normally be a continuance of the sentencing proceedings; and failure to consider prior crimes for presumptive sentencing purposes can be condoned only in those cases where the state, after exercising due diligence, is unable to meet the statutory requirements for proof of a prior conviction. Kelly v. State, 683 P.2d 967 (Alaska Ct. App. 1983).

When a mandatory minimum sentence is prescribed for a repeat offender, it would be inappropriate for the court to sentence the defendant as a first offender merely because the state has failed to obtain proof of the prior conviction in time for sentencing. The normal recourse under such circumstance is a continuance. Stewart v. State, 763 P.2d 616 (Alaska Ct. App. 1988).

New sentencing hearing not required on remand. — Although the judge improperly sentenced defendant to a presumptive four-year term and a remand for imposition of a nonpresumptive sentence was necessary, a new sentencing hearing would not be required upon remand since remand for such hearing would merely result in reimposition of a nonpresumptive four-year terms. Garroutte v. State, 683 P.2d 262 (Alaska Ct. App. 1984).

Applied in Bloomstrand v. State, 660 P.2d 584 (Alaska Ct. App. 1982); Fry v. State, 666 P.2d 789 (Alaska Ct. App. 1983); Huf v. State, 676 P.2d 208 (Alaska Ct. App. 1984); Maldonado v. State, 676 P.2d 1093 (Alaska Ct. App. 1984).

Quoted in Wright v. State, 656 P.2d 1226 (Alaska Ct. App. 1983); Morgan v. State, 661 P.2d 1102 (Alaska Ct. App. 1983); Sawyer v. State, 663 P.2d 230 (Alaska Ct. App. 1983); Ortberg v. State, 751 P.2d 1368 (Alaska Ct. App. 1988); McCombs v. State, 764 P.2d 1129 (Alaska Ct. App. 1988).

Cited in Koteles v. State, 660 P.2d 1199 (Alaska Ct. App. 1983); Hale v. State, 764 P.2d 313 (Alaska Ct. App. 1988); McCombs v. State, 764 P.2d 1129 (Alaska Ct. App. 1988).

Collateral references. — Chronological or procedural sequence of former convictions as affecting enhancement of penalty for subsequent offense under habitual criminal statute. 24 ALR4th 1247.

Sec. 12.55.147. Fingerprints at time of sentencing. When a defendant is convicted of a felony by a court of this state, the defendant's fingerprints shall be placed on the judgment of conviction in open court, on the record, at the time of sentencing. The defendant and the person administering the fingerprinting shall sign their names under the fingerprints. (§ 35 ch 143 SLA 1982)

Revisor's notes. — Enacted as AS 12.55.145(f). Renumbered in 1982.

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 (i) 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 aggrava-

any of the six paragraphs of subsection (g) are met. State v. Andrews, 723 P.2d 85 (Alaska 1986).

Where defendant's various check forgery cases violated similar societal interests, he could therefore receive concurrent sentences. Winfree v. State, 683 P.2d 294 (Alaska Ct. App. 1984).

Correction of judgment unlawfully imposing concurrent sentences. — See Joseph v. State, 712 P.2d 901 (Alaska Ct. App. 1986).

Sentence was remanded for consideration of alternatives to correct the illegality of concurrent sentences without increasing the total time to serve, where the trial court had erred in imposing a one-year sentence on a probation revocation concurrently to the other sentences. Napayonak v. State, Ct. App. Op. No. 1041 (File No. A-2672), P.2d (1990).

Sec. 12.55.030. Discharge of indigents imprisoned for nonpayment of fine. [Repealed, § 16 ch 53 SLA 1973.]

Sec. 12.55.035. Fines. (a) Upon conviction of an offense, a defendant may be sentenced to pay a fine as authorized in this section or as otherwise authorized by law. In determining the amount and method of payment of a fine, the court shall take into account the financial resources of the defendant and the nature of the burden its payment will impose. No defendant may be imprisoned solely because of inability to pay a fine.

(b) Upon conviction of an offense, a defendant who is not an organization may be sentenced to pay, unless otherwise specified in the provision of law defining the offense, a fine of no more than

(1) $75,000 for murder in the first or second degree, attempted murder in the first degree, sexual assault in the first degree, sexual abuse of a minor in the first degree, kidnapping, or misconduct involving a controlled substance in the first degree;

(2) $50,000 for a class A, B, or C felony;

(3) $5,000 for a class A misdemeanor;

(4) $1,000 for a class B misdemeanor;

(5) $300 for a violation.

(c) Upon conviction of an offense, a defendant that is an organization may be sentenced to pay a fine not exceeding the greater of

(1) an amount that is

(A) $500,000 for a felony offense or for a misdemeanor offense that results in death;

(B) $200,000 for a class A misdemeanor offense that does not result in death;

(C) $25,000 for a class B misdemeanor offense that does not result in death;

(D) $10,000 for a violation;

(2) two times the pecuniary gain realized by the defendant as a result of the offense; or

(3) two times the pecuniary damage or loss caused by the defendant to another, or to the property of another, as a result of the offense.

(d) If a defendant is sentenced to a fine, the court may grant permission for the payment to be made within a specified period of time or in specified installments.

(e) In imposing a fine under (c) of this section, in addition to any other relevant factors, the court shall consider

(1) measures taken by the organization to discipline an officer, director, employee, or agent of the organization;

(2) measures taken by the organization to prevent a recurrence of the offense;

(3) the organization's obligation to make restitution to a victim of the offense, and the extent to which imposition of a fine will impair the ability of the organization to make restitution; and

(4) the extent to which the organization will pass on to consumers the expense of the fine. (§ 12 ch 166 SLA 1978; am § 17 ch 45 SLA 1982; am § 26 ch 143 SLA 1982; am § 4 ch 59 SLA 1988; am § 18 ch 86 SLA 1988; am §§ 1, 2 ch 142 SLA 1990)

Cross references. — For classification of offenses, see AS 11.81.250; for sentences of imprisonment for felonies, see AS 12.55.125; for sentences of imprisonment for misdemeanors, see AS 12.55.135.

Effect of amendments. — The first 1988 amendment inserted "attempted murder in the first degree" in subsection (b)(1).

The second 1988 amendment inserted "sexual abuse of a minor in the first degree" in subsection (b)(1).

The 1990 amendment rewrote subsection (c) and added subsection (e).

NOTES TO DECISIONS

Court is under duty to consider defendant's earning capacity in connection with any imposition of a fine or restitution. Failure to do so requires automatic reversal and remand. Ashton v. State, 737 P.2d 1366 (Alaska Ct. App. 1987).

Applied in Wright v. State, 651 P.2d 846 (Alaska Ct. App. 1982); Wilson v. State, 756 P.2d 307 (Alaska Ct. App. 1988).

Cited in Manderson v. State, 656 P.2d 1320 (Alaska Ct. App. 1983); Constantine v. State, 739 P.2d 188 (Alaska Ct. App. 1987).

Sec. 12.55.040. Increased punishment for habitual criminal after conviction of petty larceny or misdemeanor involving fraud. [Repealed, § 21 ch 166 SLA 1978.]

Sec. 12.55.045. Restitution. (a) The court may order a defendant convicted of an offense to make restitution as provided in this section, including restitution to the victim, to a public, private, or private nonprofit organization that has provided counseling, medical, or shelter services to the victim, or as otherwise authorized by law. A defendant is presumed to have the ability to pay restitution unless the defendant establishes the inability to pay by a preponderance of the evidence. In determining the amount and method of payment of restitution, the court shall take into account the

interval in the course of one general transaction. Thomas v. State, 566 P.2d 630 (Alaska 1977); Cooper v. State, 595 P.2d 648 (Alaska 1979).

Where the crimes in question are unrelated offenses, imposition of consecutive sentences is appropriate. Preston v. State, 583 P.2d 787 (Alaska 1978).

Similar transactions and common activity no defense to separate convictions. — The imposition of consecutive sentences does not amount to a constitutional violation where the transactions were "similar" and the activity was "common." Lanier v. State, 486 P.2d 981 (Alaska 1971).

Where defendant employs the same modus operandi for each of his crimes, this does not furnish him a defense to separate convictions for each crime. Lanier v. State, 486 P.2d 981 (Alaska 1971).

Effect on sentence of defendant convicted of multiple crimes. — By authorizing consecutive sentences, the statute, in effect, gives the trial court the power to sentence a defendant convicted of multiple crimes to a term of imprisonment longer than the statutory maximum for any one of them. A concomitant of this authority is the power to fix a minimum term of imprisonment for parole eligibility purposes, based on the entire term of imprisonment. Thomas v. State, 566 P.2d 630 (Alaska 1977).

Consecutive sentences are not illegal although their cumulative impact exceeds the statutory maximum for any one of the separate offenses. Preston v. State, 583 P.2d 787 (Alaska 1978).

Presumptive sentences. — To the extent a sentencing judge has the authority to impose a presumptive sentence concurrently to another sentence, he also has the authority to impose that presumptive sentence consecutively or partially consecutively and to suspend all or any portion of that presumptive sentence, but the defendant must be required to serve a term of imprisonment which is at least as long as the greatest single presumptive sentence applicable. Griffith v. State, 676 P.2d 662 (Alaska Ct. App. 1984).

Consecutive sentences in excess of maximum penalty. — Trial court judges may impose consecutive sentences that are in excess of the maximum penalty for the most serious offense, or which are greater than the presumptive sentence for the most serious offense. When this is done, however, the court of appeals will review the sentence to make sure that the record reflects substantial reasons for the imposition of such a sentence. Clifton v. State, 758 P.2d 1279 (Alaska Ct. App. 1988).

Escape while incarcerated. — The use of consecutive sentences is particularly appropriate in cases where one escapes while incarcerated on another charge. Walton v. State, 568 P.2d 981 (Alaska 1977).

Crimes committed after imprisonment on former offense. — Under subsection (e) trial judges are required to impose consecutive sentences on individuals convicted for crimes which are committed after they had been imprisoned on a former offense. Sauderr v. State, 718 P.2d 167 (Alaska Ct. App. 1986).

Finding required for imposition. — Imposition of a consecutive sentence should require the affirmative action of the sentencing court. The court should be authorized to impose a consecutive sentence only after a finding that confinement for such term is necessary in order to protect the public from further criminal conduct by the defendant. Cleary v. State, 548 P.2d 952 (Alaska 1976).

Formal finding held unnecessary. — Where the combined effect of the consecutive sentences for the two counts of second degree murder did not exceed the maximum sentence permitted for one count of second degree murder, it was unnecessary for the sentencing judge to make a formal finding that confinement for the combined term was necessary to protect the public. Mills v. State, 592 P.2d 1247 (Alaska 1979).

Three counts of murder in first degree. — Given the heinous nature of defendant's crimes and a record which was devoid of hope for his rehabilitation, imposition of three consecutive 99-year sentences upon conviction of three counts of murder in the first degree was clearly mistaken. Nukapigak v. State, 645 P.2d 215 (Alaska Ct. App. 1982), aff'd, 663 P.2d 943 (Alaska 1983).

Kiting checks. — Where defendant is convicted of kiting checks, consecutive sentences are inappropriate, since a kiting scheme is a single episode, although involving multiple offenses. Law v. State, 624 P.2d 284 (Alaska 1981).

Consecutive sentences upheld. — Where defendant was convicted of two crimes of robbery, since this section permits consecutive sentences for such conduct, there was no error in the imposition of consecutive sentences. Davenport v. State, 543 P.2d 1204 (Alaska 1976).

Reasoning that defendant's offense was so serious that consecutive sentences were necessary to reflect the crime's seriousness is sufficient to support the imposition of consecutive sentences, in light of the legislative preference for consecutive sentences expressed in subsection (e). Jones v. State, 744 P.2d 410 (Alaska Ct. App. 1987).

Imposition of consecutive sentences for two counts of assault with a dangerous weapon, where the cumulative effect was of a six-year sentence with three years suspended, was not clearly mistaken since the aggregate sentence was not excessive. Mutschler v. State, 560 P.2d 377 (Alaska 1977).

Consecutive sentences were not precluded for narcotic sales which were made to two different individuals, although one of them may have set up both sales, approximately two months apart. Thomas v. State, 566 P.2d 630 (Alaska 1977).

Where defendant was convicted for the third time of a narcotics violation, it was entirely proper for the sentencing court to impose a consecutive term in order to provide an additional sanction for the subsequent offense. Daniels v. State, 584 P.2d 47 (Alaska 1978).

In view of the seriousness of the crimes and of the trial court's deliberate consideration of the requirements for passing sentence set forth in State v. Chaney, 477 P.2d 441 (Alaska 1970), the sentencing judge was not clearly mistaken in imposing consecutive sentences of 10 years on count of second degree arson and a count of manslaughter. Jacinth v. State, 593 P.2d 263 (Alaska 1979).

See Neal v. State, 628 P.2d 19 (Alaska 1981).

The societal interests violated by the crimes of rape and assault with a dangerous weapon are sufficiently distinct, even where the offenses are intertwined in a single episode of violence toward another person, to justify separate sentences, and where it was after the victim had pulled up her clothes and thought her assailant was through with her that he stopped her from leaving and submitted her to fear of grave bodily injury apart from the violation of her personal dignity associated with the rape, the imposing consecutive sentences was not clearly mistaken. Coleman v. State, 621 P.2d 869 (Alaska 1980), cert. denied, 454 U.S. 1090, 102 S. Ct. 653, 70 L. Ed. 2d 628 (1981).

Sentence vacated. — Trial cou should not have imposed a five-year se tence for tampering with physical e dence consecutively to a 99-year senten for murder, where the record would n support the conclusion that defenda must be incarcerated for the remainder his life without any possibility of paro Thompson v. State, 768 P.2d 127 (Alas Ct. App. 1989).

Upon revocation of probation, imp sition of a term of imprisonment consec tive to another term for an interveni offense does not impermissibly enlarge enhance the scope of the sentence whi was originally suspended. Tritt v. Sta 625 P.2d 882 (Alaska Ct. App. 1981).

Where a defendant's probation on a c viction for burglary in the first degree, 11.46.300, was revoked because of his c viction of bank robbery in federal distr court, a sentence of four years with t years suspended, consecutive to his f eral robbery sentence, was not excessi Dodd v. State, 688 P.2d 737 (Alaska App. 1984).

Under subsection (e), a sentence wh is imposed on a new offense must be c secutive to a sentence that is reimpo upon a revocation of probation. Betzner State, 768 P.2d 1150 (Alaska Ct. A 1989).

Credit where consecutive sentenc imposed. — When consecutive senten are imposed for two or more offenses, riods of presentence incarceration may credited only against the aggregate of terms imposed. An offender who recei consecutive sentences is entitled to cr against only the first sentence impos while an offender sentenced to concurr terms in effect receives credit agai each sentence. Endell v. Johnson, P.2d 769 (Alaska Ct. App. 1987).

IV. CONCURRENT SENTENCES

Trial courts have discretion un this section to impose concurrent s tences. Drumbarger v. State, 716 P.2 (Alaska Ct. App. 1986).

When concurrent sentences may imposed. — If a defendant's conduct f within paragraphs (4), (5) or (6) of sub tion (g) the court may not impose a c current sentence. However, if the de dant's conduct falls within paragraphs (2) or (3) of subsection (g) the court is thorized to impose concurrent senten Griffith v. State, 676 P.2d 662 (Alaska App. 1984).

Concurrent sentences may be give

that the defendant will receive credit for time served in order to protect defendants who may serve all or part of their terms in out-of-state prisons. Quelle v. State, 652 P.2d 481 (Alaska Ct. App. 1982).

Credit for time spent on probation. — A person in third-party custody who has the freedom to move about the community, limited only by his custodian's accompaniment, and one who is confined to a fishing boat while it is at sea is not entitled to credit for time spent on probation. Ackermann v. State, 716 P.2d 5 (Alaska Ct. App. 1986).

Where a sentencing court, in imposing the original sentence, has unambiguously manifested its intent to require that a specified term of imprisonment be served in addition to time previously served, the Alaska Court of Appeals has not hesitated to hold that subsection (c) does not require additional credit to be given; conversely, where there has been ambiguity in a trial court's sentencing remarks, the court has applied subsection (c) and required that credit be given for time previously served. Cortes v. State, 721 P.2d 665 (Alaska Ct. App. 1986).

Credit for time served since arrest for subsequent offenses. — Where defendant's sentences were to be served consecutively to a sentence then being served for a parole revocation on an earlier offense, the trial court's order that the defendant receive no credit for time served since his arrest was proper in view of the court's action in making the sentences consecutive to the time to be served on the parole revocation, for the time served from defendant's arrest should properly have been credited toward the parole revocation sentence. Reynolds v. State, 596 P.2d 21 (Alaska 1979).

In determining if a facility is such as that confinement there warrants credit for time spent in custody, the court suggests as a point of reference that common characteristics of incarcerative facilities are that their residents are involuntarily sent there by court order; the facilities require residency, and residency requirements are sufficiently stringent to involve a definite element of confinement; residents of the facilities are subject to 24-hour physical custody or supervision; any periods during which residents may be permitted to leave the facility are expressly limited, both as to time and purpose; while in the facility, residents are under a continuing duty to conform their conduct to institutional rules and to obey orders of persons who have immediate custody over them, and residents are subject to sanctions if they violate institutional rules or orders and to arrest if they leave the facility without permission. Nygren v. State, 658 P.2d 141 (Alaska Ct. App. 1983).

Credit for time spent in residential alcohol treatment programs. — Defendant was entitled to credit for time she spent in residential alcohol treatment programs while she was on bail pending trial and while she was on bail pending appeal after her conviction and sentence. Nygren v. State, 658 P.2d 141 (Alaska Ct. App. 1983).

For cases construing former computation of term statute, see Thompson v. State, 496 P.2d 651 (Alaska 1972); Leick v. State, 609 P.2d 539 (Alaska 1980).

III. CONSECUTIVE SENTENCES.

Consecutive sentences are authorized by statute. Lanier v. State, 486 P.2d 981 (Alaska 1971).

Consecutive sentencing in the superior court is permitted by statute. State v. Pete, 420 P.2d 338 (Alaska 1966).

Consecutive sentencing by the district court is permissible. State v. Pete, 420 P.2d 338 (Alaska 1966).

A plain reading of former AS 11.05.050 revealed that it was a grant of authority, or jurisdiction, affirmatively empowering sentencing courts to impose consecutive sentences. Tritt v. State, 625 P.2d 882 (Alaska Ct. App. 1981).

Consecutive sentences did not constitute cruel and unusual punishment forbidden by the state and federal constitutions. Davis v. State, 566 P.2d 640 (Alaska 1977).

The contention that consecutive sentences constitute double jeopardy has no support in case law. Thomas v. State, 566 P.2d 630 (Alaska 1977).

Consecutive sentences for separate offenses do not violate the constitutional prohibition against double jeopardy. Davis v. State, 566 P.2d 640 (Alaska 1977).

Preference for consecutive sentences. — Subsections (c) and (g) express a preference for consecutive sentences which a trial court has discretion to reject in appropriate circumstances. State v. Andrews, 707 P.2d 900 (Alaska Ct. App. 1985), aff'd, 723 P.2d 85 (Alaska 1986); Contreras v. State, 767 P.2d 1169 (Alaska Ct. App. 1989).

Subsection (c) does not establish a legislative mandate precluding sentencing courts from imposing concurrent sentences, but it does establish a legislative preference for consecutive sentences. Jones v. State, 744 P.2d 410 (Alaska Ct. App. 1987), distinguishing Lacquement v. State, 644 P.2d 866 (Alaska Ct. App. 1982) as construing former law.

The legislative preference for consecutive sentences must be interpreted to expand the situations where the court may impose consecutive sentences. Jones v. State, 744 P.2d 410 (Alaska Ct. App. 1987).

Alaska has no statutory limitation on imposition of consecutive sentences. Mutschler v. State, 560 P.2d 377 (Alaska 1977).

Former consecutive sentences statute did not contain limitations on the court's power to impose consecutive sentences. Thomas v. State, 566 P.2d 630 (Alaska 1977).

Proper sentence. — Where a consecutive sentence is imposed but the total sentence does not exceed the sentence which could be imposed on one count, a consecutive sentence is not improper. Karr v. State, 660 P.2d 450 (Alaska Ct. App. 1983), rev'd on other grounds, 680 P.2d 1192 (Alaska 1984).

A federal court may sentence consecutively to a state sentence. Marrone v. State, 458 P.2d 736 (Alaska 1969), cert. denied, 397 U.S. 967, 90 S. Ct. 1005, 25 L. Ed. 2d 260 (1970).

A state court may make its sentence run consecutively to one imposed by the courts of a sister state or the federal courts. Marrone v. State, 458 P.2d 736 (Alaska 1969), cert. denied, 397 U.S. 967, 90 S. Ct. 1005, 25 L. Ed. 2d 260 (1970).

But total term of imprisonment limited. — Trial court was clearly mistaken in imposing state sentences for drug law violations consecutively to defendant's eight-year federal term; the state sentence should have been imposed concurrently to the federal sentence, where defendant should not have been sentenced to more than eight years' imprisonment had all his offenses been state offenses. McCombs v. State, 754 P.2d 1129 (Alaska Ct. App. 1988).

Sentences should be limited to one term of imprisonment where two offenses are part of one transaction. — Where two offenses were really part of one general transaction involving the unlawful sale of liquor, the judgment of conviction should be modified so as to limit defendant's sentences to one term of imprisonment. State v. Pete, 420 P.2d 338 (Alaska 1966).

When consecutive sentences authorized. — Consecutive sentences are authorized whenever the defendant is convicted of multiple offenses. Thomas v. State, 566 P.2d 630 (Alaska 1977).

Under the language of former AS 11.05.050, when multiple convictions occurred, each sentencing judge was specifically vested with authority to impose a sentence consecutive to any sentence imposed, or to be imposed, on the other convictions. Tritt v. State, 625 P.2d 882 (Alaska Ct. App. 1981).

When consecutive sentences mandatory. — The provisions of subsection (c) make imposition of a consecutive term mandatory only where a judgment of conviction was already entered before the commission of the offense for which sentence is being imposed. Williams v. State, 769 P.2d 576 (Alaska Ct. App. 1989).

Subsections (c) and (g) do not require the trial court to impose consecutive sentences. Jones v. State, 739 P.2d 1314 (Alaska Ct. App. 1987).

Consecutive sentences from separate judges. — Nothing in the statutory language of former AS 11.05.050, either express or implied, indicated that the decision of one judge not to impose a consecutive sentence on one of several convictions deprived another judge, sentencing for a separate conviction, from availing himself of the option to sentence consecutively. Tritt v. State, 625 P.2d 882 (Alaska Ct. App. 1981).

Even though judge who sentenced defendant for the robbery conviction intended that the robbery sentence be concurrent with whatever sentence defendant might receive upon revocation of probation for damaging an aircraft, the sentencing court on the robbery charge had no authority to restrict the lawful sentencing options of the judge who later sentenced defendant upon revocation of his probation for damaging an aircraft to a sentence consecutive to the robbery sentence. Tritt v. State, 625 P.2d 882 (Alaska Ct. App. 1981).

Imposition of consecutive sentences for nonduplicative counts with separate intents is not prohibited under Alaska statutes and rules. Mutschler v. State, 560 P.2d 377 (Alaska 1977).

Consecutive sentences may be imposed when separate offenses with separate intents are committed during a brief time

(4) the crimes were not committed while the defendant attempted to escape or avoid detection or apprehension after the commission of another crime;

(5) the sentence is not for a violation of AS 11.41.100 — 11.41.470; or

(6) the sentence is not for a violation of AS 11.41.500 — 11.41.530 that results in physical injury or serious physical injury as those terms are defined in AS 11.81.900.

(h) If the defendant has been convicted of two or more crimes under AS 11.41.200 — 11.41.250 or 11.41.410 — 11.41.455 in which the victim or victims of the crimes were minors and the judgment on any of the convictions has not been entered, the court shall impose some consecutive period of imprisonment for each conviction. (§ 12 ch 166 SLA 1978; §§ 7, 8 ch 131 SLA 1980; am §§ 24, 25 ch 143 SLA 1982; am E.O. No. 66, §§ 6, 7 (1984); am § 2 ch 154 SLA 1984; am §§ 5, 6 ch 66 SLA 1988)

Effect of amendments. — The 1988 amendment inserted "and (h)" in the first sentence in subsection (c) and added subsection (h).

Legislative history reports. — For sectional analysis of CS SSSB 239, the predecessor of FCCSSB 239 (ch. 131, SLA 1980), see 1980 Senate Journal Supplement No. 23, April 1, 1980.

For House letter of intent on ch. 66, SLA 1988 (CSHB 237 (Jud)), which amended this section, see 1988 House Journal 2330-2337.

Opinions of attorney general. — Authority exists to both award and forfeit statutory good time for pretrial detainees. February 18, 1986 Op. Att'y Gen.

NOTES TO DECISIONS

I. General Consideration.
II. Computation of Term.
III. Consecutive Sentences.
IV. Concurrent Sentences.

I. GENERAL CONSIDERATION.

For cases construing former AS 12.55.075, relating to imposition of sentences, see Perrin v. State, 643 P.2d 413 (Alaska 1976); Andrews v. State, 552 P.2d 160 (Alaska 1976); Morgan v. State, 582 P.2d 1030 (Alaska 1978); Rust v. State, 582 P.2d 134 (Alaska 1978).

Consideration of totality of defendant's conduct. — Regardless of the trial court's decision to sentence consecutively or concurrently, the total sentence must reflect the totality of the defendant's conduct considered in light of his or her background and experience, and measured against the standards of rehabilitation, deterrence of self and others, and affirmation of community norms. Comegys v. State, 747 P.2d 564 (Alaska Ct. App. 1987).

Consideration of uncharged offenses or police contacts. — A sentencing court may properly consider uncharged offenses or police contacts where they are verified by supporting data or information and the defendant is given the opportunity to deny the allegations and offer rebuttal evidence. Pascoe v. State, 628 P.2d 547 (Alaska 1980).

Reference to unverified police contacts in a presentence report does not require a remand for resentencing where the record indicates that the sentencing judge was not unduly or improperly influenced by reference to the unverified police contacts. Pascoe v. State, 628 P.2d 547 (Alaska 1980).

Effect of perjury at trial. — It is improper to increase a sentence because a defendant has committed perjury at trial, but the fact of such perjury may be considered as relevant to the defendant's prospects for rehabilitation. Pierre v. State, 626 P.2d 1066 (Alaska 1980).

Oral sentence controls. — The written judgment should conform to the oral sentence. The latter ordinarily controls. Whittlesey v. State, 626 P.2d 1066 (Alaska 1980).

Unsolicited letters. — Judges must make available to counsel for the state and the defendant any unsolicited letters received concerning sentencing of a particular defendant. Bowlin v. State, 643 P.2d 1 (Alaska Ct. App. 1982).

The sentencing record must affirmatively reflect whether unsolicited letters received by the court have been considered at sentencing. Bowlin v. State, 643 P.2d 1 (Alaska Ct. App. 1982).

"Previous judgment of conviction". — As used in subsection (c) of this section, "previous judgment of conviction" means only those judgments entered prior to the commission of the crime for which sentence is currently to be imposed. Wells v. State, 706 P.2d 711 (Alaska Ct. App. 1985).

Composite sentence for multiple crimes. — When an offender is convicted of multiple crimes, the presumptive term for the most serious crime remains an important benchmark — a benchmark that is not to be exceeded without good reason. Nevertheless, the appropriate focus is no longer on the narrow issue of public danger, but rather on whether a composite sentence exceeding the presumptive term is warranted under the totality of the circumstances. Farmer v. State, 746 P.2d 1300 (Alaska Ct. App. 1987).

A composite sentence of five years with two years suspended, imposed upon a first felony offender upon conviction of two counts of burglary in the second degree, one count of theft in the second degree, and one count of theft in the third degree, was not excessive, where defendant's conviction of two separate burglaries and related thefts, and his admission of two additional burglaries and related thefts, justified a greater sentence than would a conviction of an isolated burglary and theft. Comegys v. State, 747 P.2d 564 (Alaska Ct. App. 1987).

Delegation of authority to impose conditions. — The sentencing court may not delegate its authority to impose conditions of probation which are the functional equivalent of incarceration, such as by abiding by the recommendation of a local council on alcoholism that defendant serve 30 days in a residential alcohol treatment center. Hester v. State, 7[illegible] P.2d 217 (Alaska Ct. App. 1989).

Increase of sentence upon appeal. — Where the trial court did not warn defendant under Appellate Rule 215(a) that [illegible] sentence could be increased if he appealed, the court had no authority to impose a sentence which was greater than the sentence which a three-judge panel had imposed. James v. State, 764 P.2d 1336 (Alaska Ct. App. 1988).

Applied in Schwing v. State, 633 P.2d 311 (Alaska Ct. App. 1981); O'Shea v. State, 683 P.2d 286 (Alaska Ct. App. 1984); Lewis v. State, 706 P.2d 7[illegible] (Alaska Ct. App. 1985); Oswald v. State, 716 P.2d 270 (Alaska Ct. App. 1986); State v. Moody, 720 P.2d 194 (Alaska 1986); State v. Merry, 784 P.2d 2[illegible] (Alaska Ct. App. 1989); Kepley v. State, 791 P.2d 1020 (Alaska Ct. App. 1990).

Quoted in Jennings v. State, 713 P.2d 1222 (Alaska Ct. App. 1986); Helton v. State, 778 P.2d 1166 (Alaska Ct. App. 1989).

Cited in State v. Ahwinona, 636 P.2d 488 (Alaska Ct. App. 1981); Houston v. State, 648 P.2d 1024 (Alaska Ct. App. 1982); State v. Rastopoff, 659 P.2d 6[illegible] (Alaska Ct. App. 1983); Hodges v. State, 660 P.2d 1203 (Alaska Ct. App. 198[illegible]; Juneby v. State, 665 P.2d 30 (Alaska Ct. App. 1983).

II. COMPUTATION OF TERM.

Computation of term statute should control even when a sentence does not specifically provide for giving credit for time served. Black v. State, 569 P.2d 8[illegible] (Alaska 1977).

Determination of credit for time served. — The appropriate time to resolve credit for time served is at the sentencing hearing and the trial court should expressly identify those periods of time for which credit is to be allowed. Ackerman v. State, 716 P.2d 5 (Alaska Ct. App. 1986).

Provision in formal judgment. — In order to prevent problems arising when sentence is served outside Alaska, judges should include a provision granting credit for time served in the formal judgment. Black v. State, 569 P.2d 804 (Alaska 1977).

Although credit for time already served in prison is awarded automatically by statute, and is not dependent on the judge's stating that credit should be given, judgment forms should expressly state

Sec. 12.55.020. Enforcing judgment to pay money. [Repealed, § 21 ch 166 SLA 1978. For present provisions, see AS 12.55.025(f), AS 12.55.035(a), (d) and AS 12.55.051.]

Sec. 12.55.022. Victim impact statement. As part of the presentence report prepared on each felony offender, the probation officer shall prepare a victim impact statement reporting the following information:

(1) the financial, emotional, and medical effects of the offense on the victim;

(2) the need of the victim for restitution; and

(3) any other information required by the court. (§ 1 ch 154 SLA 1984)

Cross references. — For effect of this section on Cr. R. 32(d)(2), see § 12, ch. 154, SLA 1984 in the Temporary and Special Acts.

Sec. 12.55.023. Participation by victim in sentencing. (a) If a victim requests, the prosecuting attorney shall provide the victim, before the sentencing hearing, with a copy of the following portions of the presentence report:

(1) the summary of the offense prepared by the Department of Corrections;

(2) the defendant's version of the offense;

(3) all statements and summaries of statements of the victim; and

(4) the sentence recommendation of the Department of Corrections.

(b) A victim may submit to the sentencing court a written statement that the victim believes is relevant to the sentencing decision. (§ 4 ch 59 SLA 1989)

Sec. 12.55.025. Sentencing procedures. (a) When imposing a sentence for conviction of a felony offense or a sentence of imprisonment exceeding 90 days or upon a conviction of a violation of AS 04, a regulation adopted under AS 04, or an ordinance adopted in conformity with AS 04.21.010, the court shall prepare, as a part of the record, a sentencing report that includes the following:

(1) a verbatim record of the sentencing hearing and any other in-court sentencing procedures;

(2) findings on material issues of fact and on factual questions required to be determined as a prerequisite to the selection of the sentence imposed;

(3) a clear statement of the terms of the sentence imposed;

(4) any recommendations as to the place of confinement or the manner of treatment; and

(5) in the case of a conviction for a felony offense, information assessing

(A) the financial, emotional, and medical effects of the offense on the victim;

(B) the need of the victim for restitution; and

(C) any other information required by the court.

(b) The sentencing report required under (a) of this section shall be furnished within 30 days after imposition of sentence to the Department of Law, the defendant, the Department of Corrections, the state Board of Parole if the defendant will be eligible for parole, and to the Alcoholic Beverage Control Board if the defendant is to be sentenced for a conviction of a violation of AS 04, a regulation adopted under AS 04, or an ordinance adopted under AS 04.21.010.

(c) Except as provided in (d) and (e) of this section, when a defendant is sentenced to imprisonment, the term of confinement commences on the date of imposition of sentence. A defendant shall receive credit for time spent in custody pending trial, sentencing, or appeal, if the detention was in connection with the offense for which sentence was imposed. A defendant may not receive credit for more than the actual time spent in custody pending trial, sentencing, or appeal. The time during which a defendant is voluntarily absent from official detention after the defendant has been sentenced may not be credited toward service of the sentence.

(d) A sentence of imprisonment shall be stayed if an appeal is taken and the defendant is admitted to bail. If an appeal is taken and the defendant is not admitted to bail, the Department of Corrections shall designate the facility in which the defendant shall be detained pending appeal or admission to bail.

(e) Except as provided in (g) and (h) of this section, if the defendant has been convicted of two or more crimes, sentences of imprisonment shall run consecutively. If the defendant is imprisoned upon a previous judgment of conviction for a crime, the judgment shall provide that the imprisonment commences at the expiration of the term imposed by the previous judgment.

(f) A sentence that the defendant pay money, either as a fine or in restitution or both, constitutes a lien in the same manner as a judgment for money entered in a civil action. Nothing in this section limits the authority of the court to otherwise enforce payment of a fine or restitution.

(g) If the defendant has been convicted of two or more crimes before the judgment on either has been entered, any sentences of imprisonment may run concurrently if

(1) the crimes violate similar societal interests;

(2) the crimes are part of a single, continuous criminal episode;

(3) there was not a substantial change in the objective of the criminal episode, including a change in the parties to the crime, the property or type of property right offended, or the persons offended;

would be entitled to bring a sentence appeal upon the imposition of the suspended portion of the sentence. Tazruk v. State, 655 P.2d 788 (Alaska Ct. App. 1982).

In evaluating whether a partially suspended sentence for a first felony offender is in excess of the presumptive sentence which a second felony offender would receive, the reviewing court should consider only that portion of the sentence which imposes a period of incarceration. Tazruk v. State, 655 P.2d 788 (Alaska Ct. App. 1982).

Where defendant was a first felony offender convicted of a class B felony, sexual abuse of a minor, and, had the defendant been subject to presumptive sentencing, the circumstances would have been sufficiently extraordinary to warrant a substantial increase in the applicable presumptive term, the case qualified as an exceptional one under Austin v. State, 627 P.2d 667 (Alaska Ct. App. 1981); and the imposition of a sentence in excess of the four-year presumptive term for second offenders did not violate the Austin rule. Skrepich v. State, 740 P.2d 950 (Alaska Ct. App. 1987).

Although the judge indicates that a lengthy sentence will serve the sentencing goals of general deterrence and community condemnation, these goals cannot, in themselves, support the imposition of a maximum 10-year term for a first offender convicted of a class B felony, such as sexual assault of a minor. Skrepich v. State, 740 P.2d 950 (Alaska Ct. App. 1987).

Where defendant with no prior felony convictions was convicted of three counts of sexual assault in the first degree, an unclassified felony, and one count of attempted sexual assault in the first degree, a class A felony, the many separate incidents of sexual assault, defendant's multiple victims, his use of a dangerous instrument, and his willingness to injure his victims with that instrument, established that he was a particularly dangerous offender who had to be isolated for a substantial period of time to protect the public, and the composite sentence imposed of 37 years with 12 years suspended was not clearly mistaken. Goolsby v. State, 738 P.2d 786 (Alaska Ct. App. 1987).

A first felony offender's prior record of misdemeanor convictions, even if extensive, does not qualify as an extraordinary circumstance warranting imposition of a term exceeding the second offender presumptive. Reynolds v. State, 730 P.2d 1151 (Alaska Ct. App. 1987).

Where the defendant, a first felony offender, was convicted of one count of theft in the second degree and three counts of forgery in the second degree, she should not have received a total sentence, including consecutive increments, more severe than the presumptive term established for a third felony offender, where there was nothing in the record to suggest that a composite sentence of imprisonment, including all consecutive increments, greater than this presumptive term was needed to deter the defendant. Young v. State, 762 P.2d 497 (Alaska Ct. App. 1988).

Sentence in accord with Austin rule. — First felony offender's sentence of four years imprisonment, with three years suspended, was substantially more lenient than the two-year presumptive term that would have been applicable to a second felony offender, and therefore did not violate the Austin rule. Long v. State, 772 P.2d 1099 (Alaska Ct. App. 1989).

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, ambu-

lance attendant, or other emergency responder who was engag the performance of official duties at the time of the assault sh sentenced to a minimum term of imprisonment of 30 days.

(e) The execution of a sentence under (c) or (d) of this section not be suspended and probation or parole may not be granted unt minimum term of imprisonment has been served. Imposition of a tence under (c) or (d) of this section may not be suspended, except condition that the defendant be imprisoned for no less than the mum term of imprisonment provided in (c) or (d) of this section the minimum sentence provided for in (c) or (d) of this section ma be otherwise reduced. (§ 12 ch 166 SLA 1978; am § 2 ch 139 1980; am § 22 ch 59 SLA 1982; am § 13 ch 61 SLA 1982; am § 143 SLA 1982; am §§ 4, 5 ch 92 SLA 1983)

NOTES TO DECISIONS

Constitutionality of presumptive sentencing provisions. — See notes under same heading, AS 12.55.125. Neil v. State, 642 P.2d 1301 (Alaska Ct. App. 1982).

Maximum sentence for joyriding justified. — The district court judge was not clearly mistaken in characterizing a defendant as a worst offender, and in imposing the maximum sentence of one year for third-degree criminal mischief (joyriding). Despite the limited period of time in which the defendant committed the offenses, the defendant's record, coupled with the especially serious nature of the particular joyriding offenses, i.e., that it was committed in order to perpetrate a felony, justifies the sentence imposed. Plant v. State, 724 P.2d 536 (Alaska Ct. App. 1986).

Sentence upheld. — Composite sentence of 24 months with six months suspended for refusal to submit to a chemical breath test and for driving with a suspended operator's license was affi where the defendant had five prior ing while intoxicated convictions a least four prior driving with suspend cense convictions and was on probati a prior driving while intoxicated and ing with suspended license convi Witt v. State, 692 P.2d 976 (Alask App. 1984).

Consecutive sentencing by dis court permissible under former — See State v. Pate, 420 P.2d 338 (Al 1966), decided under former AS 11.05

Applied in Ostrosky v. State, 725 1087 (Alaska Ct. App. 1986); Purcel State, 765 P.2d 114 (Alaska Ct. 1988).

Cited in Law v. State, 624 P.2d (Alaska 1981); Kelly v. State, 663 967 (Alaska Ct. App. 1983); Stat Wanlken, 749 P.2d 1360 (Alaska Ct. 1988); Smith v. State, 760 P.2d (Alaska Ct. App. 1988); Stewart v. St 703 P.2d 516 (Alaska Ct. App. 1985

Sec. 12.55.140. Sentences for violations. [Repealed, § 23 ch 59 S 1982.]

Sec. 12.55.145. Prior convictions. (a) For purposes of consid ing prior convictions in imposing sentence under AS 12.55.125 (d)(1), (d)(2), (e)(1), (e)(2), or (i)

(1) a prior conviction may not be considered if a period of 10 or m years has elapsed between the date of the defendant's unconditio discharge on the immediately preceding offense and commission of t present offense unless the prior conviction was for an unclassified class A felony;

both could be separately considered as prior convictions in any subsequent case.

Conviction being appealed. — A conviction with the attendant constitutional safeguards is sufficient for purposes of presumptive sentencing even though on appeal. Wright v. State, 656 P.2d 1226 (Alaska Ct. App. 1983).

Where total sentence received by first offender exceeds presumptive sentence for second offender but period of actual imprisonment is substantially less, such sentence meets requirement of Austin v. State, 627 P.2d 667 (Alaska Ct. App. 1981), of a substantially more favorable sentence for first offender; where, however, actual period of imprisonment equals or exceeds presumptive term for second offender, aggravating factors or extraordinary circumstances are required to justify additional time even if it is suspended. Brezenoff v. State, 668 P.2d 1359 (Alaska Ct. App. 1983).

In prosecution for burglary and attempted sexual assault, where defendant had long record of misdemeanor offenses consisting of approximately 32 convictions in the last nine years, including three convictions for assault, numerous convictions for disorderly conduct, and numerous theft-related offenses, the case was an exceptional one where a first felony offender could be given a sentence in excess of presumptive sentence for second offender, but did not justify imposition of consecutive sentences totalling in excess of 10 years. Hansen v. State, 667 P.2d 862 (Alaska Ct. App. 1983).

Adjustment of presumptive sentence. — Where a manslaughter and a first-degree assault originate from identical reckless conduct, the original legislative intent clearly establishes that it is the presumptive sentence for assault rather than the presumptive sentence for manslaughter that should be adjusted. New v. State, 714 P.2d 378 (Alaska Ct. App. 1986).

Modification of presumptive term. — The presumptive term imposed by paragraph (c)(3), and by extension paragraph (d)(3), are subject to modification because of aggravating or mitigating factors as well as possible referral to a three-judge panel like all other presumptive sentences. Edwin v. State, 762 P.2d 499 (Alaska Ct. App. 1988).

Deviation from presumptive sentences. — In sentencing proceedings involving allegations of aggravating and mitigating circumstances, the provisions of AS 12.55.155(f) require the party seeking to establish a factor to bear a dual burden of proving to the court by clear and convincing evidence the existence of the alleged factor, and, providing the court with sufficient reasons to justify a conclusion, by clear and convincing evidence, that the factor warrants deviation from the statutorily prescribed presumptive sentence. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

Sentence was illegal where trial judge gave less than presumptive sentence without finding any mitigating factors. State v. LaPorte, 672 P.2d 466 (Alaska Ct. App. 1983).

Nature of crime charged is factor. — In order to determine the realistic impact that proof of an aggravating or mitigating circumstance should have on adjustment of a presumptive sentence in any given case, it is essential to consider not only the specific conduct constituting the aggravating or mitigating factor, but also the nature of the crime charged. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

Possession of firearm. — Where an accomplice furnishes a firearm to his principal in order to aid and abet a sexual assault, the trial court may properly find that the accomplice possessed a firearm for purposes of the enhanced presumptive term. Howell v. State, 728 P.2d 1220 (Alaska Ct. App. 1986).

Conduct knowingly directed at peace officer. — By requiring that the defendant's conduct be "knowingly directed," subsection (c)(3) clearly contemplates a conscious aiming or guiding of the prohibited conduct at an officer. Dellart v. State, 781 P.2d 989 (Alaska Ct. App. 1989).

The question of whether the defendant's conduct was "knowingly directed" at a police officer presents a factual issue to be independently determined by the sentencing court, based on the specific circumstances of each case; the state bears the burden of proving the issue beyond a reasonable doubt. Dellart v. State, 781 P.2d 989 (Alaska Ct. App. 1989).

To meet its burden under subsection (c)(3), the state need not establish that the defendant acted with any particular objective or goal in mind. In this regard, the statute does not require the state to prove

specific intent. Dellart v. State, 781 P.2d 989 (Alaska Ct. App. 1989).

Sentences for first-degree sexual assault (class A felony) under former law should roughly fall into three categories: (1) the most mitigated, 90 days to three years; (2) typical conduct, three years to six years; and (3) aggravated conduct, six years to 20 years. State v. Brinkley, 681 P.2d 361 (Alaska Ct. App. 1984).

Finding required for consecutive sentence exceeding presumptive term for single count. — An affirmative finding by the sentencing court that confinement of the defendant for the aggregate period of a consecutive sentence is necessary to protect the public is required in all cases where imposition of consecutive presumptive terms would result in an aggregate sentence that exceeds the presumptive term for a single count. Lacquement v. State, 644 P.2d 860 (Alaska Ct. App. 1982). See also Friedberg v. State, 663 P.2d 558 (Alaska Ct. App. 1983).

State sentence consecutive to federal sentence. — When a state sentence is imposed consecutively to a federal term of imprisonment, the combined length of incarceration must be considered in determining whether the sentence imposed by the state court is excessive. Williams v. State, 769 P.2d 675 (Alaska Ct. App. 1988).

Scope of review. — See notes under heading "Review of presumptively imposed sentences," AS 12.55.120, Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

Justified departure from Austin rule. — Where defendant, between the time of his initial sentencing and his probation revocation sentencing, was convicted of first-degree burglary, disorderly conduct, two incidents of driving while intoxicated, and driving while license revoked, such facts justified departure from the Austin rule that a first felony offender should receive a more favorable sentence than a presumptive sentence for a second offender. Witt v. State, 726 P.2d 723 (Alaska Ct. App. 1986).

Constitutional implications of correction of illegal sentence. — Correction of an illegal sentence does not implicate the double jeopardy clauses of the state and federal constitutions, or deny the beneficiary of an illegal sentence substantive or procedural due process. State v. Price, 716 P.2d 1103 (Alaska Ct. A 1986).

B. First-Offenders.

Normally a first offender should r ceive a more favorable sentence th the presumptive sentence for a second fender. Austin v. State, 627 P.2d 6 (Alaska Ct. App. 1981).

Since first-felony offenders are not su ject to presumptive sentencing, the l vised Criminal Code's provisions do directly affect their sentences; but fi felony offenders must be sentenced to l than the presumptive term for a seco felony offender, except in exceptio cases. Smith v. State, 739 P.2d 1 (Alaska Ct. App. 1987).

Where defendant was convicted of p jury, a class B felony, as a first offend in the absence of aggravating factors, should receive a sentence substantia more favorable than the four-year p sumptive sentence for a second felony fender, and a sentence of three years w two and one-half years suspended clea satisfies this requirement. Esmailka State, 740 P.2d 466 (Alaska Ct. A 1987).

Sentence for first-time offender excess of presumptive sentence second or third offenders. — Unadj sentence for a first felony offender wh is in excess of the presumptive sente for a second felony offender must be ju fied either by specific aggravating fac under the criminal code, or else by agg vating factors which would qualify as traordinary circumstances under 12.55.165 and would justify a repeat fender receiving an enhanced sentence a three judge panel. Neakok v. State, P.2d 658 (Alaska Ct. App. 1982).

Imposition of a sentence for first-ti Class A felony offenders in excess of presumptive sentence for second offend is permissible only in exceptional circ stances, which may be determined by c sideration of the aggravating factors sp fied in AS 12.55.155 or consideration any additional, unspecified aggravat factors that would constitute extraor nary circumstances under AS 12.55.1 Pertook v. State, 666 P.2d 1308 (Ala Ct. App. 1982); Flink v. State, 683 P 725 (Alaska Ct. App. 1984).

If a suspended portion of a sentence a first felony offender is later impo thus causing the period of incarceratio exceed the presumptive sentence for a s ond felony offender, the first offen

v. State, 764 P.2d 318 (Alaska Ct. App. 1988).

In order to insure that the law will be carried out, and that judicial negligence will not result in disparate and unequal sentencing, the sentence imposed upon defendant was held illegal. State v. Price, 716 P.2d 1183 (Alaska Ct. App. 1986).

III. PRESUMPTIVE SENTENCING.

A. In General.

Constitutionality of presumptive sentencing provisions. — The presumptive sentencing provisions, AS 12.55.125 — 12.55.175, do not conflict with Alaska Const., art. I, § 12 because the legislature has the authority to reasonably restrict judicial discretion in order to accomplish the goal of eliminating unjustified sentencing disparity. Nell v. State, 642 P.2d 1361 (Alaska Ct. App. 1982).

The presumptive sentencing provisions contained in AS 12.55.125 — 12.55.175 are not an unconstitutional violation of the separation of powers doctrine or of Alaska Const., art. IV, § 1 as a legislative infringement on the power of the judiciary to sentence on the basis of the particular facts of the case and the nature of a particular offender because although the presumptive sentencing statutes do limit the discretion of a judge in imposing a sentence, they do not foreclose sentences of less than the presumptive sentence or the possibility of placing a person on probation. Nell v. State, 642 P.2d 1361 (Alaska Ct. App. 1982).

The 20-year minimum sentence for first-degree murder does not constitute cruel and unusual punishment in violation of § 12, art. I, of the state constitution, and U.S. Const., amend. 8, nor does it deprive defendant of substantive due process and the equal protection of the laws in violation of U.S. Const., amend. 14 and of the comparable provisions in the Alaska Constitution. Martin v. State, 664 P.2d 612 (Alaska Ct. App. 1983), cert. denied, 466 U.S. 1007, 104 S. Ct. 1001, 79 L. Ed. 2d 234 (1984).

Determination of whether a person is a second, third, or subsequent felony offender for purposes of applying the presumptive sentencing provisions of this section is governed by the provisions of AS 12.55.145 and 12.55.185(6), (7) and (8). Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

Purpose of presumptive sentencing. — The presumptive sentencing framework contained in this section is directed at a more fundamental goal than simple sentence enhancement and its application to a second or subsequent felony offender was viewed by the legislature as a means of achieving long-term uniformity and predictability in the sentencing of repeat offenders. Fry v. State, 655 P.2d 789 (Alaska Ct. App. 1983).

The purpose of applying presumptive sentencing to a second or subsequent felony offender under this section cannot properly be equated with the purpose served by the provisions of AS 12.55.155 relating to enhancement of presumptive sentences upon proof of specified aggravating factors. Fry v. State, 655 P.2d 789 (Alaska Ct. App. 1983).

Reflection of legislative intent. — The presumptive sentencing provisions contained in this section and AS 12.55.155 reflect the legislature's intent to assure predictability and uniformity in sentencing by the use of fixed and relatively inflexible sentences, statutorily prescribed, for persons convicted of second or subsequent felony offenses. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other grounds and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

The legislature clearly intended that anyone who used a dangerous instrument — any kind of weapon — should be liable for the aggravated offense of robbery in the first degree; beyond that, it intended that offenders who used firearms — a particularly dangerous subcategory of dangerous instrument — should further be subject to an enhanced presumptive term. Burke v. State, 706 P.2d 1190 (Alaska Ct. App. 1985).

The presumptive sentencing structure is mandatory, and it must be followed when it applies. Kelly v. State, 663 P.2d 967 (Alaska Ct. App. 1983).

The presumptive term for a first-felony offender convicted of a class A felony is seven years. Therefore the judge was required to impose the seven-year presumptive sentence unless he found aggravating or mitigating factors. Hastings v. State, 736 P.2d 1167 (Alaska Ct. App. 1987).

The presumptive terms set out in this section were intended as appropriate for imposition in most cases, without significant upward or downward adjustment. Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified on other

grounds and aff'd on rehearing, 665 P.2d 30 (Alaska Ct. App. 1983).

Prior conviction which is necessary element of present offense. — Subsection (e)(1) of this section, when read in conjunction with AS 12.55.145(a)(1) and AS 12.55.185(7), makes no exception for cases in which the prior conviction relied upon for application of presumptive sentencing is also a necessary element of the present offense. Fry v. State, 655 P.2d 789 (Alaska Ct. App. 1983).

AS 12.55.155(e) does not purport to deal with limitations on the applicability of presumptive sentencing under this section and does not preclude the use of a prior conviction to invoke presumptive sentencing under this section when that prior conviction is a necessary element of the present offense. Fry v. State, 655 P.2d 789 (Alaska Ct. App. 1983).

In prosecution for escape in the second degree, it was not error to sentence appellant as a second felony offender and to impose a presumptive sentence on ground that evidence of his confinement on prior felony offenses was used to prove an element of escape charge, i.e., that appellant, at time of escape, was in "a correctional facility while under official detention." Bell v. State, 668 P.2d 787 (Alaska Ct. App. 1983).

Use of the same conviction to prove a prior conviction under AS 11.61.200(a)(1) as well as to trigger application of presumptive sentencing is not improper. Gilbreath v. State, 668 P.2d 1364 (Alaska Ct. App. 1983).

Where AS 12.55.145(a)(1) prohibited consideration of prior convictions for purposes of rendering defendant a second offender or third offender under this section, and where defendant was not otherwise subject to a presumptive sentence under this section, the prior criminal acts may nevertheless be considered as constituting an "exceptional case" justifying imposition of sentence in excess of the presumptive sentence for a second offender. Kognanluk v. State, 665 P.2d 339 (Alaska Ct. App. 1983).

Even if a prior felony conviction is too remote in time to be considered in determining whether a defendant is subject to the presumptive sentencing statutes, the conviction can still be considered for sentencing purposes; and substantial weight can be given to that conviction if the present circumstances indicate that the prior conviction is still relevant. Maal v. State, 670 P.2d 708 (Alaska Ct. App. 1983).

Failure to prove prior convictio — When a party has had insufficient t to comply with the notice requirem relating to proof of prior convictions or gravating and mitigating factors, the proprlate remedy should normally b continuance of the sentencing proc ings; and failure to consider prior cri for presumptive sentencing purposes be condoned only in those cases where state, after exercising due diligence, is able to meet the statutory requirem for proof of a prior conviction. Kell State, 663 P.2d 967 (Alaska Ct. A 1983).

Periods of suspended sentence considered. — A first offender sh normally receive a more favorable tence than the presumptive term for a ond offender, but the supreme court applying this rule, focuses on the peri actual incarceration, excluding suspe periods of imprisonment, so where de dant received only one year of un pended imprisonment, since the presu tive sentence for a second felony offe convicted of assault in the third degr two years, his sentence did not violate rule. Lee v. State, 760 P.2d 1039 (Al Ct. App. 1988).

Imposition of additional time wh is suspended. — The trial court lack thority to impose additional time f first offender whose applicable presu tive term is five years, in the absenc any aggravating factors, even if the a tional time is suspended. Connolly State, 758 P.2d 633 (Alaska Ct. A 1988).

One conviction must precede next. — Under the plain terms of 12.55.145(a)(3) and 12.55.185(6), (7), (8), one conviction must precede the s before presumptive sentencing can ap State v. Rastopoff, 669 P.2d 630 (Al Ct. App. 1983).

Where defendant's three separate cr nal episodes occurred in close proxi and his convictions were entered afte of the offenses had been committed cannot be deemed to be a second fe offender under this section and 12.55.185. State v. Rastopoff, 669 P 630 (Alaska Ct. App. 1983), depar from the holding in State v. Carlson, P.2d 26 (Alaska 1977) only to the ex that Carlson specifically required the viction for one offense to be entered p to commission of the next offense be