

ALASKA LEGISLATURE COMMITTEE FILES, 2003-2004 80/2

10823 HOUSE JUDICIARY

04-0033

1/16/2004

CS FOR HOUSE BILL NO. 244(2d JUD)  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTY-THIRD LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Introduced:

Referred:

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

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to murder in the second degree, the justification of defense of self or  
2 others, immunity from prosecution, sentencing, probation, discretionary parole, and the  
3 right to representation in certain criminal proceedings; relating to violation of a  
4 custodian's duty; relating to sexual abuse of a minor; relating to release of agency  
5 records, upon request, concerning an adjudication of a sexual offense; relating to local  
6 options regarding alcoholic beverages, the offense of furnishing or delivery of alcoholic  
7 beverages to a person under 21 years old, and forfeiture of money or other items of  
8 value used in financial transactions derived from violation of certain laws relating to  
9 alcoholic beverages; relating to assault by means of a dangerous instrument; relating to  
10 operating or driving a motor vehicle, aircraft, or watercraft while under the influence of  
11 an alcoholic beverage, inhalant, or controlled substance, to the refusal to submit to a  
12 chemical test, and to the presumptions and chemical analysis of breath or blood; and

1 providing for an effective date."

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

3 \* Section 1. AS 04.11.010(c) is amended to read:

4 (c) Unless a municipality or established village has adopted a more  
5 restrictive local option under AS 04.11.491(g), in [IN] a criminal prosecution for  
6 possession of alcoholic beverages for sale in violation of (a) of this section, the fact  
7 that a person

8 (1) possessed more than 12 liters of distilled spirits, 24 liters or more  
9 of wine, or 12 gallons or more of malt beverages in an area where the sale of alcoholic  
10 beverages is restricted or prohibited under AS 04.11.491 creates a presumption that  
11 the person possessed the alcoholic beverages for sale;

12 (2) sends, transports, or brings more than 12 liters of distilled  
13 spirits, 24 liters or more of wine, or 12 gallons or more of malt beverages to an  
14 area where the sale of alcoholic beverages is restricted or prohibited under AS  
15 04.11.491 creates a presumption that the person sent, transported, or brought the  
16 alcoholic beverages for sale in the area.

17 \* Sec. 2. AS 04.11.010 is amended by adding a new subsection to read:

18 (d) In this section,

19 (1) "bring" has the meaning given in AS 04.11.499;

20 (2) "send" has the meaning given in AS 04.11.499;

21 (3) "transport" has the meaning given in AS 04.11.499.

22 \* Sec. 3. AS 04.11.150(g) is amended to read:

23 (g) If a shipment is to an area that has restricted the sale of alcoholic  
24 beverages under AS 04.11.491(a)(1), (2), or (3) or (b)(1) or (2), a package store  
25 licensee, agent, or employee may not ship to a purchaser more than 10 and one-half  
26 liters of distilled spirits, 24 liters or more of wine, or 12 gallons or more of malt  
27 beverages in a calendar month, or a lower amount of distilled spirits, wine, or malt  
28 beverages if the municipality or established village has adopted the lower amount  
29 by local option under AS 04.11.491(g).

30 \* Sec. 4. AS 04.11.491 is amended by adding a new subsection to read:

1 (g) If a municipality or established village has adopted a local option under  
2 (a)(1), (2), (3), or (4), or (b)(1), (2), or (3) of this section, the municipality or  
3 established village, as part of the local option question or questions placed before the  
4 voters, may

5 (1) adopt an amount of alcoholic beverages that may be imported that  
6 is less than the amounts set out in AS 04.11.150(g);

7 (2) adopt an amount of alcoholic beverages that would give rise to a  
8 presumption that the person possessed the alcoholic beverages for sale; the amounts  
9 adopted under this paragraph may be lower than those set out in AS 04.11.010(c).

10 \* Sec. 5. AS 04.16.051(d) is amended to read:

11 (d) A person acting with criminal negligence who violates this section is guilty  
12 of a class C felony if

13 (1) within the five years preceding the violation, the person has been  
14 previously convicted under

15 (A) this section; or

16 (B) a law or ordinance of this or another jurisdiction with  
17 elements substantially similar to this section; [OR]

18 (2) the person who receives the alcoholic beverage negligently causes  
19 serious physical injury to or the death of another person while under the influence of  
20 the alcoholic beverage received in violation of this section; in this paragraph,

21 (A) "negligently" means acting with civil negligence; and

22 (B) "serious physical injury" has the meaning given in

23 AS 11.81.900; or

24 (3) the violation occurs within the boundaries of a municipality or  
25 the perimeter of an established village that has adopted a local option under  
26 AS 04.11.491.

27 \* Sec. 6. AS 04.16.220(a) is amended to read:

28 (a) The following are subject to forfeiture:

29 (1) alcoholic beverages manufactured, sold, offered for sale or  
30 possessed for sale, bartered or exchanged for goods and services in this state in  
31 violation of AS 04.21.010; alcoholic beverages possessed, stocked, warehoused, or

1 otherwise stored in violation of AS 04.11.060; alcoholic beverages sold, or offered for  
2 sale in violation of a local option adopted under AS 04.11.491; alcoholic beverages  
3 transported into the state and sold to persons not licensed under this chapter in  
4 violation of AS 04.16.170(b);

5 (2) materials and equipment used in the manufacture, sale, offering for  
6 sale, possession for sale, barter or exchange of alcoholic beverages for goods and  
7 services in this state in violation of AS 04.11.010; materials and equipment used in the  
8 stocking, warehousing, or storage of alcoholic beverages in violation of AS 04.21.060;  
9 materials and equipment used in the sale or offering for sale of an alcoholic beverage  
10 in an area in violation of a local option adopted under AS 04.11.491;

11 (3) aircraft, vehicles, or vessels used to transport, or facilitate the  
12 transportation of

13 (A) alcoholic beverages manufactured, sold, offered for sale or  
14 possessed for sale, bartered or exchanged for goods and services in this state in  
15 violation of AS 04.11.010;

16 (B) property stocked, warehoused, or otherwise stored in  
17 violation of AS 04.21.060;

18 (C) alcoholic beverages imported into a municipality or  
19 established village in violation of AS 04.11.499;

20 (4) alcoholic beverages found on licensed premises that do not bear  
21 federal excise stamps if excise stamps are required under federal law;

22 (5) alcoholic beverages, materials or equipment used in violation of  
23 AS 04.16.175;

24 (6) money, securities, negotiable instruments, or other things of  
25 value used in financial transactions derived from activity prohibited under  
26 AS 04.11.010 or in violation of a local option adopted under AS 04.11.491.

27 \* Sec. 7. AS 04.16.220 is amended by adding a new subsection to read:

28 (i) When forfeiting property under (a) or (d) of this section, a court may award  
29 to a municipal law enforcement agency that participated in the arrest or conviction of  
30 the defendant, the seizure of property, or the identification of property for seizure, (1)  
31 the property if the property is worth \$5,000 or less and is not money or some other

1 thing that is divisible, or (2) up to 75 percent of the property or the value of the  
2 property if the property is worth more than \$5,000 or is money or some other thing  
3 that is divisible. In determining the percentage a municipal law enforcement agency  
4 may receive under this subsection, the court shall consider the municipal law  
5 enforcement agency's total involvement in the case relative to the involvement of the  
6 state.

7 \* Sec. 8. AS 11.41.110(a) is amended to read:

8 (a) A person commits the crime of murder in the second degree if

9 (1) with intent to cause serious physical injury to another person or  
10 knowing that the conduct is substantially certain to cause death or serious physical  
11 injury to another person, the person causes the death of any person;

12 (2) the person knowingly engages in conduct that results in the death  
13 of another person under circumstances manifesting an extreme indifference to the  
14 value of human life;

15 (3) under circumstances not amounting to murder in the first degree  
16 under AS 11.41.100(a)(3), while acting either alone or with one or more persons, the  
17 person commits or attempts to commit arson in the first degree, kidnapping, sexual  
18 assault in the first degree, sexual assault in the second degree, sexual abuse of a minor  
19 in the first degree, sexual abuse of a minor in the second degree, burglary in the first  
20 degree, escape in the first or second degree, robbery in any degree, or misconduct  
21 involving a controlled substance under AS 11.71.010(a), 11.71.020(a), 11.71.030(a)(1)  
22 or (2), or 11.71.040(a)(1) or (2) and, in the course of or in furtherance of that crime or  
23 in immediate flight from that crime, any person causes the death of a person [OTHER  
24 THAN ONE OF THE PARTICIPANTS];

25 (4) acting with a criminal street gang, the person commits or attempts  
26 to commit a crime that is a felony and, in the course of or in furtherance of that crime  
27 or in immediate flight from that crime, any person causes the death of a person  
28 [OTHER THAN ONE OF THE PARTICIPANTS]; or

29 (5) the person with criminal negligence causes the death of a child  
30 under the age of 16, and the person has been previously convicted of a crime involving  
31 a child under the age of 16 that was

1 (A) a felony violation of AS 11.41;

2 (B) in violation of a law or ordinance in another jurisdiction  
3 with elements similar to a felony under AS 11.41; or

4 (C) an attempt, a solicitation, or a conspiracy to commit a  
5 crime listed in (A) or (B) of this paragraph.

6 \* Sec. 9. AS 11.41.220(a) is amended to read:

7 (a) A person commits the crime of assault in the third degree if that person

8 (1) recklessly

9 (A) places another person in fear of imminent serious physical  
10 injury by means of a dangerous instrument;

11 (B) causes physical injury to another person by means of a  
12 dangerous instrument; or

13 (C) while being 18 years of age or older

14 (i) causes physical injury to a child under 10 years of  
15 age and the injury reasonably requires medical treatment;

16 (ii) causes physical injury to a child under 10 years of  
17 age on more than one occasion;

18 (2) with intent to place another person in fear of death or serious  
19 physical injury to the person or the person's family member makes repeated threats to  
20 cause death or serious physical injury to another person; [OR]

21 (3) while being 18 years of age or older, knowingly causes physical  
22 injury to a child under 16 years of age but at least 10 years of age and the injury  
23 reasonably requires medical treatment; or

24 (4) with criminal negligence causes serious physical injury to  
25 another person by means of a dangerous instrument.

26 \* Sec. 10. AS 11.41.438(a) is amended to read:

27 (a) An offender commits the crime of sexual abuse of a minor in the third  
28 degree if

29 (1) being under 16 years of age, the offender engages in sexual  
30 penetration with a person who is under 13 years of age and at least three  
31 years younger than the offender;

1                   (2) being 16 years of age or older, the offender engages in sexual  
2 contact with a person who is 13, 14, or 15 years of age and at least three years younger  
3 than the offender; or

4                   (3) [(2)] being 18 years of age or older, the offender engages in sexual  
5 penetration with a person who is 16 or 17 years of age and at least three years younger  
6 than the offender, and the offender occupies a position of authority in relation to the  
7 victim.

8 \* Sec. 11. AS 11.41.440(a) is amended to read:

9                   (a) An offender commits the crime of sexual abuse of a minor in the fourth  
10 degree if

11                   (1) being under 16 years of age, the offender engages in [SEXUAL  
12 PENETRATION OR] sexual contact with a person who is under 13 years of age and  
13 at least three years younger than the offender; or

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

18 \* Sec. 12. AS 11.56 is amended by adding a new section to read:

19                   Sec. 11.56.758. Violation of custodian's duty. (a) A person commits the  
20 crime of violation of custodian's duty if the person fails, when acting as a custodian  
21 appointed by the court for a released person under AS 12.30, to report immediately as  
22 directed by the court that the person released has violated a condition of release.

23                   (b) Violation of custodian's duty is

24                   (1) a class A misdemeanor if the released person is charged with a  
25 felony;

26                   (2) a class B misdemeanor if the released person is charged with a  
27 misdemeanor.

28 \* Sec. 13. AS 11.81.330(a) is amended to read:

29                   (a) A person may use nondeadly force upon another when and to the extent the  
30 person reasonably believes it is necessary for self defense against what the person  
31 reasonably believes to be the use of unlawful force by the other, unless

1 (1) the force involved was the product of mutual combat not  
2 authorized by law;

3 (2) the person claiming the defense of justification provoked the  
4 other's conduct with intent to cause physical injury to the other; [OR]

5 (3) the person claiming the defense of justification was the initial  
6 aggressor; or

7 (4) the person claiming the defense of justification was, at the time  
8 the force was used,

9 ~~the person claiming the defense of justification was, at the time~~  
10 (A) acting alone or with others to further the criminal  
11 objectives of one or more other persons; or

12 (B) a participant in a transaction or purported transaction  
13 or in immediate flight from a transaction or purported transaction in  
14 violation of AS 11.71.

15 \* Sec. 14. AS 11.81 is amended by adding a new section to read:

16 Sec. 11.81.345. **Defense of self and others.** A court may instruct the jury  
17 about the justification described in AS 11.81.330 - 11.81.340 if the court, sitting  
18 without a jury, finds that there is some plausible evidence to warrant a reasonable jury  
19 to find the elements of the justification.

20 \* Sec. 15. AS 12.50.101(a) is amended to read:

21 (a) If a witness refuses, on the basis of the privilege against self-incrimination,  
22 to testify or provide other information in a criminal proceeding before or ancillary to a  
23 court or grand jury of this state, and a judge issues an order under (b) of this section,  
24 the witness may not refuse to comply with the order on the basis of the privilege  
25 against self-incrimination. If the witness fully complies with the order, the witness  
26 may not be prosecuted for an offense about which the witness is compelled to  
27 testify [NO TESTIMONY OR OTHER INFORMATION COMPELLED UNDER  
28 THE ORDER, OR INFORMATION DIRECTLY OR INDIRECTLY DERIVED  
29 FROM THAT TESTIMONY OR OTHER INFORMATION, MAY BE USED  
30 AGAINST THE WITNESS IN A CRIMINAL CASE], except in a prosecution based  
31 on perjury, giving a false statement[,] or otherwise knowingly providing false  
information, or hindering prosecution.

1 \* Sec. 16. AS 12.50.101(e) is amended by adding new paragraphs to read:

2 (2) "higher-level felony" means an unclassified or a class A felony,

3 (3) "lower-level felony" means a class B or a class C felony,

4 (4) "proffer" means a written or oral statement by the attorney for the  
5 witness, stating the attorney's good faith belief of the substance of the witness's  
6 testimony or other information.

7 \* Sec. 17. AS 12.50.101 is amended by adding new subsections to read:

8 (f) If a witness refuses, or there is reason to believe the witness will refuse, to  
9 testify or provide other information based on the privilege against self-incrimination,  
10 and if the attorney general or the attorney general's designee has not applied for an  
11 order under (b) of this section, the court shall inform the witness of the right to be  
12 represented by an attorney, and that an attorney will be appointed for the witness if the  
13 witness qualifies for counsel under AS 18.85. The court shall recess the proceeding to  
14 allow the witness to consult with the attorney for the witness.

15 (g) If the attorney general or the attorney general's designee declines to seek  
16 an order under (b) of this section after the witness has had an opportunity to consult  
17 with an attorney, and the witness continues to refuse to testify or provide other  
18 information, the court shall hold a hearing to determine the validity of the claim of  
19 privilege by the witness. The hearing shall be in camera.

20 (h) At the hearing under (g) of this section, the attorney for the witness, in the  
21 form of a proffer, shall describe the testimony or other information that the witness  
22 claims is privileged. The proffer must include a description of how the testimony or  
23 other information could connect the witness with a crime. The proffer is privileged  
24 and inadmissible for any other purpose. If the proffer establishes a factual basis that  
25 there is a real or substantial danger that the testimony or other information to be  
26 compelled would support a conviction or would furnish a link in the chain of evidence  
27 leading to conviction for a crime, the court may find that the witness has a valid claim  
28 of privilege.

29 (i) If the court finds that the witness has a valid claim of privilege, it shall  
30 advise the prosecution of that finding and inform the prosecution of the category of  
31 offense to which the privilege applies: a higher-level felony, a lower-level felony, or a

1           misdemeanor.

2       \* Sec. 18. AS 12.55.025(c) is amended to read:

3           (c) Except as provided in (d) [AND (e)] of this section, when a defendant is  
4           sentenced to imprisonment, the term of confinement commences on the date of  
5           imposition of sentence unless the court specifically provides that the defendant must  
6           report to serve the sentence on another date. If the court provides another date to  
7           begin the term of confinement, the court shall provide the defendant with written  
8           notice of the date, time, and location of the correctional facility to which the defendant  
9           must report. A defendant shall receive credit for time spent in custody pending trial,  
10          sentencing, or appeal, if the detention was in connection with the offense for which  
11          sentence was imposed. A defendant may not receive credit for more than the actual  
12          time spent in custody pending trial, sentencing, or appeal. The time during which a  
13          defendant is voluntarily absent from official detention after the defendant has been  
14          sentenced may not be credited toward service of the sentence.

15       \* Sec. 19. AS 12.55 is amended by adding a new section to read:

16           Sec. 12.55.127. **Consecutive terms of imprisonment.** (a) If a defendant is  
17          required to serve a term of imprisonment under a separate judgment, any term of  
18          imprisonment imposed in a later judgment, amended judgment, or probation  
19          revocation shall be consecutive.

20           (b) Except as provided in (c) of this section, if a defendant is being sentenced  
21          for two or more crimes in a single judgment, terms of imprisonment may be  
22          concurrent or partially concurrent.

23           (c) If the defendant is being sentenced for

24                   (1) escape, the term of imprisonment shall be consecutive to the term  
25          for the underlying crime;

26                   (2) two or more crimes under AS 11.41, a consecutive term of  
27          imprisonment shall be imposed for at least

28                           (A) the mandatory minimum term under AS 12.55.125(a) for  
29          each additional crime that is murder in the first degree;

30                           (B) the mandatory minimum term for each additional crime  
31          that is an unclassified felony governed by AS 12.55.125(b);

1 (C) the presumptive term specified in AS 12.55.125(c) or the  
2 active term of imprisonment, whichever is less, for each additional crime that  
3 is

4 (i) manslaughter; or

5 (ii) kidnapping that is a class A felony;

6 (D) two years or the active term of imprisonment, whichever is  
7 less, for each additional crime that is criminally negligent homicide;

8 (E) one-fourth of the presumptive term under AS 12.55.125(c)  
9 or (i) for each additional crime that is sexual assault in the first degree under  
10 AS 11.41.410 or sexual abuse of a minor in the first degree under  
11 AS 11.41.434, or an attempt, solicitation or conspiracy to commit those  
12 offenses; and

13 (F) some additional term of imprisonment for each additional  
14 crime, or each additional attempt or solicitation to commit the offense, under  
15 AS 11.41.200 - 11.41.250, 11.41.420 - 11.41.432, 11.41.436 - 11.41.458, or  
16 11.41.500 - 11.41.520.

17 (d) In this section,

18 (1) "active term of imprisonment" means the total term of  
19 imprisonment imposed for a crime, minus suspended imprisonment;

20 (2) "additional crime" means a crime that is not the primary crime;

21 (3) "primary crime" means the crime

22 (A) for which the sentencing court imposes the longest active  
23 term of imprisonment; or

24 (B) that is designated by the sentencing court as the primary  
25 crime when no single crime has the longest active term of imprisonment.

26 \* Sec. 20. AS 18.85.100 is amended by adding a new subsection to read:

27 (f) Notwithstanding (a) of this section, an indigent person is entitled to the  
28 representation and necessary services and facilities of representation as provided in (a)  
29 of this section when the person is a witness who refuses or there is reason to believe  
30 will refuse to testify or provide other information based on the privilege against self-  
31 incrimination.

1 \* Sec. 21. AS 28.35.030(n) is amended to read:

2 (n) A person is guilty of a class C felony if the person is convicted under (a) of  
3 this section and either has been previously convicted two or more times since  
4 January 1, 1996, and within the 10 years preceding the date of the present offense, or  
5 punishment under this subsection or under AS 28.35.032(n) was previously  
6 imposed. For purposes of determining minimum sentences based on previous  
7 convictions, the provisions of (r)(4) of this section apply. Upon conviction, the court

8 (1) shall impose a fine of not less than \$10,000 and a minimum  
9 sentence of imprisonment of not less than

10 (A) 120 days if the person has been previously convicted twice;

11 (B) 240 days if the person has been previously convicted three  
12 times;

13 (C) 360 days if the person has been previously convicted four  
14 or more times;

15 (2) may not

16 (A) suspend execution of sentence or grant probation except on  
17 condition that the person serve the minimum imprisonment under (1) of this  
18 subsection; or

19 (B) suspend imposition of sentence;

20 (3) shall permanently revoke the person's driver's license, privilege to  
21 drive, or privilege to obtain a license subject to restoration of the license under (o) of  
22 this section;

23 (4) may order that the person, while incarcerated or as a condition of  
24 probation or parole, take a drug or combination of drugs, intended to prevent the  
25 consumption of an alcoholic beverage; a condition of probation or parole imposed  
26 under this paragraph is in addition to any other condition authorized under another  
27 provision of law;

28 (5) shall order forfeiture under AS 28.35.036 of the vehicle, watercraft,  
29 or aircraft used in the commission of the offense, subject to remission under  
30 AS 28.35.037; and

31 (6) shall order the department to revoke the registration for any vehicle

1 registered by the department in the name of the person convicted under this  
2 subsection; if a person convicted under this subsection is a registered co-owner of a  
3 vehicle or is registered as a co-owner under a business name, the department shall  
4 reissue the vehicle registration and omit the name of the person convicted under this  
5 subsection.

6 \* Sec. 22. AS 28.35.030 is amended by adding a new subsection to read:

7 (s) In a prosecution under (a) of this section, a person may introduce evidence  
8 of having consumed alcohol to rebut or explain the results of a chemical test, but only  
9 if the consumption of alcohol occurred after the driving or operating that is the subject  
10 of the prosecution.

11 \* Sec. 23. AS 28.35.032(p) is amended to read:

12 (p) A person is guilty of a class C felony if the person is convicted under this  
13 section and either has been previously convicted two or more times since January 1,  
14 1996, and within the 10 years preceding the date of the present offense, or  
15 punishment under this subsection or under AS 28.35.030(n) was previously  
16 imposed. For purposes of determining minimum sentences based on previous  
17 convictions, the provisions of AS 28.35.030(r)(4) apply. Upon conviction,

18 (1) the court shall impose a fine of not less than \$10,000 and a  
19 minimum sentence of imprisonment of not less than

20 (A) 120 days if the person has been previously convicted twice;

21 (B) 240 days if the person has been previously convicted three  
22 times;

23 (C) 360 days if the person has been previously convicted four  
24 or more times;

25 (2) the court may not

26 (A) suspend execution of the sentence required by (1) of this  
27 subsection or grant probation, except on condition that the person serve the  
28 minimum imprisonment under (1) of this subsection; or

29 (B) suspend imposition of sentence;

30 (3) the court shall permanently revoke the person's driver's license,  
31 privilege to drive, or privilege to obtain a license subject to restoration under (q) of

1 this section;

2 (4) the court may order that the person, while incarcerated or as a  
3 condition of probation or parole, take a drug, or combination of drugs, intended to  
4 prevent consumption of an alcoholic beverage; a condition of probation or parole  
5 imposed under this paragraph is in addition to any other condition authorized under  
6 another provision of law;

7 (5) the sentence imposed by the court under this subsection shall run  
8 consecutively with any other sentence of imprisonment imposed on the person;

9 (6) the court shall order forfeiture under AS 28.35.036, of the motor  
10 vehicle, aircraft, or watercraft used in the commission of the offense, subject to  
11 remission under AS 28.35.037; and

12 (7) the court shall order the department to revoke the registration for  
13 any vehicle registered by the department in the name of the person convicted under  
14 this subsection; if a person convicted under this subsection is a registered co-owner of  
15 a vehicle, the department shall reissue the vehicle registration and omit the name of  
16 the person convicted under this subsection.

17 \* Sec. 24. AS 28.35.033(c) is amended to read:

18 (c) Except as provided in AS 28.35.030(s). ~~the~~ [THE] provisions of (a) of  
19 this section may not be construed to limit the introduction of any other competent  
20 evidence bearing upon the question of whether the person was or was not under the  
21 influence of intoxicating liquor.

22 \* Sec. 25. AS 33.16.090(b) is amended to read:

23 (b) Except as provided in (e) of this section, a prisoner is not eligible for  
24 discretionary parole during the term of a presumptive sentence; however, a prisoner is  
25 eligible for discretionary parole during a term of sentence enhancement imposed under  
26 AS 12.55.155(a) or during the term of a consecutive or partially consecutive  
27 presumptive sentence imposed under AS 12.55.127 [AS 12.55.025(e) OR (g)]. A  
28 prisoner sentenced to a mandatory 99-year term under AS 12.55.125(a) or a definite  
29 term under AS 12.55.125(l) is not eligible for discretionary parole during the entire  
30 term.

31 \* Sec. 26. AS 33.16.090(c) is amended to read:

1 (c) Except as provided in (e) of this section, a prisoner eligible for  
2 discretionary parole during a period of sentence enhancement imposed under  
3 AS 12.55.155(a) or during a consecutive or partially consecutive presumptive sentence  
4 imposed under AS 12.55.127 [AS 12.55.025(e) OR (g)] shall serve the unenhanced  
5 portion of the sentence or the initial presumptive sentence before being otherwise  
6 eligible for discretionary parole under AS 33.16.100(c) or (d). For purposes of this  
7 subsection, the sentence for the most serious offense in the case of consecutive or  
8 partially consecutive presumptive sentences shall be considered the initial presumptive  
9 sentence. The unenhanced sentence or the initial presumptive sentence is considered  
10 served for purposes of discretionary parole on the date the unenhanced or initial  
11 presumptive sentence is due to expire less good time earned under AS 33.20.010.

12 \* Sec. 27. AS 47.12.310(b) is amended to read:

13 (b) A state or municipal agency or employee shall disclose

14 (1) information regarding a case to a federal, state, or municipal law  
15 enforcement agency for a specific investigation being conducted by that agency; and

16 (2) appropriate information regarding a case to

17 (A) a guardian ad litem appointed by the court;

18 (B) a person or an agency requested by the department or the  
19 minor's legal custodian to provide consultation or services for a minor who is  
20 subject to the jurisdiction of the court under this chapter as necessary to enable  
21 the provision of the consultation or services;

22 (C) school officials as may be necessary to protect the safety of  
23 the minor who is the subject of the case and the safety of school students and  
24 staff or to enable the school to provide appropriate counseling and supportive  
25 services to meet the needs of a minor about whom information is disclosed;

26 (D) a governmental agency as may be necessary to obtain that  
27 agency's assistance for the department in its investigation or to obtain physical  
28 custody of a minor;

29 (E) a law enforcement agency of this state or another  
30 jurisdiction as may be necessary for the protection, rehabilitation, or  
31 supervision of any minor or for actions by that agency to protect the public

1 safety;

2 (F) a victim or to the victim's insurance company as may be  
3 necessary to inform the victim or the insurance company about the arrest of the  
4 minor, including the minor's name and the names of the minor's parents, copies  
5 of reports, or the disposition or resolution of a case involving a minor;

6 (G) the state medical examiner under AS 12.65 as may be  
7 necessary to perform the duties of the state medical examiner,

8 (H) foster parents or relatives with whom the child is placed by  
9 the department as may be necessary to enable the foster parents or relatives to  
10 provide appropriate care for the child who is the subject of the case, to protect  
11 the safety of the child who is the subject of the case, and to protect the safety  
12 and property of family members and visitors of the foster parents or relatives;

13 (I) the Department of Law or its agent for use and subsequent  
14 release if necessary for collection of an order of restitution on behalf of the  
15 recipient;

16 (J) the Violent Crimes Compensation Board established in  
17 AS 18.67.020 for use in awarding compensation under AS 18.67.080; [AND]

18 (K) a state, municipal, or federal agency of this state or another  
19 jurisdiction that has the authority to license adult or children's facilities and  
20 services: and

21 (L) upon request, a member of the public regarding an  
22 adjudication of a sexual offense under AS 11.41.410 - 11.41.460 as may be  
23 necessary to protect the safety of a child or vulnerable adult: in this  
24 subparagraph. "vulnerable adult" has the meaning given in AS 47.24.900.

25 \* Sec. 28. (a) AS 09.50.010(13) is repealed.

26 (b) AS 12.55.025(e), 12.55.025(g), and 12.55.025(h) are repealed.

27 \* Sec. 29. The uncodified law of the State of Alaska is amended by adding a new section to  
28 read:

29 APPLICABILITY. (a) The changes made in secs. 5, 6, 8 - 11, 13, 14, 18, 19, 25, 26,  
30 and 28(b) of this Act apply to offenses committed on or after the respective effective date of  
31 those sections.

CS HB 244 (2d JUD)

AMENDMENT 1 - PASSED  
by REP. MCGUIRE

**Pages 15-16, Section 27.**

**Delete the entire contents of the section and insert instead:**

AS 47.12.310 is amended by adding a new subsection to read:

(k) A state or municipal agency or authorized employee, other than a state or municipal law enforcement agency under (c) of this section, may disclose to the public information regarding a case as may be necessary to protect the safety of the public, provided the disclosure is authorized by regulations adopted by the department.

AMENDMENT #4 - PASSED  
by REP. MCGUIRE

OFFERED IN THE HOUSE

TO: CSHB 244(JUD)

Page 8, lines <sup>7</sup>~~9~~ - 13:

Delete all material and insert the following:

"(4) the force applied was the result of using a ~~dangerous~~ <sup>A#1 to the A.</sup> deadly weapon  
instrument that the person claiming the defense of justification possessed  
while

(A) acting alone or with others to further a felony criminal  
objective of the person or one or more other persons; or

(B) participating in a felony transaction or purported  
transaction, or in immediate flight from a felony transaction or  
purported transaction in violation of AS 11.71.

HB 244

Amendment 6 - PASSED Gara

Insert at p 25

At line 24 after "participants" and at line 28 after "participants" the following language:

"except that when the killing of the participant is the direct result of <sup>felony</sup> criminal conduct by a non-participant."

\*  
A#10 (same A.) - PASSED  
by Rep. McGuire

AMENDMENT NO. 9 - WITHDRAWN  
by Rep. Gruenberg

OFFERED IN THE HOUSE  
To: CSHB 244(JUD) Work Draft 1/16/2004

Page 6, line 24

(4) with criminal negligence causes serious physical injury under AS 11.81.900(55)(B)  
to another person by means of a dangerous instrument.

D

HB 244

conceptual for placement purposes  
Amendment 11 - PASSED

Gara

(Insert at p 7 line <sup>28</sup>13, and renumber remaining sections accordingly:

Amend AS 12.30.020 by adding a subsection (i) that reads:

~~"In the case of a misdemeanor,~~ the court shall issue written findings to demonstrate why conditions provided under subsection (b)(1) needed to be imposed."

conceptual  
AMENDMENT NO. 15  
by Rep. Gruenberg

-PASSED  
AS AMENDED

OFFERED IN THE HOUSE  
To: CSHB 244(JUD) Work Draft 1/16/2004

Page 2, line 30 - p. 3 line 26

Sec. 4 AS 04.11.491 is amended by adding a new subsection to read:

(g) If a municipality or established village has adopted a local option under (a)(1), (2), (3), or (4), or (b)(1), (2), or (3) of this section, the municipality or established village, as part of the local option question or questions placed before the voters, may

(1) adopt an amount of alcoholic beverages that may be imported that is less than the amounts set out in AS 04.11.150(g);

(2) adopt an amount of alcoholic beverages that would give rise to a presumption that the person possessed the alcoholic beverages for sale; the amounts adopted under this paragraph may be lower than those set out in AS 04.11.010©;

(3) adopt an increased penalty of a class C felony for furnishing or delivery of alcoholic beverages to persons under 21 pursuant to AS 04.16.051(d)(3).

Sec. 5 AS 04.16.051(d) is amended to read

(d) A person acting with criminal negligence who violates this section is guilty of a class C felony if

(1) within the five years preceding the violation, the person has been previously convicted under

(A) this section; or

(B) a law or ordinance of this or another jurisdiction with elements substantially similar to this section; [OR]

(2) the person who receives the alcoholic beverage negligently causes serious physical injury to or the death of another person while under the influence of the alcoholic beverage received in violation of this section; in this paragraph,

(A) "negligently" means acting with civil negligence; and

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

(3) the violation occurs within the boundaries of a municipality or the perimeter of an established village that has adopted a local option and the increased penalty of a class C felony under AS 04.11.491.

A. to A. :  
→ will not be increased penalty unless muni/village opts. out (reverse) it

A



1 (b) Sections 21 and 23 of this Act apply to offenses occurring on or after the effective  
2 date of those sections, except that previous punishment, referred to in AS 28.35.030(n), as  
3 amended by sec. 21 of this Act, and in AS 28.35.032(p), as amended by sec. 23 of this Act,  
4 includes punishment imposed before, on, or after the effective date of secs. 21 and 23 of this  
5 Act.

6 (c) Section 12 of this Act applies to custodians who fail to report on or after the  
7 effective date of sec. 12 of this Act, for persons released for offenses committed before, on, or  
8 after the effective date of sec. 12 of this Act.

9 (d) The changes made in secs. 7, 15 - 17, 20, 22, and 25 of this Act apply to criminal  
10 proceedings for offenses committed before, on, or after the effective date of those sections.

11 (e) Section 27 of this Act applies to an offense occurring before, on, or after the  
12 effective date of this Act.

13 \* Sec. 30. This Act takes effect July 1, 2004.

AMENDMENT TO CSHB 244 (2D JUD) Work Draft 1/16/2004 # 5 - sit aside  
by REP. MCGUIRE

Delete Page 13, lines 7-10

Insert in its place:

(s) In a prosecution under (a) of this section, a person may introduce evidence of having consumed alcohol before operating or driving the motor vehicle, aircraft or watercraft, to rebut or explain the results of a chemical test, but it is not a defense that the chemical test did not measure the blood alcohol at the time of the operating or driving.

Add a new section and renumber other sections accordingly:

\*Sec. \_\_\_. AS 28.35.030(a) is amended to read:

(a) A person commits the crime of driving while under the influence of an alcoholic beverage, inhalant, or controlled substance if the person operates or drives a motor vehicle or operates an aircraft or a watercraft

(1) while under the influence of an alcoholic beverage, intoxicating liquor, inhalant, or any controlled substance ;

and ~~(2)~~ if [WHEN], as determined by a chemical test taken within four hours after the alleged offense was committed, there is 0.08 percent or more by weight of alcohol in the person's blood or 80 milligrams or more of alcohol per 100 milliliters of blood, or if [WHEN] there is 0.08 grams or more of alcohol per 210 liters of the person's breath; or

(3) while the person is under the combined influence of an alcoholic beverage, an intoxicating liquor, an inhalant, or [AND] a controlled substance.

Tech  
A.#1  
to A.

HB 244

Amendment 7 - FAILED Gara

Delete page 6, lines 24 and 25.

HB 244

Amendment 8 - <sup>Gara</sup> WITHDRAWN

Insert at p 6 line 24 after "negligence" the following language:

"in violation of AS 28.35.030"

HB 244

Amendment ~~\_\_\_\_\_~~

Gara

Delete page 12 lines 19 – 27, and renumber sections accordingly.

HB 244

Amendment 12 - FAILED

Gara

Delete page 8 lines 7 - 13 all language after "aggressor".

(Delete sect. 13 of the bill)

HB 244

Amendment

B - WITHDRAWN

Gara

At page 9 line 30, delete remainder of sentence after "finding".

See A #3

HB 244

Amendment 14 - FAILED Gara

At pages 10 - 11, delete Section 19.

& conforming sections

## AMENDMENT NO. \_\_\_\_\_

## OFFERED IN THE HOUSE

To: CSHB 244(JUD) Work Draft 1/16/2004

Page 3, Sec 5, line lines 10-26 omit proposed new section (3) (highlighted) thereby omitting amendment.

Sec. 5 AS 04.16.051(d) is amended to read

(d) A person acting with criminal negligence who violates this section is guilty of a class C felony if

(1) within the five years preceding the violation, the person has been previously convicted under

(A) this section; or

(B) a law or ordinance of this or another jurisdiction with elements substantially similar to this section; [OR]

(2) the person who receives the alcoholic beverage negligently causes serious physical injury to or the death of another person while under the influence of the alcoholic beverage received in violation of this section; in this paragraph,

(A) "negligently" means acting with civil negligence; and

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

(3) the violation occurs within the boundaries of a municipality or the perimeter of an established village that has adopted a local option under AS 04.11.491.

B

AMENDMENT NO. \_\_\_\_\_

OFFERED IN THE HOUSE

To: CSHB 244(JUD) Work Draft 1/16/2004

Page 6, line 24

(4) with criminal negligence has consumed alcohol and causes serious physical injury to another person by means of a dangerous instrument.

e

AMENDMENT NO. \_\_\_\_\_

OFFERED IN THE HOUSE

To: CSHB 244(JUD) Work Draft 1/16/2004

Page 6, line 24

(4) with criminal negligence and when as determined by a chemical test taken within four hours after the alleged offense was committed, there is 0.05 percent or more by weight of alcohol in the person's blood or 50 milligrams or more of alcohol per 100 milliliters of blood, or when there is 0.05 grams or more of alcohol per 210 liters of the person's breath, causes serious physical injury under AS 11.81.900(55)(B) to another person by means of a dangerous instrument.

E

AMENDMENT NO. \_\_\_\_\_

OFFERED IN THE HOUSE

To: CSHB 244(JUD) Work Draft 1/16/2004

Page 6, line 24

(4) with criminal negligence and when as determined by a chemical test taken within four hours after the alleged offense was committed, there is 0.05 percent or more by weight of alcohol in the person's blood or 50 milligrams or more of alcohol per 100 milliliters of blood, or when there is 0.05 grams or more of alcohol per 210 liters of the person's breath. causes permanent serious physical injury under AS 11,81,900(55)(B) to another person by means of a dangerous instrument.

✓

F

AMENDMENT NO. \_\_\_\_\_

OFFERED IN THE HOUSE

To: CSHB 244(JUD) Work Draft 1/16/2004

Page 6, line 24

(4) with criminal negligence and when as determined by a chemical test taken within four hours after the alleged offense was committed, there is 0.05 percent or more by weight of alcohol in the person's blood or 50 milligrams or more of alcohol per 100 milliliters of blood, or when there is 0.05 grams or more of alcohol per 210 liters of the person's breath, causes permanent serious physical injury to another person by means of a dangerous instrument.

G

AMENDMENT NO. \_\_\_\_\_

OFFERED IN THE HOUSE

To: CSHB 244(JUD) Work Draft 1/16/2004

Page 6, line 24

(4) with criminal negligence causes permanent serious physical injury to another person by means of a dangerous instrument.

##

AMENDMENT NO. \_\_\_\_\_

OFFERED IN THE HOUSE

To: CSHB 244(JUD) Work Draft 1/16/2004

Page 6, line 24

(4) with criminal negligence and when as determined by a chemical test taken within four hours after the alleged offense was committed, there is 0.05 percent or more by weight of alcohol in the person's blood or 50 milligrams or more of alcohol per 100 milliliters of blood, or when there is 0.05 grams or more of alcohol per 210 liters of the person's breath, causes serious physical injury to another person by means of a dangerous instrument.

I

**AMENDMENT \_\_\_\_\_**

**OFFERED IN THE HOUSE**

**TO: CSHB 244 (JUD) WORK DRAFT 04-0033**

Page 7, after line 17 :

Insert the following new Sections 12 - 29:

**\*\*Sec. 12. AS 11.46.120(a) is amended to read:**

(a) A person commits the crime of theft in the first degree if the person commits theft as defined in AS 11.46.100 and the value of the property or services is \$50,000 [\$25,000] or more.

**Sec 13. AS 11.46.130(a) is amended to read:**

(a) A person commits the crime of theft in the second degree if the person commits theft as defined in AS 11.46.100 and

(1) the value of the property or services is \$1,000 [\$500] or more but less than \$50,000 [\$25,000];

(2) the property is a firearm or explosive;

(3) the property is taken from the person of another;

(4) the property is taken from a vessel and is vessel safety or survival equipment;

(5) the property is taken from an aircraft and the property is aircraft safety or survival equipment; or

5-1

(6) the value of the property is \$100 [\$50] or more but less than \$1,000 [\$500] and within the preceding five years the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of

(A) AS 11.46.120, or an offense under another law or ordinance with similar elements;

(B) a crime set out in this subsection or an offense under another law or ordinance with similar elements;

(C) AS 11.46.140(a)(1) or (2), or an offense under another law or ordinance with similar elements; or

(D) AS 11.46.220(c)(1) or (c)(2)(A), or an offense under another law or ordinance with similar elements.

Sec. 14. AS 11.46.140(a) is amended to read:

(a) A person commits the crime of theft in the third degree if the person commits theft as defined in AS 11.46.100 and

(1) the value of the property or services is \$100 [\$50] or more but less than \$1,000 [\$500];

(2) the property is an access device; or

(3) the value of the property is less than \$100 [\$50] and, within the past five years, the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of theft or concealment of merchandise, or an offense under another law or ordinance with similar elements.

Sec. 15. AS11.46.150(a) is amended to read:

(a) A person commits the crime of theft in the fourth degree if the person commits theft as defined in AS 11.46.100 and the value of the property or services is less than \$100 [\$50].

Sec. 16. AS 11.46.220(c) is amended to read:

(c) Concealment of merchandise is

(1) a class C felony if

(A) the merchandise is a firearm;

(B) the value of the merchandise is \$1,000 [\$500] or more;

or

(C) the value of the merchandise is \$100 [\$50] or more but less than \$1,000 [\$500] and within the preceding five years the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of the offense of

(i) concealment of merchandise under this paragraph or (2)(A) of this subsection, or an offense under another law or ordinance with similar elements; or

(ii) AS 11.46.120, 11.46.130, or 11.46.140(a)(1) or (a)(2), or an offense under another law or ordinance with similar elements;

(2) a class A misdemeanor if

(A) the value of the merchandise is \$100 [\$50] or more but less than \$1,000 [\$500]; or

- (B) the value of the merchandise is less than \$100 [\$50] and within the preceding five years the person has been convicted and sentenced on two or more separate occasions of the offense of concealment of merchandise or theft in any degree, or an offense under another law or ordinance with similar elements;
- (3) a class B misdemeanor if the value of the merchandise is less than \$100 [\$50].

Sec. 17. AS 11.46.260 (b) is amended to read:

(b) Removal of identification marks is

- (1) a class C felony if the value of the property on which the serial number or identification mark appeared is \$1,000 [\$500] or more;
- (2) a class A misdemeanor if the value of the property on which the serial number or identification mark appeared is \$100 [\$50] or more but less than \$1,000 [\$500];
- (3) a class B misdemeanor if the value of the property on which the serial number or identification mark appeared is less than \$100 [\$50].

Sec. 18. AS 11.46.270(b) is amended to read:

(b) Unlawful possession is

- (1) a class C felony if the value of the property on which the serial number or identification mark appeared is \$1,000 [\$500] or more;

(2) a class A misdemeanor if the value of the property on which the serial number or identification mark appeared is \$100 [\$50] or more but less than \$1,000 [\$500];

(3) a class B misdemeanor if the value of the property on which the serial number or identification mark appeared is less than \$100 [\$50].

**Sec. 19. AS 11.46.280(d) is amended to read:**

(d) Issuing a bad check is

(1) a class B felony if the face amount of the check is \$50,000 [\$25,000] or more;

(2) a class C felony if the face amount of the check is \$1,000 [\$500] or more but less than \$50,000 [\$25,000];

(3) a class A misdemeanor if the face amount of the check is \$100 [\$50] or more but less than \$1,000 [\$500];

(4) a class B misdemeanor if the face amount of the check is less than \$100 [\$50].

**Sec. 20. AS 11.46.285(b) is amended to read:**

(b) Fraudulent use of an access device is

(1) a class B felony if the value of the property or services obtained is \$50,000 [\$25,000] or more;

(2) a class C felony if the value of the property or services obtained is \$1,000 [\$500] or more but less than \$50,000 [\$25,000];

(3) a class A misdemeanor if the value of the property or services obtained is \$100 [\$50] or more but less than \$1,000 [\$500];

(4) a class B misdemeanor if the value of the property or services obtained is less than \$100 [\$50].

Sec. 21. AS 11.46.360(a) is amended to read:

(a) A person commits the crime of vehicle theft in the first degree if, having no right to do so or any reasonable ground to believe the person has such a right, the person drives, tows away, or takes

(1) the car, truck, motorcycle, motor home, bus, aircraft, or watercraft of another;

(2) the propelled vehicle of another and

(A) the vehicle or any other property of another is damaged in a total amount of \$1,000 [\$500] or more;

(B) the owner incurs reasonable expenses as a result of the loss of use of the vehicle, in a total amount of \$1,000 [\$500] or more; or

(C) the owner is deprived of the use of the vehicle for seven days or more;

(3) the propelled vehicle of another and the vehicle is marked as a police or emergency vehicle; or

(4) the propelled vehicle of another and, within the preceding seven years, the person was convicted under (A) this section or AS

J-6

11.46.365;

Sec. 22. AS 11.46.482(a)(1) is amended to read:

(a) A person commits the crime of criminal mischief in the third degree if, having no right to do so or any reasonable ground to believe the person has such a right,

(1) with intent to damage property of another, the person damages property of another in an amount of \$1,000 [\$500] or more;

Sec. 23. AS 11.46.484(a)(1) is amended to read:

(a) A person commits the crime of criminal mischief in the fourth degree if, having no right to do so or any reasonable ground to believe the person has such a right

(1) with intent to damage property of another, the person damages property of another in an amount of \$100 [\$50] or more but less than \$1,000 [\$500];

Sec. 24. AS 11.46.486(a)(2) is amended to read:

(a) A person commits the crime of criminal mischief in the fifth degree if, having no right to do so or any reasonable ground to believe the person has such a right,

(1) with reckless disregard for the risk of harm to or loss of the property or with intent to cause substantial inconvenience to another, the person tampers with property of another;

(2) with intent to damage property of another, the person damages property of another in an amount less than \$100 [\$50]; or

(3) the person rides in a propelled vehicle knowing it has been stolen or that it is being used in violation of AS 11.46.360 or AS 11.46.365(a)(1).

Sec. 25. AS 11.46.530(b) is amended to read:

(b) Criminal simulation is

(1) a class C felony if the value of what the object purports to represent is \$1,000 [\$500] or more;

(2) a class A misdemeanor if the value of what the object purports to represent is \$100 [\$50] or more but less than \$1,000 [\$500];

(3) a class B misdemeanor if the value of what the object purports to represent is less than \$100 [\$50].

Sec. 25. AS 11.46.600(a) is amended to read:

(a) A person commits the crime of scheme to defraud if the person engages in conduct constituting a scheme

(1) to defraud five or more persons or to obtain property or services from five or more persons by false or fraudulent pretense,

representation, or promise and obtains property or services in accordance with the scheme; or

(2) to defraud one or more persons of \$20,000 [\$10,000] or to obtain \$20,000 [\$10,000] or more from one or more persons by false or fraudulent pretense, representation, or promise and obtains property or services in accordance with the scheme.

Sec. 27. AS 11.46.620(d) is amended to read:

(d) Misapplication of property is

(1) a class C felony if the value of the property misapplied is \$1,000 [\$500] or more;

(2) a class A misdemeanor if the value of the property misapplied is less than \$1,000 [\$500].

Sec. 28. AS 11.46.730(c) is amended to read:

(c) Defrauding creditors is a class A misdemeanor unless that secured party, judgment creditor, or creditor incurs a pecuniary loss of \$1,000 [\$500] or more as a result to the defendant's conduct, in which case defrauding secured creditors is

(1) a class B felony if the loss is \$50,000 [\$25,000] or more;

(2) a class C felony if the loss is \$1,000 [\$500] or more but less than \$50,000 [\$25,000].

Sec. 29. AS 11.56.120(a) is amended to read:

(a) A public servant commits the crime of receiving unlawful gratuities if, for having engaged in an official act which was required or authorized and for which the public servant was not entitled to any special or additional compensation, the public servant

(1) solicits a benefit, regardless of value; or

(2) accepts or agrees to accept a benefit having a value of \$100

[\$50] or more.”

Remember the subsequent bill sections accordingly.

AMENDMENT NO. \_\_\_\_\_

OFFERED IN THE HOUSE

To: CSHB 244(JUD) Work Draft 1/16/2004

Page 7, line 18-27

Sec.12

Sec 12. AS 11.56.758 is amended by adding a new section to read:

**SEC. AS 11.56.758 Violation of custodian's duty.**

(a) A person commits the crime of violation of custodian's duty if the person intentionally fails, when acting as a custodian by the court for a released person under AS 12.30, to report immediately as directed by the court that the person released has violated a condition of release.

(b) Violation if a custodian's duty is

[(1)] a class [A] ~~B~~ misdemeanor [IF THE RELEASED PERSON IS CHARGED WITH A FELONY]

[(2) A CLASS B MISDEMEANOR IF THE RELEASED PERSON IS CHARGED WITH A MISDEMEANOR.]

K

AMENDMENT NO. \_\_\_\_\_

OFFERED IN THE HOUSE

To: CSHB 244(JUD) Work Draft 1/16/2004

Page 7, line 18-27

Sec.12

OMIT Sec 12. AS 11.56.758 in its entirety; renumber remaining sections

L

## OFFERED IN THE HOUSE

To: CSHB 244(JUD) Work Draft 1/16/2004

Page <sup>8</sup>~~2~~, line <sup>19</sup>~~12~~Proposed Sec. ~~AA~~<sup>15</sup> (renumber the following bill sections accordingly)

Legislative Intent: The Alaska Legislature acknowledges the findings contained in the Alaska Judicial Council's study "Alaska Felony Process: 1999" that the use of third party custodians was initially intended to give indigent defendants an equal opportunity for predisposition release; that said bail condition was one of the most important influences on the length of time that defendants spent incarcerated before disposition of their cases; and that said bail condition has resulted in substantially longer terms of predisposition incarceration in non-violent type cases. Given the right to bail guaranteed by art. I, sec. 11 of the Alaska Constitution, it is the intent of the Legislature that judicial officers more rigorously apply the statutory framework set out AS 12.30.010-029 for pretrial release. Specifically, it is the intent of the Legislature that defendants should be released on their own recognizance or upon execution of an unsecured appearance bond unless the offense is an unclassified or class A felony, or unless the court finds that the release of the person will not reasonably assure the appearance of the person as required or will pose a danger to the alleged victim, other persons, or community. It is the Legislature's further intent that where the court finds additional release assurances are required to assure court appearances and public safety, it should impose, in descending order, execution of a secured bond, cash bail, and, finally, release to a third-party custodian. Release to a third party custodian should only be in lieu of a bond or cash at a defendant's request; or, in combination thereof, if the court finds by clear and convincing evidence that release of a person will not reasonably assure the appearance of the person, or will pose a danger to the alleged victim, other persons, or the community, and if the offense alleged is a violation of AS 11.41.100 - 530, or AS 28.35.030(n) or AS 28.35.032(p).

Legislative Intent to "N"

## AMENDMENT NO. \_\_\_\_\_

## OFFERED IN THE HOUSE

To: CSHB 244(JUD) Work Draft 1/16/2004

Page 8, line 19

Proposed Sec.15 (renumber the following bill sections accordingly)

AS 12.30.020 is amended to read as follows:

**AS 12.30.020 Release before trial**

(a) A person charged with an offense shall, at that person's first appearance before a judicial officer, be ordered released pending trial on the person's personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer unless the offense is an unclassified felony or class A felony or unless the officer [DETERMINES] finds by clear and convincing evidence that the release of the person will not reasonably assure the appearance of the person as required or will pose a danger to the alleged victim, other persons, or the community. If requested, such findings of fact and conclusions of law shall be put on the record. If the offense with which a person is charged is a felony, on motion of the prosecuting attorney, the judicial officer may allow the prosecuting attorney up to 48 hours to demonstrate that release of the person on the person's personal recognizance or upon the execution of an unsecured appearance bond will not reasonably assure the appearance of the person or will pose a danger to the alleged victim, other persons, or the community.

(b) If a judicial officer [DETERMINES] finds by clear and convincing evidence under (a) of this section that the release of a person will not reasonably assure the appearance of the person, or will pose a danger to the alleged victim, other persons, or the community, the judicial officer may

(1) if the offense alleged is a violation of AS 11.41.100 - 530, or AS 28.35.030(n) or AS 28.35.032(p), or at the request of the defendant, place the person in the custody of a designated person or organization agreeing as a custodian to supervise the person; the court shall, personally and in writing, inform the custodian about the duties required of a custodian, and that failure to report immediately in accordance with the terms of the order that the person released has violated a condition of release may result in the custodian's being held in contempt under AS 09.50.010:

(2) place restrictions on the travel, association, or place of abode of the person during the period of release;

(3) require the person to return to custody after daylight hours on designated conditions;

(4) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security, a sum not to exceed 10 percent of the amount of the bond; the deposit to be returned upon the performance of the condition of release;

(5) require the execution of a bail bond with sufficient solvent sureties or the deposit of cash;

(6) require the execution of a performance bond in a specified amount and the deposit in the registry of the court, in cash or other security; the performance bond must be imposed and

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enforced separately from any appearance bond, and the deposit to be returned upon the performance of the condition of release; or

(7) impose any other condition considered reasonably necessary to assure the defendant's appearance as required and the safety of the alleged victim, other persons, or the community.

(c) In determining the conditions of release under (b) of this section, the judicial officer shall take into account

(1) the nature and circumstances of the offense charged, including the effect of the offense upon the alleged victim;

(2) the weight of the evidence against the person;

(3) the person's family ties;

(4) the person's employment;

(5) the person's financial resources;

(6) the person's character and mental condition;

(7) the length of the person's residence in the community;

(8) the person's record of convictions;

(9) the person's record of appearance at court proceedings;

(10) the flight of the accused to avoid prosecution or the person's failure to appear at court proceedings; and

(11) threats the person has made, and the danger the person poses, to the alleged victim.

(d) A judicial officer authorizing the release of a person under this section shall issue an order containing a statement of the conditions imposed.

(e) The judicial officer shall inform the person of the penalties that may be imposed for a violation of the conditions of release and advise the person that a warrant for the person's arrest will be issued immediately upon a violation or that the person may be arrested without a warrant for a violation of conditions of release as set out in AS 12.25.030(b).

(f) A person who remains in custody 48 hours after appearing before a judicial officer because of inability to meet the conditions of release shall, upon application, be entitled to have the conditions reviewed by the judicial officer who imposed them. If the judicial officer who imposed the conditions of release is not available, any other judicial officer in the district may review the conditions. If the conditions are not amended and the person remains in custody, the judicial officer shall set out in writing the reasons for requiring the conditions imposed.

(g) A judicial officer who orders the release of a person on a condition specified in (b) of this section may at any time amend the order to impose additional or different conditions of release, or to release the person under (a) of this section.

(h) Information offered or introduced at a hearing before a judicial officer to determine the conditions of release need not conform to the rules governing the admissibility of evidence in a court of law.

AMENDMENT NO. \_\_\_\_\_

OFFERED IN THE HOUSE

To: CSHB 244(JUD) Work Draft 1/16/2004

Page 10 line 15 through page 11 line 25: omit proposed new section 19 in its entirety; renumber sections.

Page 14, line 22-30, omit Sec. 25 amendment [AS 12.55.127], renumber sections.

Page 14 line 31 – page 15 line 11, omit sec. 26 amendment [AS 12.55.127], renumber sections.

Page 16, line 26, omit Sec. 28(b).



## CS for HOUSE BILL 244 (2<sup>nd</sup> JUD)

### Sectional Summary

**Sections 1 - 4** allow communities to adopt, as part of a local option, lower amounts of alcohol that may be possessed or imported into the community than may currently be possessed or imported, and still presumed to be for personal use rather than for sale. Certain communities have already adopted lower limits by ordinance. If it is part of a local option, however, state law enforcement authorities can help communities enforce these limits.

**Section 5** raises the penalty for furnishing alcohol to a person under 21 years of age from a class A misdemeanor to a class C felony, if the offense occurs in a village or municipality that has adopted a local option.

**Sections 6 - 7** allow for the forfeiture of money used in bootlegging offenses, and provides for sharing of the proceeds of forfeitures from bootlegging offenses with local law enforcement.

**Section 8** expands the felony-murder rule so that an offender who commits a dangerous crime can be charged with second-degree murder if an accomplice is killed. The current felony-murder rule allows an offender to be charged with second-degree murder if a person, such as a bystander, is killed during the commission of the crime, even if the offender did not directly cause the death. The purpose of the felony-murder rule is to discourage serious crimes. It will be more effective if it also applies to the death of a participant in the crime.

**Section 9** increases the penalty from a class A misdemeanor to a class C felony for certain vehicular offenses that cause serious physical injury. This will apply to persons who drive partly impaired (but not enough to be DUI) and cause serious injuries to another person.

**Sections 10 - 11** increase the penalty for sexual abuse of very young children by teenagers from a class A misdemeanor to a class C felony.

**Section 12** adopts a new crime - that of violating a person's duty as a third party custodian. It applies to a person who agrees to be a third party custodian, but does not report to authorities if the person in custody violates release conditions. It is either a class A or class B misdemeanor, depending on the crime with which the person released is charged.

**Section 13** disallows self-defense if the state proves that the defendant was furthering his own criminal objectives or those of a gang, or was buying or selling illegal drugs.

**Section 14** would require the court to give an instruction to the jury on self-defense only if there is plausible evidence to support self-defense. Current law requires the court to instruct the jury on self-defense even if the evidence supporting it is "weak or implausible". This

transactional  
immunity  
in AK  
Gonzales

12.55.025

(e)  
presumption  
of consecutive  
sentences

change adopts the federal approach, which requires evidence on which a rational jury could find self-defense before the instruction is given.

**Sections 15 - 17 and 20** adopt a fair and uniform procedure to determine if a witness has a valid Fifth Amendment privilege against self-incrimination. An attorney is appointed for the witness, and the court makes the determination in a closed proceeding outside the presence of the prosecution. If the court determines that the witness has a valid privilege, the court will inform the prosecution of the level of seriousness of the crime.

**Sections 18 - 19 and 25 - 26** give direction to courts in sentencing a defendant for more than one crime. Current law appears to require consecutive sentences, but was not interpreted that way because of bad drafting. This clarifies that for most crimes a court may impose sentences that are concurrent or partially concurrent. However, for homicides, kidnapping, and serious sex offenses, this section specifies the minimum amount of consecutive time that must be imposed. For example, for two counts of first-degree murder, the court must require the mandatory minimum term of the second offense to be served consecutively. For manslaughter and kidnapping, at least the period of the presumptive term of the second offense must be served consecutively.

**Sections 21 and 23** provide that once a person has been convicted of felony drunk driving or felony refusal to submit to a chemical test, any subsequent drunk driving or refusal offense will also be a felony.

**Sections 22 and 24** disallow the "big gulp" defense in drunk driving cases. It reverses a recent court decision, *Conrad v. State*, 60 P.3d 701 (Alaska App. 2002), that allows a driver to claim that he drank alcohol just before driving, and was able to drive before the alcohol affected his perceptions. This is a major step back in the state's efforts to reduce drunk driving, and requires expert testimony about alcohol assimilation rates and other issues confusing to jurors. The legislature, in prohibiting driving with .08 blood alcohol, as determined by a chemical test taken within four hours of driving, intended to avoid this battle of chemical experts.

**Section 27** allows for greater disclosure to the public of information about juvenile sex offenders, if necessary to protect children or vulnerable adults.

**Section 28** provides conforming repealers.

**Sections 29 and 30** include applicability and effective date provisions.

Comparison of HB 244/SB 170, CSHB 244 (Jud) and Proposed Committee Substitute for 2004

	HB 244 and SB 170 as introduced	CSHB 244 (Jud)	Proposed Committee Substitute for 2004
Heat of Passion	Makes Heat-of-passion (essentially a form of temporary insanity), an affirmative defense that the defendant must prove by a preponderance of evidence, just like insanity.	No similar provision	No similar provision
Self-defense; Defense of others	Makes self-defense an affirmative defense, that the defendant must prove by a preponderance of evidence, with certain exception, such as a person on their own property.	No similar provision	No similar provision. <b>DOES NOT CHANGE THE BURDEN OF PROOF.</b>
	Prohibits use of deadly force if a person brings a deadly weapon to an encounter with reckless disregard that the encounter would result in combat.	No similar provision	Prohibits self-defense if the force was used to further the criminal objectives of other persons (i.e., gang activity), or in an illegal drug transaction. Court may instruct a jury on self-defense if the court finds there is <b>plausible</b> evidence to warrant a reasonable jury to find self-defense.
Felony-Murder	No similar provision	No similar provision	Expands felony-murder rule so offenders committing dangerous crimes can be charged with second-degree murder if their accomplice is killed.
Rights of arrested person	Clarified that a person may not interrupt an interview with the police if the arrested person has consented to the interview after being advised of his rights.	Same	No similar provision
Prior convictions admissible when elements of crime	The bill allows evidence of prior convictions to be admitted during the state's case-in-chief, if the state is required to prove the prior convictions (e.g. felony drunk driving) as an element of the offense. Allows the defendant to challenge the validity of these prior convictions only by proving to the court, sitting without the jury, that the defendant was denied the right to counsel or to a jury trial in the prior prosecutions.	No similar provision	No similar provision
Immunity for witnesses	Conforms statutory law to <i>State v. Gonzales</i> , 853 P.2d 526 (Alaska 1993), that requires complete immunity if a person is compelled to testify after claiming a valid privilege against self-incrimination.	Same	Same
	Establishes orderly procedure for the court to consider if the witness has a valid claim of the privilege against self-incrimination. An attorney would be appointed to represent the witness, and the prosecutor would be present. The court would specify the crime to which the privilege applies.	No similar provision	Establishes a procedure similar to HB 244 for the court to consider if the witness has a valid privilege. <b>However, the prosecutor would not be present in the hearing.</b> The court may inform the prosecution only about the seriousness of the crime, but not the specific crime the witness may have committed.

Comparison of HB 244/SE 170, CSHB 244 (Jud) and Proposed Committee Substitute for 2004

	HB 244 and SB 170 as introduced	CSHB 244 (Jud)	Proposed Committee Substitute for 2004
<b>Consecutive sentences</b>	Adopts guidelines for sentencing defendants for more than one crime. In 1982, the legislature enacted AS 12.55.025 (e) and (g), which requires consecutive sentences for each count of homicide, assault, and sexual assault. Because of imprecise drafting, the courts have interpreted these statutes as a legislative preference for consecutive sentences, which is frequently ignored.	Same	Same
	For homicide, kidnapping, first-degree sexual assault, and first-degree sexual abuse (penetration), the bill adopts minimum requirements for consecutive sentences in cases with multiple convictions.	Same	Same
	For less serious crimes against a person, such as a misdemeanor assaults, the court must impose some period of consecutive time for each crime.	Same	Same
	For other less serious crimes, the bill allows the complete judicial discretion to impose sentences that are concurrent or partially concurrent.	Same	Same
<b>Sexual abuse and Sexual assault sentence mitigator</b>	Added a statutory mitigating factor for sentencing in sexual assault and sexual abuse cases - that the defendant mitigated the effect of the crime on the victim by entering a plea of guilty or no contest within 30 days of arraignment in superior court.	No similar provision	No similar provision
<b>Discovery in criminal cases: Notice of Defenses</b>	Requires the defense to give notice of certain defenses (e.g. alibi, entrapment) 30 days before trial (current rules require 10 days notice). It also requires the defense to give notice of these defenses if they are likely to raise them, and requires the court to disallow the defense if notice is not given within 7 days of trial.	Same	No similar provision
<b>Discovery in criminal cases: Sanctions</b>	Clarifies that sanctions for discovery violations, such as failure to give notice of defenses discussed above, are in addition to other sanctions provided in the Criminal Rules.	Same	No similar provision

Comparison of HB 244/SB 170, CSHB 244 (Jud) and Proposed Committee Substitute for 2004

	HB 244 and SB 170 as introduced	CSHB 244 (Jud)	Proposed Committee Substitute for 2004
<b>Discovery in criminal cases: Expert witnesses</b>	Requires the disclosure of expert witnesses at least 45 days before trial. Adopts an orderly procedure for disclosure of written reports of experts. The bill also provides sanctions for failure to comply with the rule. The court must exclude the testimony if disclosure is not made within 7 days of trial.	Same	No similar provision
<b>Impeachment evidence</b>	Admits evidence of a statement to be used as impeachment, if the statement was voluntary and not coerced, but suppressed because <i>Miranda v. Arizona</i> was violated. This would prevent a person from testifying falsely with impunity after a statement is suppressed.	Same	No similar provision
<b>Impeachment evidence</b>	Allows evidence illegally obtained (for example, taken as a result of a search that was later found to be flawed), to be used to impeach testimony, if the court finds that the evidence was not obtained in substantial violation of rights.	Same	No similar provision
<b>Impeachment with prior conviction</b>	Increases the time after a conviction that the conviction can be used for impeachment.	Same	No similar provision
<b>Domestic violence reports</b>	Allows a statement made within 24 hours of an alleged domestic violence offense to be admitted, as an exception to the hearsay rule.	Same	No similar provision
<b>Bootlegging</b>	No similar provision	No similar provision	Allows communities to adopt lower limits of alcohol possession and importation as part of the local option system. Increases the penalty for bootleggers in urban areas who send alcohol to local option areas. Increases penalty to a class C felony for furnishing alcohol to minors in local options areas, and for sending large amounts of alcohol to local option areas. Strengthens the forfeiture law for bootlegging.
<b>Drunk Driving</b>	No similar provision	No similar provision	If a person has committed felony drunk driving, all later drunk driving offenses would be treated as felonies. Increases penalty to a class C felony for certain vehicular offenses that cause serious physical injury. Prohibits the "big gulp" defense in drunk driving cases.
<b>Protects Children from Juvenile Sex Offenders</b>	No similar provision	No similar provision	Increases penalty for sexual abuse of young children by teenagers. Allows greater disclosure of information about juvenile sex offenders.

## Westlaw.

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▷  
 Briefs and Other Related Documents

Supreme Court of the United States

Earline MARTIN, Petitioner,  
 v.  
 OHIO.

No. 85-6461.

Argued Dec. 2, 1986.  
 Decided Feb. 25, 1987.  
 Rehearing Denied April 20, 1987.  
 See 481 U.S. 1024, 107 S.Ct. 1913.

Defendant was convicted in the Court of Common Pleas, Cuyahoga County, of aggravated murder, and she appealed. The Court of Appeals affirmed, and defendant moved for leave to appeal. The Ohio Supreme Court, Celebrezze, C.J., 21 Ohio St.3d 91, 488 N.E.2d 166, affirmed, and defendant petitioned for writ of certiorari. The Supreme Court, Justice White, held that: (1) trial court's instruction, that jurors could acquit defendant of aggravated murder if she proved by preponderance of evidence that she was acting in self-defense, did not violate due process by shifting burden of proof, and (2) Ohio practice, placing on defendant the burden of proving that she was acting in self-defense when she committed alleged murder, did not violate due process.

Affirmed.

Justice Powell dissented and filed opinion, in which Justice Brennan and Justice Marshall joined, and in which Justice Blackmun joined in part.

West Headnotes

[1] Constitutional Law ↪268(11)  
 92k268(11) Most Cited Cases

[1] Criminal Law ↪778(5)  
 110k778(5) Most Cited Cases

[1] Criminal Law ↪822(11)  
 110k822(11) Most Cited Cases

Trial court's instruction, that jurors could acquit defendant of aggravated murder charge if defendant proved by preponderance of evidence that she was acting in self-defense, did not violate due process by shifting burden of proof, where trial court also instructed jurors that State had burden of establishing elements of aggravated murder beyond reasonable doubt; trial court's instructions, when read as whole, adequately conveyed to jury that all evidence, including evidence going to self-defense, had to be considered in deciding whether there was reasonable doubt about sufficiency of State's proof. U.S.C.A. Const.Amend. 14; Ohio R.C. § 2901.05(A).

[2] Constitutional Law ↪266(7)  
 92k266(7) Most Cited Cases

[2] Homicide ↪947  
 203k947 Most Cited Cases  
 (Formerly 203k151(3))

Ohio practice, placing on defendant the burden of proving that she was acting in self-defense when she committed alleged murder, did not violate due process. U.S.C.A. Const.Amend. 14; Ohio R.C. § 2901.05(A).

\*\*1098 \*228 Syllabus [FN\*]

FN\* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Under the Ohio Revised Code (Code), the burden of proving the elements of a criminal offense is upon the prosecution, but, for an affirmative defense, the burden of proof by a preponderance of

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the evidence is placed on the accused. Self-defense is an affirmative defense under Ohio law and therefore must be proved by the defendant. Petitioner was charged by Ohio with aggravated murder, which is defined \*\*1099 as "purposely, and with prior calculation and design, causing the death of another." She pleaded self-defense, and testified that she had shot and killed her husband when he came at her following an argument during which he had struck her. As to the crime itself, the jury was instructed (1) that, to convict, it must find, in light of all the evidence, that each of the elements of aggravated murder was proved by the State beyond reasonable doubt, and that the burden of proof with respect to those elements did not shift; and (2) that, to find guilt, it must be convinced that none of the evidence, whether offered by the State or by petitioner in connection with her self-defense plea, raised a reasonable doubt that she had killed her husband, that she had had the specific purpose and intent to cause his death, or that she had done so with prior calculation and design. However, as to self-defense, the jury was instructed that it could acquit if it found by a preponderance of the evidence that petitioner had proved (1) that she had not precipitated the confrontation with her husband; (2) that she honestly believed she was in imminent danger of death or great bodily harm and that her only means of escape was to use force; and (3) that she had satisfied any duty to retreat or avoid danger. The jury found her guilty, and both the Ohio Court of Appeals and Supreme Court affirmed the conviction, rejecting petitioner's Due Process Clause challenge which was based on the charge's placing on her the self-defense burden of proof. In reaching its decision, the State Supreme Court relied on *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977).

*Held:*

1. Neither Ohio law nor the above instructions violate the Due Process Clause of the Fourteenth Amendment by shifting to petitioner the State's burden of proving the elements of the crime. The instructions, when read as a whole, do not improperly suggest that self-defense evidence could not be considered in determining whether there was reasonable doubt about the sufficiency of the State's proof of the crime's elements. \*229 Furthermore, simply because evidence offered to support self-defense might negate a purposeful killing by

prior calculation and design does not mean that elements of the crime and self-defense impermissibly overlap, since evidence creating a reasonable doubt about any fact necessary for a finding of guilt could easily fall far short of proving self-defense by a preponderance of the evidence, but, on the other hand, a killing will be excused if self-defense is satisfactorily established even if there is no reasonable doubt in the jury's mind that the defendant is guilty. Pp. 1101-1103.

2. It is not a violation of the Due Process Clause for Ohio to place the burden of proving self-defense on a defendant charged with committing aggravated murder. There is no merit to petitioner's argument that it is necessary under Ohio law for the State to disprove self-defense since both unlawfulness and criminal intent are elements of serious offenses, while self-defense renders lawful that which would otherwise be a crime and negates a showing of criminal intent. The Court will follow Ohio courts that have rejected this argument, holding that unlawfulness in such cases is the conduct satisfying the elements of aggravated murder, and that the necessary mental state for this crime is the specific purpose to take life pursuant to prior calculation and design. Furthermore, the mere fact that all but two States have abandoned the common-law rule that affirmative defenses, including self-defense, must be proved by the defendant does not render that rule unconstitutional. The Court will follow *Patterson* and other of its decisions which allowed States to fashion their own affirmative-defense, burden-of-proof rules. Pp. 1102-1103.

21 Ohio St.3d 91, 488 N.E.2d 166 (1986), affirmed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and STEVENS, O'CONNOR, and SCALIA, JJ., joined. POWELL, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, and in Parts I and III \*\*1100 of which BLACKMUN, J., joined, *post*, p. ---.

*James R. Willis* argued the cause for petitioner. With him on the briefs was *Margery B. Koosed*.

*George J. Sadd* argued the cause for respondent. With him on the brief was *John J. Corrigan*.\*

\* *Randall M. Dana, Gregory L. Ayers, Richard L.*

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*Aynes, Margery B. Koosed, and J. Dean Carro* filed a brief for the Ohio Public Defender Commission as *amicus curiae* urging reversal.

\*230 Justice WHITE delivered the opinion of the Court.

The Ohio Code provides that "[e]very person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof by a preponderance of the evidence, for an affirmative defense, is upon the accused." Ohio Rev.Code Ann. § 2901.05(A) (1982). An affirmative defense is one involving "an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence." Ohio Rev.Code Ann. § 2901.05(C)(2) (1982). The Ohio courts have "long determined that self-defense is an affirmative defense," 21 Ohio St.3d 91, 93, 488 N.E.2d 166, 168 (1986), and that the defendant has the burden of proving it as required by § 2901.05(A)

As defined by the trial court in its instructions in this case, the elements of self-defense that the defendant must prove are that (1) the defendant was not at fault in creating the situation giving rise to the argument; (2) the defendant had an honest belief that she was in imminent danger of death or great bodily harm, and that her only means of escape from such danger was in the use of such force; and (3) the defendant did not violate any duty to retreat or avoid danger. App. 19. The question before us is whether the Due Process Clause of the Fourteenth Amendment forbids placing the burden of proving self-defense on the defendant when she is charged by the State of Ohio with committing the crime of aggravated murder, which, as relevant to this case, is defined by the Revised Code of Ohio as "purposely, and with prior calculation and design, caus[ing] the death of another." Ohio Rev.Code Ann. § 2903.01 (1982).

The facts of the case, taken from the opinions of the courts below, may be succinctly stated. On July 21, 1983, petitioner Earline Martin and her

husband, Walter Martin, \*231 argued over grocery money. Petitioner claimed that her husband struck her in the head during the argument. Petitioner's version of what then transpired was that she went upstairs, put on a robe, and later came back down with her husband's gun which she intended to dispose of. Her husband saw something in her hand and questioned her about it. He came at her, and she lost her head and fired the gun at him. Five or six shots were fired, three of them striking and killing Mr. Martin. She was charged with and tried for aggravated murder. She pleaded self-defense and testified in her own defense. The judge charged the jury with respect to the elements of the crime and of self-defense and rejected petitioner's Due Process Clause challenge to the charge placing on her the burden of proving self-defense. The jury found her guilty.

Both the Ohio Court of Appeals and the Supreme Court of Ohio affirmed the conviction. Both rejected the constitutional challenge to the instruction requiring petitioner to prove self-defense. The latter court, relying upon our opinion in *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), concluded that the State was required to prove the three elements of aggravated murder but that *Patterson* did not require it to disprove self-defense, which is a separate issue that did not require Mrs. Martin to disprove any element of the offense with which she was charged. The court said, "the state proved beyond a reasonable doubt that appellant purposely, and with prior calculation and design, caused the death of her husband. Appellant did not dispute the existence of these elements, but rather sought to justify \*\*1101 her actions on grounds she acted in self defense." 21 Ohio St.3d, at 94, 488 N.E.2d, at 168. There was thus no infirmity in her conviction. We granted certiorari, 475 U.S. 1119, 106 S.Ct. 1634, 90 L.Ed.2d 180 (1986), and affirm the decision of the Supreme Court of Ohio.

*In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970), declared that the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact \*232 necessary to constitute the crime with which he is charged." A few years later, we held that *Winship*'s mandate was fully satisfied where the State of New York had proved beyond reasonable doubt each of the elements of murder,

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but placed on the defendant the burden of proving the affirmative defense of extreme emotional disturbance, which, if proved, would have reduced the crime from murder to manslaughter. *Patterson v. New York, supra*. We there emphasized the preeminent role of the States in preventing and dealing with crime and the reluctance of the Court to disturb a State's decision with respect to the definition of criminal conduct and the procedures by which the criminal laws are to be enforced in the courts, including the burden of producing evidence and allocating the burden of persuasion. 432 U.S., at 201-202, 97 S.Ct., at 2322. New York had the authority to define murder as the intentional killing of another person. It had chosen, however, to reduce the crime to manslaughter if the defendant proved by a preponderance of the evidence that he had acted under the influence of extreme emotional distress. To convict of murder, the jury was required to find beyond a reasonable doubt, based on all the evidence, including that related to the defendant's mental state at the time of the crime, each of the elements of murder and also to conclude that the defendant had not proved his affirmative defense. The jury convicted Patterson, and we held there was no violation of the Fourteenth Amendment as construed in *Winship*. Referring to *Leland v. Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952), and *Rivera v. Delavare*, 429 U.S. 877, 97 S.Ct. 226, 50 L.Ed.2d 160 (1976), we added that New York "did no more than *Leland* and *Rivera* permitted it to do without violating the Due Process Clause" and declined to reconsider those cases. 432 U.S., at 206, 207, 97 S.Ct., at 2324, 2325. It was also observed that "the fact that a majority of the States have now assumed the burden of disproving affirmative defenses--for whatever reasons--[does not] mean that those States that strike a different balance are in violation of the Constitution." *Id.*, at 211, 97 S.Ct., at 2327.

\*233 [1] As in *Patterson*, the jury was here instructed that to convict it must find, in light of all the evidence, that each of the elements of the crime of aggravated murder has been proved by the State beyond reasonable doubt, and that the burden of proof with respect to these elements did not shift. To find guilt, the jury had to be convinced that none of the evidence, whether offered by the State or by Martin in connection with her plea of self-defense, raised a reasonable doubt that Martin had killed her husband, that she had the specific purpose and

intent to cause his death, or that she had done so with prior calculation and design. It was also told, however, that it could acquit if it found by a preponderance of the evidence that Martin had not precipitated the confrontation, that she had an honest belief that she was in imminent danger of death or great bodily harm, and that she had satisfied any duty to retreat or avoid danger. The jury convicted Martin.

We agree with the State and its Supreme Court that this conviction did not violate the Due Process Clause. The State did not exceed its authority in defining the crime of murder as purposely causing the death of another with prior calculation or design. It did not seek to shift to Martin the burden of proving any of those elements, and the jury's verdict reflects that none of her self-defense evidence raised a reasonable \*\*1102 doubt about the State's proof that she purposefully killed with prior calculation and design. She nevertheless had the opportunity under state law and the instructions given to justify the killing and show herself to be blameless by proving that she acted in self-defense. The jury thought she had failed to do so, and Ohio is as entitled to punish Martin as one guilty of murder as New York was to punish Patterson.

It would be quite different if the jury had been instructed that self-defense evidence could not be considered in determining whether there was a reasonable doubt about the State's case, *i.e.*, that self-defense evidence must be put aside for all purposes unless it satisfied the preponderance \*234 standard. Such an instruction would relieve the State of its burden and plainly run afoul of *Winship*'s mandate. 397 U.S., at 364, 90 S.Ct., at 1072. The instructions in this case could be clearer in this respect, but when read as a whole, we think they are adequate to convey to the jury that all of the evidence, including the evidence going to self-defense, must be considered in deciding whether there was a reasonable doubt about the sufficiency of the State's proof of the elements of the crime.

We are thus not moved by assertions that the elements of aggravated murder and self-defense overlap in the sense that evidence to prove the latter will often tend to negate the former. It may be that most encounters in which self-defense is claimed arise suddenly and involve no prior plan or specific

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purpose to take life. In those cases, evidence offered to support the defense may negate a purposeful killing by prior calculation and design, but Ohio does not shift to the defendant the burden of disproving any element of the state's case. When the prosecution has made out a prima facie case and survives a motion to acquit, the jury may nevertheless not convict if the evidence offered by the defendant raises any reasonable doubt about the existence of any fact necessary for the finding of guilt. Evidence creating a reasonable doubt could easily fall far short of proving self-defense by a preponderance of the evidence. Of course, if such doubt is not raised in the jury's mind and each juror is convinced that the defendant purposely and with prior calculation and design took life, the killing will still be excused if the elements of the defense are satisfactorily established. We note here, but need not rely on, the observation of the Supreme Court of Ohio that "[a]ppellant did not dispute the existence of [the elements of aggravated murder], but rather sought to justify her actions on grounds she acted in self-defense." 21 Ohio St.3d, at 94, 488 N.E.2d, at 168. [FN\*]

FN\* The dissent believes that the self-defense instruction might have led the jury to believe that the defendant had the burden of proving the absence of prior calculation and design. Indeed, its position is that *no* instruction could be clear enough not to mislead the jury. As is evident from the text, we disagree. We do not harbor the dissent's mistrust of the jury; and the instructions were sufficiently clear to convey to the jury that the State's burden of proving prior calculation did not shift and that self-defense evidence had to be considered in determining whether the State's burden had been discharged. We do not depart from *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), in this respect, or in any other.

\*235 Petitioner submits that there can be no conviction under Ohio law unless the defendant's conduct is unlawful, and that because self-defense renders lawful what would otherwise be a crime, unlawfulness is an element of the offense that the state must prove by disproving self-defense. This

argument founders on state law, for it has been rejected by the Ohio Supreme Court and by the Court of Appeals for the Sixth Circuit. *White v. Arn*, 788 F.2d 338, 346-347 (1986); *State v. Morris*, 8 Ohio App.3d 12, 18-19, 455 N.E.2d 1352, 1359-1360 (1982). It is true that unlawfulness is essential for conviction, but the Ohio courts hold that the unlawfulness in cases like this is the conduct satisfying the elements of aggravated murder--an interpretation of state law that we are not in a position to dispute. The same is true of the claim that it is necessary to prove a "criminal" intent to convict for serious crimes, which cannot occur if self-defense is shown: the necessary mental state for aggravated murder under Ohio law is the specific purpose to take life pursuant to prior calculation and design. See *White v. Arn*, *supra*, at 346.

[2] As we noted in *Patterson*, the common-law rule was that affirmative defenses, including self-defense, were matters for the defendant to prove. "This was the rule when the Fifth Amendment was adopted, and it was the American rule when the Fourteenth Amendment was ratified." 432 U.S., at 202, 97 S.Ct., at 2322. Indeed, well into this century, a number of States followed the common-law rule and required a defendant to shoulder the burden of proving that he acted in self-defense. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 Yale L.J. 880, 882, and n. 10 (1968). We are aware that all but two of the States, Ohio and South Carolina, have abandoned the common-law rule and require the prosecution to prove the absence of self-defense when it is properly raised by the defendant. But the question remains whether those States are in violation of the Constitution; and, as we observed in *Patterson*, that question is not answered by cataloging the practices of other States. We are no more convinced that the Ohio practice of requiring self-defense to be proved by the defendant is unconstitutional than we are that the Constitution requires the prosecution to prove the sanity of a defendant who pleads not guilty by reason of insanity. We have had the opportunity to depart from *Leland v. Oregon*, 343 U.S. 790, 72 S.Ct. 1002, 96 L.Ed. 1302 (1952), but have refused to do so. *Rivera v. Delaware*, 429 U.S. 877, 97 S.Ct. 226, 50 L.Ed.2d 160 (1976). These cases were important to the *Patterson* decision and they, along

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with *Patterson*, are authority for our decision today.

The judgment of the Ohio Supreme Court is accordingly

*Affirmed.*

Justice POWELL, with whom Justice BRENNAN and Justice MARSHALL join, and with whom Justice BLACKMUN joins with respect to Parts I and III, dissenting.

Today the Court holds that a defendant can be convicted of aggravated murder even though the jury may have a reasonable doubt whether the accused acted in self-defense, and thus whether he is guilty of a crime. Because I think this decision is inconsistent with both precedent and fundamental fairness, I dissent.

I

Petitioner Earline Martin was tried in state court for the aggravated murder of her husband. Under Ohio law, the elements of the crime are that the defendant has purposely killed another with "prior calculation and design." Ohio Rev.Code Ann. § 2903.01 (1982). Martin admitted that she \*237 shot her husband, but claimed that she acted in self-defense. Because self-defense is classified as an "affirmative" defense in Ohio, the jury was instructed that Martin had the burden of proving her claim by a preponderance of the evidence. Martin apparently failed to carry this burden, and the jury found her guilty.

The Ohio Supreme Court upheld the conviction, relying in part on this Court's opinion in *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977). The Court today also relies on the *Patterson* reasoning in affirming the Ohio decision. If one accepts *Patterson* as the proper method of analysis for this case, I believe that the Court's opinion ignores its central meaning.

In *Patterson*, the Court upheld a state statute that shifted the burden of proof for an affirmative defense to the accused. New York law required the prosecutor to prove all of the statutorily defined elements of murder beyond a reasonable doubt, but

permitted a defendant to reduce \*\*1104 the charge to manslaughter by showing that he acted while suffering an "extreme emotional disturbance." See N.Y.Penal Law §§ 125.25, 125.20 (McKinney 1975 and Supp.1987). The Court found that this burdenshifting did not violate due process, largely because the affirmative defense did "not serve to negative any facts of the crime which the State is to prove in order to convict of murder." 432 U.S., at 207, 97 S.Ct., at 2325. The clear implication of this ruling is that when an affirmative defense *does* negate an element of the crime, the state may not shift the burden. See *White v. Arn*, 788 F.2d 338, 344-345 (CA6 1986). In such a case, *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), requires the state to prove the nonexistence of the defense beyond a reasonable doubt.

The reason for treating a defense that negates an element of the crime differently from other affirmative defenses is plain. If the jury is told that the prosecution has the burden of proving all the elements of a crime, but then also is instructed \*238 that the defendant has the burden of *dis* proving one of those same elements, there is a danger that the jurors will resolve the inconsistency in a way that lessens the presumption of innocence. For example, the jury might reasonably believe that by raising the defense, the accused has assumed the ultimate burden of proving that particular element. Or, it might reconcile the instructions simply by balancing the evidence that supports the prosecutor's case against the evidence supporting the affirmative defense, and conclude that the state has satisfied its burden if the prosecution's version is more persuasive. In either case, the jury is given the unmistakable but erroneous impression that the defendant shares the risk of nonpersuasion as to a fact necessary for conviction. [FN1]

FN1. Indeed, this type of instruction has an inherently illogical aspect. It makes no sense to say that the prosecution has the burden of proving an element beyond a reasonable doubt, *and* that the defense has the burden of proving the contrary by a preponderance of the evidence. If the jury finds that the prosecutor has *not* met his burden, it of course will have no occasion to consider the affirmative defense. And

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if the jury finds that each element of the crime *has* been proved beyond a reasonable doubt, it necessarily has decided that the defendant has not disproved an element of the crime. In either situation the instructions on the affirmative defense are surplusage. Because a reasonable jury will attempt to ascribe some significance to the court's instructions, the likelihood that it will impermissibly shift the burden is increased.

Of course, whether the jury will in fact improperly shift the burden away from the state is uncertain. But it is "settled law ... that when there exists a reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside." *Francis v. Franklin*, 471 U.S. 307, 323, n. 8, 105 S.Ct. 1965, 1976, n. 8, 85 L.Ed.2d 344 (1985).

Given these principles, the Court's reliance on *Patterson* is puzzling. Under Ohio law, the element of "prior calculation and design" is satisfied only when the accused has engaged in a "definite process of reasoning *in advance* of the killing," *i.e.*, when he has given the plan at least some "studied consideration." App. 14 (jury instructions) (emphasis added). In contrast, when a defendant such as Martin raises a claim of \*239 self-defense, the jury also is instructed that the accused must prove that she "had an honest belief that she was in *imminent* danger of death or great bodily harm." [FN2] *Id.*, at 19 (emphasis added). In many cases, a defendant who finds himself in immediate danger and reacts with deadly force will not have formed a prior intent to kill. The Court recognizes this when it states:

FN2. The accused also must have avoided the danger if possible, and must not have been at fault in creating the threatening situation. See *State v. Robbins*, 58 Ohio St.2d 74, 79-80, 388 N.E.2d 755, 758 (1979).

"It may be that most encounters in which self-defense is claimed arise suddenly and involve

no prior plan or specific purpose to take life. In those cases, evidence offered to support the defense may negate a purposeful killing by prior \*1105 calculation and design...." *Ante*, at 1102.

Under *Patterson*, this conclusion should suggest that Ohio is precluded from shifting the burden as to self-defense. The Court nevertheless concludes that Martin was properly required to prove self-defense, simply because "Ohio does not shift to the defendant the burden of disproving any element of the State's case." *Ibid.*

The Court gives no explanation for this apparent rejection of *Patterson*. The only justification advanced for the Court's decision is that the jury could have used the evidence of self-defense to find that the State failed to carry its burden of proof. Because the jurors were free to consider both Martin's and the State's evidence, the argument goes, the verdict of guilt necessarily means that they were convinced that the defendant acted with prior calculation and design, and were unpersuaded that she acted in self-defense. *Ante*, at 1101. The Court thus seems to conclude that as long as the jury is told that the state has the burden of proving all elements of the crime, the overlap between the offense and defense is immaterial.

\*240 This reasoning is flawed in two respects. First, it simply ignores the problem that arises from inconsistent jury instructions in a criminal case. The Court's holding implicitly assumes that the jury in fact understands that the ultimate burden remains with the prosecutor at all times, despite a conflicting instruction that places the burden on the accused to disprove the same element. But as pointed out above, the *Patterson* distinction between defenses that negate an element of the crime and those that do not is based on the legitimate concern that the jury *will* mistakenly lower the state's burden. In short, the Court's rationale fails to explain why the overlap in this case does not create the risk that *Patterson* suggested was unacceptable. [FN3]

FN3. This risk could have been reduced--although in my view, not eliminated--if the instructions had made it clear that evidence of self-defense can create a reasonable doubt as to guilt, *even if* that same evidence did not rise to the level necessary to prove an affirmative defense.

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But the instructions gave little guidance in this respect. The trial court simply told the jury that the prosecution must prove the elements of the crime, and the defendant must prove the existence of the defense. The instructions gave no indication how the jury should evaluate evidence that affected an element of *both* the crime and the defense. Cf. *Francis v. Franklin*, *supra*, 471 U.S., at 322, 105 S.Ct., at 1975 ("Nothing in these specific sentences or in the [jury] charge as a whole makes clear ... that one of these contradictory instructions carries more weight than the other").

Second, the Court significantly, and without explanation, extends the deference granted to state legislatures in this area. Today's decision could be read to say that virtually all state attempts to shift the burden of proof for affirmative defenses will be upheld, regardless of the relationship between the elements of the defense and the elements of the crime. As I understand it, *Patterson* allowed burdenshifting because evidence of an extreme emotional disturbance did not negate the *mens rea* of the underlying offense. After today's decision, however, even if proof of the defense *does* negate an element of the offense, burdenshifting still may be \*241 permitted because the jury can consider the defendant's evidence when reaching its verdict.

I agree, of course, that States must have substantial leeway in defining their criminal laws and administering their criminal justice systems. But none of our precedents suggests that courts must give complete deference to a State's judgment about whether a shift in the burden of proof is consistent with the presumption of innocence. In the past we have emphasized that in some circumstances it may be necessary to look beyond the text of the State's burden-shifting laws to satisfy ourselves that the requirements of *Winship* have been satisfied. In *Mullaney v. Wilbur*, 421 U.S. 684, 698-699, 95 S.Ct. 1881, 1889, 44 L.Ed.2d 508 (1975) we explicitly noted the danger of granting the State \*\*1106 unchecked discretion to shift the burden as to any element of proof in a criminal case. [FN4] The Court today fails to discuss or even cite *Mullaney*, despite our unanimous agreement in that case that this danger would justify judicial

intervention in some cases. Even *Patterson*, from which I dissented, recognized that "there are obviously constitutional limits beyond which the States may not go [in labeling elements of a crime as an affirmative defense]." [FN5] 432 U.S., at 210, 97 S.Ct., at 2327. Today, however, the Court simply asserts that Ohio law properly allocates the burdens, without giving any indication of where those limits lie.

FN4. We noted, for example:

"[I]f *Winship* were limited to those facts that constitute a crime as defined by state law, a State could undermine many of the interests that decision sought to protect without effecting any substantive change in its law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." 421 U.S., at 698, 95 S.Ct., at 1889.

FN5. See also *McMillan v. Pennsylvania*, 477 U.S. 79, 86, 106 S.Ct. 2411, 2416, 91 L.Ed.2d 67 (1986) ("[I]n certain limited circumstances *Winship*'s reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged").

Because our precedent establishes that the burden of proof may not be shifted when the elements of the defense and the elements of the offense conflict, and because it seems clear \*242 that they do so in this case, I would reverse the decision of the Ohio Supreme Court.

II

Although I believe that this case is wrongly decided even under the principles set forth in *Patterson*, my differences with the Court's approach are more fundamental. I continue to believe that the better method for deciding when a State may shift the burden of proof is outlined in the Court's opinion in *Mullaney* and in my dissenting opinion in *Patterson*. In *Mullaney*, we emphasized that the state's obligation to prove certain facts beyond a

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reasonable doubt was not necessarily restricted to legislative distinctions between offenses and affirmative defenses. The boundaries of the state's authority in this respect were elaborated in the *Patterson* dissent, where I proposed a two-part inquiry:

"The Due Process Clause requires that the prosecutor bear the burden of persuasion beyond a reasonable doubt only if the factor at issue makes a substantial difference in punishment and stigma. The requirement of course applies *a fortiori* if the factor makes the difference between guilt and innocence.... It also must be shown that in the Anglo-American legal tradition the factor in question historically has held that level of importance. If either branch of the test is not met, then the legislature retains its traditional authority over matters of proof." 432 U.S., at 226-227, 97 S.Ct., at 2335 (footnotes omitted).

Cf. *McMillan v. Pennsylvania*, 477 U.S. 79, 103, 106 S.Ct. 2411, 2425, 91 L.Ed.2d 67 (1986) (STEVENS, J., dissenting) ("[I]f a State provides that a specific component of a prohibited transaction shall give rise both to a special stigma and to a special punishment, that component must be treated as a 'fact necessary to constitute the crime' within the meaning of our holding in *In re Winship*").

There are at least two benefits to this approach. First, it ensures that the critical facts necessary to sustain a conviction will be proved by the state. Because the Court would \*243 be willing to look beyond the text of a state statute, legislatures would have no incentive to redefine essential elements of an offense to make them part of an affirmative defense, thereby shifting the burden of proof in a manner inconsistent with *Winship* and *Mullaney*. Second, it would leave the states free in all other respects to recognize new factors that may mitigate the degree of criminality or punishment, without requiring that they also bear the burden of disproving these defenses. \*\*1107 See *Patterson v. New York*, 432 U.S., at 229-230, 97 S.Ct., at 2336-2337 (POWELL, J., dissenting) ("New ameliorative affirmative defenses ... generally remain undisturbed by the holdings in *Winship* and *Mullaney*" (footnote omitted)).

Under this analysis, it plainly is impermissible to require the accused to prove self-defense. If petitioner could have carried her burden, the result

would have been decisively different as to both guilt and punishment. There also is no dispute that self-defense historically is one of the primary justifications for otherwise unlawful conduct. See, e.g., *Beard v. United States*, 158 U.S. 550, 562, 15 S.Ct. 962, 966, 39 L.Ed. 1086 (1895). Thus, while I acknowledge that the two-part test may be difficult to apply at times, it is hard to imagine a more clear-cut application than the one presented here.

### III

In its willingness to defer to the State's legislative definitions of crimes and defenses, the Court apparently has failed to recognize the practical effect of its decision. Martin alleged that she was innocent because she acted in self-defense, a complete justification under Ohio law. See *State v. Nolton*, 19 Ohio St.2d 133, 249 N.E.2d 797 (1969). Because she had the burden of proof on this issue, the jury could have believed that it was just as likely as not that Martin's conduct was justified, and yet still have voted to convict. In other words, even though the jury may have had a substantial doubt whether Martin committed a crime, she was found guilty under Ohio law. I do not agree that the Court's authority \*244 to review state legislative choices is so limited that it justifies increasing the risk of convicting a person who may not be blameworthy. See *Patterson v. New York*, *supra*, 432 U.S., at 201-202, 97 S.Ct., at 2322 (state definition of criminal law must yield when it " 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental' " (quoting *Speiser v. Randall*, 357 U.S. 513, 523, 78 S.Ct. 1332, 1340, 2 L.Ed.2d 1460 (1958))). The complexity of the inquiry as to when a State may shift the burden of proof should not lead the Court to fashion simple rules of deference that could lead to such unjust results.

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Briefs and Other Related Documents (Back to top)

• 1986 WL 728123 (Appellate Brief) Reply Brief of Petitioner (Nov. 17, 1986)

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- 1986 WL 728122 (Appellate Brief) Respondent's Brief on the Merits (Sep. 12, 1986)
- 1986 WL 728121 (Appellate Brief) Motion for Leave to File Brief Amicus Curiae and Brief for Ohio Public Defender Commission as Amicus Curiae in Support of Petitioner (Jul. 11, 1986)
- 1986 WL 728120 (Appellate Brief) Motion for Leave to File Brief Amicus Curiae and Brief for Ohio Public Defender Commission as Amicus Curiae in Support of Petitioner (Mar. 31, 1986)
- 1985 WL 669489 (Appellate Brief) Petitioner's Brief on the Merits (Oct. Term 1985)

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STATE of Alaska, Petitioner,  
 v.  
 Peter ANDREWS, Sr., Respondent.  
 Peter ANDREWS, Sr., Appellant,  
 v.  
 STATE of Alaska, Appellee.  
 George R. KOENIG, Appellant,  
 v.  
 STATE of Alaska, Appellee.  
 Nos. A-468, A-492 and A-552.  
 Court of Appeals of Alaska.  
 Sept. 6, 1985.

Teacher's aide was convicted in the Superior Court, Dillingham County, Eben H. Lewis, J., of four counts of sexual abuse of minor and seven counts of sexual assault in first degree. The State petitioned for review and appeal and aide cross-appealed. In a separate prosecution, teacher was convicted in the Superior Court, Palmer County, James A. Hanson, J., of one count of sexual abuse of minor in first degree and two counts in second degree, and he appealed. Appeals were consolidated. The Court of Appeals, Singleton, J., held that statutory provisions governing consecutive and concurrent sentencing of defendant who has been convicted of two or more crimes express preference for consecutive sentences which trial court has discretion to reject.

Case A-468 affirmed; A-492 dismissed; A-552 vacated and remanded.

#### 1. Criminal Law $\S$ 1210(3)

AS 12.55.025(e, g), governing consecutive and concurrent sentencing where defendant has been convicted of two or more crimes, expresses preference for consecutive sentences for crimes of sexual assault, which trial court has discretion to reject in appropriate circumstances. Const. Art. 1,

$\S$  12; AS 11.41.434(a)(1), 11.41.436(a)(2), 11.41.440(a)(2), 12.55.005; AS 11.41.410(a)(3) (Repealed).

#### 2. Criminal Law $\S$ 1206

Purported repeal of AS 12.55.025(e), governing consecutive sentencing for defendant who has been convicted of two or more crimes, was obvious result of drafting error, as recognized in commentary, and should be disregarded by Court of Appeals.

#### 3. Statutes $\S$ 154

Designation of act to be repealed will not effect repeal of that act where, due to clerical mistake, wrong act was named.

#### 4. Statutes $\S$ 241(1)

Ambiguities in criminal statutes must be narrowly read and construed strictly against government, whether provisions govern sentencing or define crimes.

#### 5. Statutes $\S$ 241(1)

Under "rule of lenity," statute establishing penalty which is susceptible of more than one meaning should be construed so as to provide most lenient penalty.

See publication Words and Phrases for other judicial constructions and definitions.

#### 6. Statutes $\S$ 190

Statute which is susceptible of two or more conflicting but reasonable meanings is "ambiguous."

See publication Words and Phrases for other judicial constructions and definitions.

#### 7. Criminal Law $\S$ 1210(2)

Trial judge had limited discretion to give defendant concurrent rather than consecutive sentences, despite conviction of multiple sexual assaults. AS 11.41.440(a)(2); AS 11.41.410(a)(3)(Repealed).

#### 8. Criminal Law $\S$ 1206.3(1)

Legislature intended that revised code create reasonable uniformity and eliminate unjustified disparity in sentences and, thus, established somewhat rigid sentencing framework. AS 12.55.005.

**9. Criminal Law** ⇨1208.1(1)

Statutory goal found in AS 12.55.005, which enumerates considerations in imposing sentence, is that those whose criminal conduct is roughly identical should receive essentially similar sentences.

**10. Criminal Law** ⇨1208.1(2)

Person who commits ten sexual assaults should receive more severe sentence than person convicted of single incident, but he should not be punished ten times as severely. Const. Art. 1, § 12; AS 11.41.434(a)(1), 11.41.436(a)(2), 11.41.440(a)(2), 12.55.005; AS 11.41.410(a)(3) (Repealed).

**11. Criminal Law** ⇨1208.1(3)

AS 12.55.125(f, g), governing suspension of sentences and reduction of term of imprisonment for felonies, requires only that person sentenced at time for two or more crimes each of which is subject to presumptive sentence must receive sentence at least equal to most severe presumptive sentence when adjusted to reflect aggravating or mitigating factors.

**12. Infants** ⇨20

Defendant, convicted of sexual abuse of minors in first and second degrees, was properly given aggravated sentence, although case was not sufficiently aggravated to warrant maximum sentence or sentences, where victims were eight and nine years of age, defendant was public school teacher with position of authority over victims, he was convicted of offenses involving multiple victims, and trial court properly considered uncharged offenses verified in record. AS 11.41.434(a)(1), 11.41.436(a)(2), 12.55.155(c)(5); AS 11.41.410(a)(4)(A) (Repealed).

**13. Criminal Law** ⇨986.2(1)

Proof of aggravating factors by clear and convincing evidence, while necessary condition for aggravated sentence, is not sufficient for that purpose but, rather, trial court must consider totality of defendant's conduct in light of his past record and future prospects. AS 12.55.005.

**14. Criminal Law** ⇨986.2(4)

In imposing sentence for sexual abuse, court should consider defendant's history of violent or sexually-abusive behavior with victim named in indictment, as well as similar conduct directed at other victims that has been verified in record. AS 11.41.434(a)(1), 11.41.436(a)(2); AS 11.41.410(a)(3) (Repealed).

**15. Criminal Law** ⇨986.2(1)

In determining appropriate incremental increase in sentencing defendant for identical but separate criminal episodes, trial court should consider totality of defendant's conduct in comparison with totality of conduct of other sentenced offenders discussed in reported case.

**16. Assault and Battery** ⇨100

Sentencing range of ten to 15 years for aggravated sexual assaults involving both adult and child victims is warranted, whether aggravation is found because of multiple victims, multiple assaults on single victim, or serious injuries to one or more victims.

**17. Assault and Battery** ⇨100**Infants** ⇨20

In aggravated cases of sexual assault in first degree, or sexual abuse of minor in first degree, by second and third felony offenders, sentences slightly higher than presumptive sentences of 15 and 25 years would be appropriate. AS 12.55.125(i), 12.55.155.

**18. Infants** ⇨20

On remand, defendant's sentence for one count of sexual abuse of minor in first degree and two counts of sexual abuse of minor in second degree, whether involving concurrent or consecutive increments, should not exceed 20 years with five years suspended. AS 11.41.434(a)(1), 11.41.436(a)(2), 12.55.025(e, g).

Cynthia M. Hora, Asst. Atty. Gen., Anchorage, and Norman C. Gorsuch, Atty. Gen., Juneau, for petitioner in No. A-468, and appellee in No. A-492.

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John M. Murtaugh, Anchorage, for respondent in No. A-468, and appellant in No. A-492.

Laurel J. Peterson, Anchorage, for appellant in No. A-552.

Michael N. White, Dist. Atty., Palmer, and Norman C. Gorsuch, Atty. Gen., Juneau, for appellee in No. A-552.

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

### OPINION

#### SINGLETON, Judge.

Peter Andrews, Sr., and George R. Koenig are school teachers. In unrelated prosecutions, each was convicted of multiple counts of sexual abuse and sexual assault on their elementary school female pupils. Andrews and Koenig are first offenders. Neither has a juvenile or adult criminal record. Andrews received concurrent sentences totaling eight years' imprisonment, and Koenig received consecutive sentences totaling forty years with twenty years suspended. Koenig's sentences were based in part on the trial court's conclusion that consecutive sentences were mandatory when a defendant is convicted of multiple counts of sexual assault involving different victims. AS 12.55.025(e). Andrews' sentences were based in part on an opposite conclusion by the trial court in his case.

[1] The primary issue in each appeal is the proper interpretation of AS 12.55.025(e) and (g). On our own motion, we have therefore consolidated them for decision. In Andrews' case, the state contends that

1. In addition, Andrews has cross-appealed, arguing that one of the five-year maximum sentences he received for sexual abuse of a minor was excessive. He asks that we reach this issue only in the event we rule against him on the issue of consecutive sentences. Our disposition makes it unnecessary to address this issue further.

2. Former AS 11.41.440(a)(2) provided, in relevant part:

A person commits the crime of sexual abuse of a minor if, being 16 years of age or older, he engages in . . . sexual contact with a person who is under 13 years of age . . .

where an individual is convicted of multiple counts of sexual assault, he must receive consecutive sentences, at least where his sexual abuse involves separate victims. In contrast, Andrews argues that the legislature has expressed a preference for consecutive sentences but that the trial court has discretion to reject that preference in an appropriate case. Judge Lewis accepted Andrews' argument below and sentenced Andrews to concurrent terms. The state has petitioned for review and we consider the issue of sufficient importance to warrant our granting review.<sup>1</sup> In Koenig's case, Judge Hanson was of the view that consecutive sentences were mandatory. He therefore gave Koenig consecutive sentences. Koenig appeals, contending that those sentences were excessive. We have carefully reviewed the record and conclude that AS 12.55.025(e) and (g) express a preference for consecutive sentences which a trial court has discretion to reject in appropriate circumstances. We therefore affirm Andrews' sentences and vacate Koenig's sentences, remanding his case for resentencing. We also set out some guidelines to be applied to Koenig in resentencing. We set out the relevant facts regarding each of these two defendants and then proceed to a discussion of the issues.

#### ANDREWS

Peter Andrews, Sr., was convicted of four counts of sexual abuse of a minor, a class C felony, former AS 11.41.440(a)(2),<sup>2</sup> and seven counts of sexual assault in the first degree, an unclassified felony, former

Former AS 11.81.900(b)(51) defined "sexual contact" as:

(A) the intentional touching, directly or through clothing, by the defendant of the victim's genitals, anus, or female breast; or

(B) the defendant's intentionally causing the victim to touch, directly or through clothing, the defendant's or victim's genitals, anus, or female breast.

Alaska Statute 12.55.125(e) provides: "A defendant convicted of a class C felony may be sentenced to a definite term of imprisonment of not more than five years. . . ."

Cite as 707 P.2d 900 (Alaska App. 1985)

AS 11.41.410(a)(3).<sup>3</sup> Andrews was sentenced to five years for each count of sexual abuse and eight years (the presumptive term) for each count of first-degree sexual assault; all terms were imposed concurrently.

The charges against Andrews involved three victims: K.E. (age nine), L.K. (age ten) and D.M. (age ten). All the offenses took place between November 1, 1982, and June 21, 1983, mainly at the village school in Aleknagik, where Andrews worked as a teacher's aide. The only incident involving K.E. was one in which Andrews touched her breasts and vaginal area. L.K. was subjected to digital penetration on at least two occasions as well as less serious sexual contact similar to that suffered by K.E. In addition to less serious contact, D.M., the third victim, was subjected to digital and penile penetration of her anus, and digital, penile and oral penetration of her vagina. L.K. told police that the penile penetration hurt her and on at least one occasion made her bleed. Andrews' contact with D.M. was the most extensive. Andrews would take D.M. into the language lab, both during school and when school was not in session. Sometimes he would cover her mouth to keep her from yelling. On at least one occasion, Andrews enticed D.M. to his home and abused her. He also arranged for D.M. to work for him, so he

could engage in sexual conduct more freely. Andrews apparently gave money or candy to his victims, but at no time threatened them with physical harm.

Andrews is a well-respected member of the Aleknagik community. He has served as mayor and, at the time of his arrest, was a member of the city council. In addition to his work as a teacher's aide at the school, Andrews has also served as a lay minister for the Moravian Church and has been employed as a fisherman. Andrews is in poor health. He has had multiple tumors removed from his bladder and will probably need ongoing medical treatment. Andrews was fifty-nine years of age at the time of sentencing. His formal education ended with the eighth grade. He is married and has thirteen children, six of whom continue to live with him. Andrews was honorably discharged from the United States Army.

Judge Lewis carefully considered the *Chaney* criteria. *State v. Chaney*, 477 P.2d 441 (Alaska 1970). He recognized the state's argument that consecutive sentences were mandatory under AS 12.55.025(e) and (g), but concluded that when read together with article I, section 12 of the Alaska Constitution,<sup>4</sup> and AS 12.55.005,<sup>5</sup> the statute permits imposition of con-

3. Former AS 11.41.410 provided, in relevant part:

A person commits the crime of sexual assault in the first degree if, . . . being 16 years of age or older, he engages in sexual penetration with another person under 13 years of age. . . .

Former AS 11.81.900(b)(52) defined sexual penetration as:

genital intercourse, cunnilingus, fellatio, anal intercourse, or an intrusion, however slight, of an object or any part of a person's body into the genital or anal opening of another person's body; each party to any of the acts defined as "sexual penetration" is considered to be engaged in sexual penetration.

At the time of Andrews' offenses, AS 12.55.125(i) provided:

A defendant convicted of sexual assault 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.

4. Alaska Constitution, article I, section 12 provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Penal administration shall be based on the principle of reformation and upon the need for protecting the public.

5. Alaska Statute 12.55.005 provides:

The purpose of this chapter is to provide the means for determining the appropriate sen-

current sentences under some circumstances. He concluded that while there was a statutory preference for consecutive sentences, the legislature has given trial courts discretion to reject that preference where necessary to serve the defendant's rehabilitation and the protection of the community. The court noted that in light of Andrews' age and poor health, a sentence in excess of eight years would be a virtual life sentence. The court therefore concluded that on the peculiar facts of this case, concurrent sentences requiring that Andrews serve no more than eight years' incarceration would fully satisfy all of the statutory requirements.

In reaching this conclusion, Judge Lewis did not minimize the significance of Andrews' offenses. He noted that Andrews, as a teacher and community leader, had the respect and confidence of his victims and, in effect, abused a trust in subjecting them to sexual abuse. He further noted that Andrews exhibited no remorse and that, despite the jury verdicts, Andrews refused to acknowledge any guilt or responsibility, characterizing his touching of the victims as normal activity between teacher and student. Finally, Judge Lewis recognized, in part based upon his observation of the demeanor of the victims as they testified, that they had all suffered substantial psychological injury and would probably require extensive counseling in the future in

tence to be imposed on conviction of an offense. The legislature finds that the elimination of unjustified disparity in sentences and the attainment of reasonable uniformity in sentences can best be achieved through a sentencing framework fixed by statute as provided in this chapter. In imposing sentence, the court shall consider

- (1) the seriousness of the defendant's present offense in relation to other offenses;
- (2) the prior criminal history of the defendant and the likelihood of rehabilitation;
- (3) the need to confine the defendant to prevent further harm to the public;
- (4) the circumstances of the offense and the extent to which the offense harmed the victim or endangered the public safety or order;
- (5) the effect of the sentence to be imposed in deterring the defendant or other members of society from future criminal conduct; and

order to have any hope of a psychologically healthy adult life.

#### KOENIG

George R. Koenig was thirty-three years of age at the time of his offenses. He has a master's degree in philosophy and was the music and language teacher at a Wasilla grammar school. Koenig was initially charged with sixteen counts of sexual abuse and sexual assault involving eight victims: S.L.F. (age nine); K.L.M. (age nine); M.A.S. (age twelve); D.M.I. (age eight); J.L.S. (age nine); G.L.H. (age eleven); E.E. (age eight); and H.D.K. (age eight). As part of a plea agreement, Koenig entered a plea of *nolo contendere* to three charges, and the state dismissed the other thirteen with the understanding that it could bring out evidence regarding all sixteen offenses at sentencing. Koenig was therefore convicted of one count of sexual abuse of a minor in the first degree, an unclassified felony, AS 11.41.434(a)(1), based upon digital penetration of H.D.K., and two counts of sexual abuse of a minor in the second degree, a class B felony, AS 11.41.436(a)(2), based upon, respectively, the touching of K.L.M.'s vagina and the touching of E.E.'s breasts.<sup>6</sup> Koenig was sentenced to twenty years with ten suspended on the first-degree sexual abuse conviction, and ten years with five suspended on each of the second-degree sexual abuse convictions. All three sentences

(6) the effect of the sentence to be imposed as a community condemnation of the criminal act and as a reaffirmation of societal norms.

6. Alaska Statute 11.41.434(a)(1) provides in relevant part:

An offender commits the crime of sexual abuse of a minor in the first degree if ... being 16 years of age or older, the offender engages in sexual penetration with a person who is under 13 years of age....

Alaska Statute 11.41.436(a)(2) provides in relevant part:

An offender commits the crime of sexual abuse of a minor in the second degree if ... being 16 years of age or older, the offender engages in sexual contact with a person who is under 13 years of age....

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were made consecutive, so that Koenig received a total sentence of forty years with twenty years suspended.

Judge Hanson considered a number of factors in framing the sentence as he did. First, he concluded the consecutive sentences were mandatory for sexual assaults involving separate victims under AS 12.55.025(e) and (g). Second, he noted that Koenig had abused a position of trust since he was a school teacher and since all of the acts of sexual abuse occurred during school hours. Third, he recognized that Koenig's victims in the offenses to which he pled were particularly young, eight and nine years of age, and therefore vulnerable. *See* AS 12.55.155(c)(5). Finally, he noted a report by Dr. Rothrock, a psychiatrist, that Koenig was a pedophile and that his prognosis for rehabilitation was guarded. These factors led Judge Hanson to conclude that Koenig's conduct was the worst contemplated within the definitions of the offenses charged. AS 12.55.155(c)(10). Because two aggravating factors were found, Judge Hanson was not limited by the eight-year presumptive term prescribed for the single count of first-degree sexual abuse.

In Koenig's favor, Judge Hanson noted that Koenig's offenses involved sexual touching including digital penetration but no genital intercourse, that Koenig was a hard worker, that he was a well-educated, intelligent man, and that he had expressed a substantial amount of remorse and actively sought treatment in the hope it would cure his sexual predilection for small children.

## DISCUSSION

### I.

The primary question presented by this appeal is the proper interpretation of AS 12.55.025(e) and (g). The statute provides:

(e) Except as provided in (g) 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.

(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;

(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.

Alaska Statute 12.55.025(e) requires consecutive sentences in all cases subject to exceptions defined in (g), which contains six subparagraphs. The first three subparagraphs, (1)-(3), identify three situations in which concurrent sentences have been traditionally imposed. *Cf.* former AS 12.55.145(a)(3) (considering prior offenses committed under similar circumstances a single prior offense for purposes of presumptive sentencing). The problem arises because the last three subparagraphs, (4)-(6), are phrased in the negative and appear to describe situations in which the legislature may not have wished concurrent sentences, yet the drafter placed all six subparagraphs in the disjunctive. This grammatical structure suggests that each subparagraph should be considered an independent basis for permitting concurrent sentences. Read in this literal fashion, however, the

statute would permit imposition of concurrent sentences in almost every case, since the conduct need only satisfy one of the six subparagraphs, and three of them are in the negative. In *Griffith v. State*, 675 P.2d 662 (Alaska App.1984), we accepted a stipulation of the parties, ignored the disjunctive "or", and construed the three final subparagraphs as exceptions to the exceptions, i.e., as situations in which the general rule precluding concurrent sentences would apply. We noted, however, the ambiguity inherent in this awkward grammatical structure, thereby indicating that interpretational problems would have existed in the absence of the parties' stipulation.

## A.

Before constraining AS 12.55.025(g) and considering the parties' arguments, it is necessary to reach a preliminary point. In the revisor's notes to AS 12.55.025, it is stated:

Alaska Statute 12.55.025(e) was amended by § 24, Ch. 143, SLA 1982 and purportedly repealed by § 42, Ch. 143, SLA 1982. The repeal in § 42 was apparently a drafting error. See House Journal Supplement No. 63, (dated June 1, 1982), page 18.

Andrews argues that the repeal, though perhaps an oversight, must be given full force and effect. He further argues that paragraph (e) governs paragraph (g), and that if (e) was repealed, (g) cannot have any force or effect.<sup>7</sup> The state concedes that § 42 of Chapter 143, SLA 1982 states that AS 12.55.025(e) is repealed, and that section 24 of the same chapter repealed former AS 12.55.025(e), which had previ-

7. The state disputes Andrews' claim that paragraph (g) depends upon paragraph (e). It points out that (g) makes no reference to (e) and that (e) sheds no light on the proper interpretation of (g). Further, the state contends that even if (e) were deemed repealed, (g) would still require consecutive sentences for sexual assaults. In light of our decision that (e) was not repealed, it is unnecessary for us to reach these arguments.

8. Former AS 12.55.025(e) provided:

If the defendant is convicted of two or more crimes before judgment on either has been

ously governed imposition of concurrent or consecutive sentences, and enacted the present provisions in its place.

[2, 3] The state reasons, however, that the commentary to the bill which became Chapter 143 recognized that the purported repeal of AS 12.55.025(e) contained in § 42 was an error, since the commentary discusses only § 24 of the bill. Supp. No. 63 at 12 in 3 House Journal (1982), following p. 2356. The revisor picked up the error as we have seen. Consequently, the state concludes, since the alleged repeal was obviously an error, we should disregard it. We agree. As Sutherland points out, "designation of an act to be repealed will not effect a repeal of that act where, due to clerical mistake, the wrong act was named." 1A C. Sands, *Sutherland Statutory Construction* § 23.07, at 219-20 n. 5 (4th ed. 1972). We are satisfied that the legislature intended to repeal the existing AS 12.55.025(e) and re-enact a new 12.55.025(e), and that the language used accomplished that purpose, though somewhat inartfully. We therefore reject Andrews' argument.

## B.

In *Lacquement v. State*, 644 P.2d 856 (Alaska App.1982), we charted the history of consecutive sentencing under former law. We noted that where a defendant was convicted of two or more crimes before the judgment on either had been entered, prior legislation as well as the law in effect at the time of Lacquement's sentencing permitted a trial court to impose sentences either concurrently or consecutively.<sup>8</sup> We

entered, any sentences of imprisonment may run concurrently or consecutively, as the court provides. If the court does not specify, the sentences of imprisonment shall run concurrently. If the defendant is imprisoned upon a previous judgment of conviction for a crime, the judgment may provide that the imprisonment commences at the expiration of the term limited by the previous judgment or on the date of imposition of sentence.

Prior to enactment of the revised criminal code, the applicable provision was former AS 11.05.050, which provided:

also noted, however, that neither the legislature nor the Alaska Supreme Court had ever established guidelines to assist trial judges in determining under what circumstances consecutive rather than concurrent sentences should be imposed. 644 P.2d at 861. In this case, the parties are in agreement that Chapter 143, SLA 1982 was intended in part to respond to this statutory void. The parties are also in agreement that the legislature clearly articulated a preference for consecutive sentences, subject to certain exceptions. They disagree, however, over the proper interpretation of those exceptions.

[4, 5] Ambiguities in criminal statutes must be narrowly read and construed strictly against the government. *State v. Rice*, 626 P.2d 104 (Alaska 1981); *Kuvaas v. State*, 696 P.2d 684 (Alaska App.1985); *Conner v. State*, 696 P.2d 680, 682 (Alaska App.1985); *State v. Rastopsoff*, 659 P.2d 630, 640 (Alaska App.1983); *Hugo v. City of Fairbanks*, 658 P.2d 155, 161 (Alaska App.1983); *Siggelkow v. State*, 648 P.2d 611, 614-15 (Alaska App.1982); *Cassell v. State*, 645 P.2d 219, 222 (Alaska App.1982); *Belarde v. Anchorage*, 634 P.2d 567, 568 (Alaska App.1981); *Pierce v. State*, 627 P.2d 211, 219 (Alaska App.1981); 3 C. Sands, *Sutherland Statutory Construction*, §§ 59.03, 59.04, 59.06 (4th ed. 1974). The foregoing rule applies equally to provisions governing sentencing and provisions defining crimes. See *Kuvaas*, 696 P.2d at 685; *Rastopsoff*, 659 P.2d at 640; see also *Bifulco v. United States*, 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980). Closely allied to the doctrine that criminal statutes must be strictly construed is the so-called rule of lenity. If a statute establishing a penalty is susceptible of more than one meaning, it should be construed so as to provide the most lenient penalty. See, e.g., *Brookins v. State*, 600 P.2d 12, 17 (Alaska 1979).

If the defendant is convicted of two or more crimes, before judgment on either, the judgment may be that the imprisonment upon one conviction begins at the expiration of the imprisonment for any other of the crimes. If

As stated above, in *Griffith v. State*, 675 P.2d 662 (Alaska App.1984), it was unnecessary for us to finally interpret AS 12.55.025(g) because the parties reached an agreement as to its meaning which was fully dispositive of Griffith's case. We set out the statute and then concluded as follows:

The statute is not well drafted and there are a number of possible interpretations of the statutory language. Fortunately, the state and Griffith agree on an interpretation of the statute. They agree that if a defendant's conduct falls within subparagraphs (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], the court may not impose a concurrent sentence. However, if the defendant's conduct falls within subparagraphs (1), (2) or (3), the court is authorized to impose concurrent sentences.

675 P.2d at 664. The parties' agreement was dispositive of Griffith's case. They agreed that the trial court had not correctly interpreted the statute and did not understand that it could have given Griffith a concurrent sentence, because Griffith's conduct did not fall within subparagraphs (4), (5), or (6), but it did fall within subparagraph (1). We accepted the agreement of the parties and remanded Griffith's case for resentencing.

The *Griffith* interpretation does not help Andrews and Koenig, however, because they were convicted of sexual offenses governed by subparagraph (g)(5). Consequently, it is necessary for us to consider in this case whether the legislature has absolutely

the defendant is imprisoned upon a previous judgment on a conviction for a crime, the judgment may be that the imprisonment commences at the expiration of the term limited by the previous judgment.

ruled out concurrent sentences for those convicted of such offenses.

Andrews argues that the various subparagraphs of (g) are tied together by semicolons except that the word "or" separates (5) from (6). He reasons that where words are placed in a series and the final two words in the series are separated by an "or," all of the paragraphs are disjunctive unless legislative intent is clearly contrary or such a construction is repugnant to the act in question. *United States v. Garcia*, 718 F.2d 1528 (11th Cir.1983), *aff'd*, — U.S. —, 105 S.Ct. 479, 83 L.Ed.2d 472 (1984); *George Hyman Construction Co. v. Occupational Safety and Health Review Commission*, 582 F.2d 834, 839-40 (4th Cir.1978); *Azure v. Morton*, 514 F.2d 897, 900 (9th Cir.1975); 1A C. Sands, *Sutherland Statutory Construction* § 21.14 (4th ed. 1972). Under this interpretation, Andrews argues, if a case arguably falls within any of the subparagraphs, concurrent sentences are presumptively appropriate, though not mandatory. While Andrews and Koenig were convicted of sexual assaults and therefore cannot benefit from the paragraph that makes concurrent sentences available to those who are not convicted of such offenses, their crimes involved similar societal interests, subparagraph (g)(1), were not committed while escaping, subparagraph (g)(4), and did not involve the circumstances set forth in subparagraph (g)(6). Consequently, according to Andrews' view, the trial courts were authorized to consider concurrent sentences in determining appropriate sentences for Andrews and, by extension, Koenig.

[6, 7] We agree that this is one possible reading of the statute. The interpretation discussed in *Griffith* is also a reasonable interpretation of the statute. Where a statute is susceptible of two or more conflicting but reasonable meanings it is ambiguous. We resolve the ambiguity by

9. The state does not argue that, even if Judge Lewis had authority to impose concurrent sentences, it was inappropriate to do so in Andrews' case. Our review of the sentencing

adopting the meaning most favorable to the defendant, and accept Andrews' interpretation of the statute. Treating the various sub-categories under paragraph (g) as disjunctive does not obviously violate legislative intent and is not repugnant to the statute. We therefore affirm Judge Lewis' conclusion that he had limited discretion to give Andrews concurrent sentences despite Andrews' conviction of multiple sexual assaults.<sup>9</sup> For the same reason, we reverse Judge Hanson's conclusion that he was obligated to give consecutive sentences to Koenig. We realize that Judge Hanson recognized that Koenig's sexual contact convictions were not presumptive and thus could have resulted in suspended sentences, even though he believed those sentences would have had to have been consecutive. Judge Hanson nevertheless declined to suspend additional time. We do not view Judge Hanson's consideration of this issue as establishing that any error he made in concluding that consecutive sentences were mandatory was harmless. We believe that Koenig should have an opportunity on remand to argue for concurrent sentences. We therefore vacate his sentences and remand for resentencing.

[8, 9] Our decision to accept Andrews' interpretation of AS 12.55.025(g) is reinforced by three considerations. First, the legislature intended that the revised code create reasonable uniformity and eliminate unjustified disparity in sentences; it therefore established a somewhat rigid sentencing framework. AS 12.55.005. If consecutive sentences were automatic in cases involving sexual assaults on minors, it would appear that the legislative goal of uniformity would be achieved. However, this uniformity would be illusory. Most incest cases involve a protracted sexual relationship between abuser and victim; typically, the victim testifies to many incidents, but has great difficulty differentiating between incidents. See *Covington v. State*, 703 P.2d 436 (Alaska App.1985). Generally, if

record discloses, however, that Judge Lewis did not abuse his discretion in imposing concurrent sentences in Andrews' case, so we would affirm the sentence even had this argument been made.

the state can prove one incident it can prove them all, since the same evidence will be before the jury and the result will turn on whether the jury believes the victim or not. The state is therefore able in almost all these cases to arbitrarily decide between charging multiple incidents or a single incident. Consider the cases of two identically situated individuals, the evidence against each of whom would support a finding of ten separate incidents of first-degree sexual assault. If the state's interpretation of the statute were correct, one person might be charged with and convicted of one offense and automatically receive an eight-year presumptive term, while the other was charged with and convicted of ten incidents, and therefore automatically sentenced to ten consecutive eight-year presumptive terms. Again, this would be true even though the evidence in both cases was identical. It is only if the statute permits concurrent sentences and is interpreted to impose reasonable restrictions on consecutive sentences that the statutory goal found in AS 12.55.005—that those whose criminal conduct is roughly identical should receive substantially similar sentences—can be attained.

Closely related is a second concern. Under the state's interpretation of the statute, where the evidence will permit single or multiple charges at the prosecutor's absolute discretion, a defendant is under substantial pressure to accept an offer to plead to a single count regardless of guilt. We recognize that this pressure will exist to a degree in any case in which the state may elect to charge fewer offenses, or a lesser-included offense in preference to a greater offense. Where consecutive sentences are mandatory, however, this pressure could become virtually insurmountable. Clearly the legislature did not wish to encourage the conviction of the innocent.

Finally, our conclusion that the statute establishes a preference for consecutive sentences in the case of crimes of sexual assault but does not make such sentences mandatory is consistent with the treatment given consecutive sentences in *Fair and Certain Punishment*, Report of The

*Twentieth Century Fund Task Force on Criminal Sentencing* (1976), which was the source from which the Alaska Criminal Law Revision Subcommittee derived presumptive sentencing. See Alaska Revised Criminal Code, Part VI, at 9 (Tentative Draft 1978) (hereafter T.D.). The authors of *Fair and Certain Punishment* concluded:

#### *Concurrent Versus Consecutive Sentences*

As observed in the text of the Task Force report, difficulties arise under presumptive sentencing in dealing with several offenses that grow out of the same or a connected transaction or that are closely related in time. Our proposal by no means creates this issue, but rather forces it to the surface because it is no longer hidden by the discretionary employment of concurrent sentences. We believe that several different approaches or principles are required in coping with this very difficult problem.

The first principle is that a single criminal transaction cannot be broken down into separate crimes for purposes of imposing consecutive sentences, nor can the sentence for such a transaction exceed the sentence for the single most serious crime. Thus, a defendant convicted for a single armed robbery cannot receive consecutive sentences for such component crimes as possession of a weapon, assault with a deadly weapon, burglary, larceny, and trespassing; his maximum exposure would be for the sentence (presumptive plus the increment, except in extraordinary cases) prescribed for armed robbery (or whatever the single most serious crime was).

The second principle is that a series of unrelated criminal acts or transactions can be punished by consecutive sentences, as in the example of four armed robberies carried out over the period of one week. We are aware that, although this is permitted under current law, it is not generally done today and could result in unrealistically long sentences. But we see no reasonable alternative other than

to devise a sophisticated system in which every additional crime in a series carries an increment of punishment, but not the full increment of a consecutive sentence. And perhaps this may prove to be the best solution.

The third principle is that a continuing crime or a series of closely run crimes should also be punished by an incremental sentencing. The example used is that of a government official who submits a single fraudulent bill versus an official who has submitted a hundred fraudulent bills over a two-year period. It would be unconscionable to punish the latter a hundred times more harshly than the former. Some legislative formula making the latter practice a *dijferent* and more serious crime with gradually increasing penalties for each new violation makes more sense than adding an entire consecutive sentence for every fraudulent bill.

A top limit could be imposed, of course, on consecutive offenses for a particular type of crime. For example, no one convicted of larceny, regardless of how many transactions were involved, could receive a sentence in excess of ten years. Or no sentence in excess of a given maximum (say, 25 years) could be imposed regardless of the type or number of crimes charged. However, this

10. The state makes a related argument. It reasons that where someone is convicted of two or more offenses each of which is subject to a presumptive term and the court determines that consecutive sentencing is appropriate, the court must impose consecutive presumptive terms. The state argues that AS 12.55.125(f) and (g) (prohibiting suspension or reduction of a presumptive term) must be read in connection with AS 12.55.025(e) and (g). Thus, if a first offender is convicted of two counts of first-degree sexual assault and no aggravating or mitigating factors were found, the state reasons that the defendants must receive two eight-year terms. AS 12.55.125(i). If the terms are imposed consecutively, a composite sixteen-year sentence is mandatory.

We reject this argument. At the very least AS 12.55.125(f) and (g) are ambiguous when read together with AS 12.55.025(e) and (g). We are thus obligated to construe their relationship strictly in favor of criminal defendants. While *in pari materia*, AS 12.55.125(f) and (g) and AS 12.55.025(e) and (g) address different concerns.

raises the related problem of whether the government must try a defendant at the same time for *all* crimes it intends to charge him with. The Task Force takes no position on this, except as it relates to sentencing.

*Fair and Certain Punishment, supra* at 49-50 (appendix A).

[10,11] As originally enacted, AS 12.55.025(e) established a preference for concurrent sentences, in reliance on ABA *Standards on Sentencing Alternatives and Procedures* § 3.4(b)(10) (Approved Draft 1971). T.D. Part VI, at 25-26. We recognize that the legislature reversed this preference when it amended subparagraph (e) and added .025(g). We do not believe, however, that the legislature intended thereby to mandate the "unconscionable" result mentioned by the authors of *Fair and Certain Punishment*. A person who commits ten sexual assaults should, consistent with the guidelines established in AS 12.55.005, receive a more severe sentence than a person convicted of a single incident, but he should not be punished ten times as severely. See *Sherman v. Holiday Construction Company*, 435 P.2d 16, 19 (Alaska 1967) (statutes should be construed to avoid glaringly absurd results seemingly compelled by their literal terms).<sup>10</sup>

We read AS 12.55.125(f) and (g) to require only that a person sentenced at the same time for two or more crimes each of which is subject to a presumptive sentence must receive a sentence at least equal to the most severe presumptive sentence when adjusted to reflect aggravating or mitigating factors. In determining whether these provisions have been satisfied, we must look to the total sentence imposed, not the individual sentence imposed on separate counts. Thus, if the trial court decided to impose consecutive sentences in the hypothetical suggested by the state, AS 12.55.125(g) would require a minimum eight-year composite sentence, but not a sixteen-year sentence. Cf. *Waters v. State*, 483 P.2d 199, 201-02 (Alaska 1971) (when two or more sentences are imposed together, a sentence which if viewed in isolation might be excessive—or, by extension, too lenient—may be appropriate in light of the total sentences imposed). An eight-year sentence would ensure that the person convicted of multiple offenses serves at least as much time as provided by the presumptive term for his most serious offense.

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## II.

[12] Koenig's appellate briefing was directed at establishing that his individual sentences were excessive. Since this issue will arise on remand and would be particularly significant if Judge Hanson should again determine that consecutive sentences were appropriate, we address a few remarks to his case. First of all, we agree with Judge Hanson that Koenig's case was, to a certain extent, aggravated. As Judge Hanson pointed out, the victims in this case were eight and nine years of age. See AS 12.55.155(c)(5) (the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to extreme youth). While the elements of AS 11.41.434(a)(1) and AS 11.41.436(a)(2) require age disparity between victim and assailant, we agree with Judge Hanson that the extreme youth of these children meets the test for the aggravating factor. By the same token, Koenig's status as a public school teacher, and the position of authority it gave him over his victims, serves to aggravate this case. See *Goulden v. State*, 656 P.2d 1218, 1222 (Alaska App.1983); see also former AS 11.41.410(a)(4)(A). Finally, Koenig was convicted of offenses involving multiple victims, and the trial court also properly considered, pursuant to the plea agreement reached between the parties, uncharged offenses verified in the record. Taking all of these factors together, we conclude that Koenig was properly given an aggravated sentence.

[13] In reaching this conclusion, we stress, however, that proof of aggravating factors by clear and convincing evidence, while a necessary condition for an aggravated sentence, is not sufficient for that purpose. Ultimately the trial court must consider the totality of the defendant's conduct in the light of his past record and future prospects in determining an appropriate sentence. In this regard, the overwhelming majority of cases involving sexual abuse of minors that we have reviewed, regardless of whether that abuse takes the form of sexual contact or sexual pen-

etration, have involved people in positions of authority over the minor, e.g., teachers, parents, babysitters, *et cetera*, and children of extreme youth. While this case is aggravated, it is not sufficiently aggravated to warrant a maximum sentence or sentences.

In order to resolve Koenig's claim that his sentence is excessive we must compare it with sentences imposed in cases involving similar offenses. *Pears v. State*, 698 P.2d 1198, 1202 (Alaska, 1985); *Page v. State*, 657 P.2d 850, 854-55 (Alaska App. 1983).

We will therefore consider other cases discussing appropriate sentences for sexual assault in order to determine an appropriate range of sentences for someone like Koenig. We have considered sentences for sexual assault in connection with a number of recent cases. See, e.g., *State v. Brinkley*, 681 P.2d 351 (Alaska App.1984); *State v. Woods*, 680 P.2d 1195 (Alaska App.1984); *State v. Morris*, 680 P.2d 1190 (Alaska App.1984); *State v. Couey*, 680 P.2d 513 (Alaska App.1984); *State v. Rushing*, 680 P.2d 500 (Alaska App.1984); and *Langton v. State*, 662 P.2d 954 (Alaska App.1983). These cases arose prior to the effective date of legislation establishing presumptive sentences for first offenders convicted of sexual offenses against children. Nevertheless, we consider them of some value in establishing a context for a discussion of sexual-offender sentencing under existing law. In those cases we were asked to decide in part whether certain sentences imposed upon those convicted of sexual assaults on children were too lenient. We canvassed sentences previously imposed and concluded that sentences for rape including what would be sexual assaults on children under current law were "roughly divided" into three categories:

(1) The most mitigated cases usually justifying a sentence from ninety days to three years;

(2) typical conduct which should ordinarily result in a sentence of from three years to six years;

(3) aggravated conduct which may justify a sentence of from six years to the prior maximum of twenty years. *State v. Brinkley*, 681 P.2d at 356. In a footnote we stated:

A first offender who receives a sentence of six years or greater under former law should have engaged in conduct which approaches use of a dangerous weapon or causes serious physical injury to the victim. Where the sentence exceeds ten years, a substantially more aggravated case is required. [Citations omitted.]

681 P.2d at 356 n. 3. Since most of the cases we were discussing involved a state claim that the sentence imposed was too lenient rather than a claim by the defendant that the sentence was excessive, it was not necessary for us to discuss those cases in which a sentence in excess of ten years was appropriate.

In *Atkinson v. State*, 699 P.2d 881 (Alaska App.1985), we considered a sentence of ten years with four years suspended. Atkinson was sentenced on a single count of sexual assault in the first degree. The victim was Atkinson's daughter. The parties agreed that the court could consider the total sexual relationship between Atkinson and the victim. The trial court found that Atkinson began abusing the victim when she was seven years old and continued for two years until she was nine, at which time the abuse was discovered. The victim vigorously resisted the assaults and was beaten and tied up to facilitate the sexual abuse. The abuse consisted of multiple incidents of both sexual contact and sexual penetration. Atkinson appealed his sentence contending it was excessive. We affirmed.

In *Depp v. State*, 686 P.2d 712, 720-21 (Alaska App.1984), we dealt with a case having facts even more similar to those presented by the cases of Andrews and Koenig. There the fifty-one-year-old principal of a school was convicted of three counts of first-degree sexual assault and three counts of sexual abuse, all involving the eleven-year-old son of a friend. The

record established a continuous course of sexual abuse of children other than the victim charged in the indictment. 686 P.2d at 721. We approved three concurrent sentences of fifteen years with seven years suspended.

In neither case did the state cross-appeal, arguing that the sentence was too lenient; our affirmances do not, therefore, indicate whether more severe sentences for Atkinson or Depp would have been excessive. Nevertheless, given the sentencing courts' careful consideration of the respective backgrounds of Atkinson and Depp, the conduct constituting their offenses and the aggravating and mitigating factors which are typically found in cases of sexual assaults on small children, *Atkinson* and *Depp* may properly serve as benchmarks against which other sentences for sexual assault on children should be measured. Unless a defendant's conduct was substantially more serious than Atkinson's and Depp's, a sentence in excess of fifteen years would appear, on its face at least, clearly mistaken. Obviously, a benchmark sentence can only be a guide, not a rule. *Page v. State*, 657 P.2d 850, 855 (Alaska App.1983).

[14,15] In this regard we recognize that Atkinson pled to a single count of first-degree sexual assault, while others (such as Depp) who have also engaged in a continuous course of sexual abuse of a minor may be convicted of multiple counts, theoretically permitting consecutive sentences. While these distinctions may be significant, we do not believe the number of counts standing alone should be given overriding weight. Certainly the existence of multiple victims or multiple assaults on a single victim occurring during a protracted period is significant to the extent that it reflects a given defendant's potential future danger to society. Nevertheless, even in imposing a single sentence, the trial court should consider the totality of the defendant's conduct to the extent that it is verified in the record. *Nukapigak v. State*, 562 P.2d 697 (Alaska 1977), modified on rehearing, 576 P.2d 982 (Alaska 1978).

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In imposing such a sentence the court should consider the defendant's history of violent or sexually-abusive behavior with the victim named in the indictment, as well as similar conduct directed at other victims that has been verified in the record. By the same token a trial judge simultaneously sentencing a defendant for multiple crimes should impose a composite sentence similarly reflecting the totality of the defendant's conduct. A sentence for one count which might, viewed in isolation, appear excessive (or, by extension, too lenient) may not be clearly mistaken when viewed as a component in a composite sentence. *Waters v. State*, 483 P.2d 199, 201-02 (Alaska 1971). As we noted earlier, a person who is simultaneously sentenced for ten identical but separate criminal episodes should receive an incrementally greater sentence than one convicted of a single incident, but not ten times as great a sentence. *Fair and Certain Punishment, supra*, at 49-50. In determining an appropriate incremental increase the trial court should consider the totality of the defendant's conduct in comparison with the totality of the conduct of other sentenced offenders discussed in the reported cases. We believe this approach particularly appropriate in sentencing sexual offenders whose victims are children. Aggravated cases warranting sentences beyond the three- to six-year mid-category established in *Brinkley* and the four to eight years established under presumptive sentenc-

ing,<sup>11</sup> will almost invariably involve multiple incidents and frequently multiple victims, whether or not there is actually a plea to multiple counts. See *State v. Brinkley*, 681 P.2d 351, 356 (Alaska App.1984). In our view, any approach to the problem other than that discussed above would subordinate judicial sentencing discretion to prosecutorial charging discretion. While the revised code clearly sought to limit discretion by establishing presumptive sentencing, there is no indication that the legislature preferred one form of discretion to the other.

[16] The Alaska Supreme Court and this court have considered a number of sexual assault sentences. We believe a review of those cases which address sexual assaults involving both adult and child victims supports a sentencing range for aggravated offenses of ten to fifteen years, and use of *Atkinson* and *Depp* as benchmarks for determining the kind of conduct warranting a sentence within that range. We believe these benchmarks are applicable to all aggravated cases, whether aggravation is found, because of: (1) multiple victims; (2) multiple assaults on a single victim; or (3) serious injuries to one or more victims. Of course, a trial court is not bound to sentence in accordance with a benchmark and should not do so in a truly extraordinary case. In almost every case, the sentence approved by the reviewing court was in the range of six to fifteen years.<sup>12</sup> These cases exhibit a variety of

11. Current law establishes an eight-year presumptive term for first offenders convicted of first-degree sexual assault. AS 12.55.125(i)(1). Mitigating factors may reduce this sentence to four years. AS 12.55.155(a)(2). Thus the legislature has slightly increased typical terms over those recognized in *Brinkley*.

12. See *Alexander v. State*, 611 P.2d 469 (Alaska 1980) (sentence of seven and one-half years for statutory rape under former law affirmed; crime was perpetrated in violent fashion, defendant had two prior robbery convictions, a forgery conviction and a heroin-possession conviction and rape occurred while defendant was on parole); *Cochrane v. State*, 611 P.2d 61 (Alaska 1980) (concurrent sentences of twelve years' imprisonment for each of two counts of rape and five years' imprisonment for each of two

counts of assault with a dangerous weapon approved, where two young women were raped at gunpoint, threatened and subjected to humiliating treatment, and trial court considered all relevant material); *Shelton v. State*, 611 P.2d 24 (Alaska 1980) (defendant committed offense of rape one week after being released on bail pending trial on attempted rape charge; sentence of fifteen years approved); *Mallott v. State*, 608 P.2d 737, 752 (Alaska 1980) (defendant, while intoxicated, raped a three-year-old girl; sentence of thirty years with fifteen years suspended approved); *Lacy v. State*, 608 P.2d 19 (Alaska 1980) (defendant convicted of rape, assault with dangerous weapon, kidnapping, and petty larceny; concurrent sentences of fifteen years for rape and two counts of kidnapping approved); *Tate v. State*, 606 P.2d 1 (Alaska 1980) (defendant engaged in constant course of antisocial

circumstances which justify characterizing them as aggravated offenses. In many cases the victims suffered serious physical injury, in others there were multiple victims, or multiple attacks on a single victim. In some cases, the defendant had a substantial record of prior convictions for crimes of violence including, in many cases,

conduct in the past and committed cruel and calculated rape; sentence of fifteen years affirmed); *Wikstrom v. State*, 603 P.2d 908 (Alaska 1979) (court approved three concurrent fifteen-year sentences for rape, where the victim was forced to submit to vaginal and anal intercourse, to perform act of fellatio, was choked and had metal device inserted into her vagina, causing internal damage); *Holden v. State*, 602 P.2d 452 (Alaska 1979) (fifteen-year sentence, for assault with intent to commit rape approved, based upon prior criminal history and verified report of another rape); *Wagner v. State*, 598 P.2d 936 (Alaska 1979) (sentence of ten years affirmed where eleven-year-old female victim's two brothers were suborned to participate in the sexual activity, defendant's record included two prior felonies, and defendant had been diagnosed as moderately antisocial and not apt to conform his conduct to the law); *Moore v. State*, 597 P.2d 975 (Alaska 1979) (concurrent ten- and fifteen-year sentences not excessive for rape and armed robbery where defendant had extensive juvenile record and prior adult felony); *Bordewick v. State*, 569 P.2d 184 (Alaska 1977) (sentence of twelve years' imprisonment affirmed where defendant convicted of rape, sodomy, and grand larceny after violent and brutal attack on sixty-nine-year-old woman); *McCarlo v. State*, 677 P.2d 1268 (Alaska App. 1984) (composite sentence of twenty years with ten years suspended for defendant convicted of rape and attempted sexual assault in the first degree; affirmed, in light of history of aggressive behavior and seriousness of present offenses); *Cordes v. State*, 676 P.2d 611 (Alaska App.1984) (sentence of ten years with two years suspended affirmed where defendant was convicted of one count of sexual assault in the first degree and conceded four separate incidents involving his six-year-old stepdaughter, including incidents of anal intercourse and fellatio); *Barry v. State*, 675 P.2d 1292 (Alaska App.1984) (concurrent sentences of twenty years with five years suspended for first-degree sexual assault and twenty years for kidnapping approved); *Pickens v. State*, 675 P.2d 665 (Alaska App.1984) (thirteen years with five years suspended for first-degree sexual assault affirmed); *Wilson v. State*, 670 P.2d 1149 (Alaska App.1983) (consecutive terms of twenty years for kidnapping and ten years for first-degree sexual assault affirmed, where defendant and confederate beat the victim and left her to die); *Nashoalook v.*

prior convictions for sexual assault. Nevertheless, as the supreme court pointed out in *Tuckfield v. State*, 621 P.2d 1350, 1353 (Alaska 1981), the court had never, prior to *Tuckfield*, approved a maximum sentence for a person convicted of rape. At the time *Tuckfield* was decided, twenty years was the maximum sentence.<sup>13</sup> The

*State*, 663 P.2d 975 (Alaska App.1983) (ten years with five years suspended for first-degree sexual assault affirmed); *Johnson v. State*, 662 P.2d 981 (Alaska App.1983) (concurrent terms of fifteen years with five years suspended for rape and kidnapping affirmed; defendant had prior felony conviction and misdemeanor conviction for crime of violence); *Willard v. State*, 662 P.2d 971 (Alaska App.1983) (eight-year nonpresumptive sentence for first-degree sexual assault affirmed, based upon extraordinary circumstances, including verified reports of other sexual misconduct); *Hodges v. State*, 660 P.2d 1203 (Alaska App.1983) (court affirmed two concurrent eight-year terms with five years suspended for first-degree sexual assault based on several instances of sexual intercourse with defendant's twelve-year-old daughter over a four- to six-week period); *Erhart v. State*, 656 P.2d 1199 (Alaska App.1982) (ten-year sentence for first felony offender approved, based on aggravating factors); *Ecker v. State*, 656 P.2d 577 (Alaska App.1982) (six-year sentence for worst offender convicted of first-degree sexual assault affirmed); *Peetook v. State*, 655 P.2d 1308 (Alaska App.1982) (twenty years with five years suspended for first-degree sexual assault affirmed where defendant invaded victim's home in the nighttime, inflicted serious injuries and tortured victim); *Koganaluk v. State*, 655 P.2d 339 (Alaska App.1982) (court approved sentence of ten years for first-degree sexual assault, where defendant had previously been convicted of similar offense); *Williams v. State*, 652 P.2d 478 (Alaska App.1982) (twenty years with five years suspended for kidnapping and ten-year concurrent sentence for first-degree sexual assault not clearly mistaken, given substantial violence involved).

13. The supreme court and this court have approved total sentences in excess of twenty years where the defendant was guilty of sexual assault and, in addition, other more serious crimes, such as kidnapping or attempted murder, crimes which permit substantially greater maximum sentences. See *Hintz v. State*, 627 P.2d 207, 210-11 (Alaska 1981) (twenty-one-year-old defendant who had prior felony conviction kidnapped victim, threatened her with a firearm, and raped her; court reduced consecutive sentences of life plus twenty years to a total of thirty years' incarceration); *Morrell v. State*, 575 P.2d 1200, 1212-13 (Alaska 1978) (first offender