11455 HOUSE JUDICIARY

ENCLOSURE 8
Letter to Legislative Council

[DATE]

Mr. John Walstad
Code Revisor
Legislative Council
600 East Boulevard, 2nd Floor
Bismarck, ND 58505-0360

Dear Mr. Walstad:

Enclosed please find a copy of the [new, amendments to, or repeal of] North Dakota Administrative Code [title, article, or chapter] regarding [topics of rules] and a copy of each written comment and a summary of each oral comment on the rules [or note that no comments were received]. By letter dated [date of Attorney General letter approving rules] the Attorney General approved the proposed rules as to their legality. On [date] the [agency] adopted the rules as approved, and is now submitting the rules for publication in the North Dakota Administrative Code.

Thank you for your attention to this matter.

Sincerely,

Enclosure

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 6
Bill Version: CSHB 33(L&C)
(H) Publish Date: 3/17/05

Revision Date/Time (Note if correction):
Dept. Affected: All
Title: Relating to regulations that may gover
RDU
Component
Sponsor: Meyer
Requester:
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	417.7	401.2	401.2	401.2	401.2	401.2
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	417.7	401.2	401.2	401.2	401.2	401.2

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*
Consolidated fiscal note for all departments. See individual department fiscal notes for fund sources and detailed explanations.

Prepared by: Brad Pierce
Phone
Division: OMB
Date/Time: 3/4/05 11:04 AM
Approved by:
Date: 3/4/2005
Agency

(Revised 9/23/2004 OMB)

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FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 5
Bill Version: CSHB 33(L&C)
(H) Publish Date: 3/17/05

Revision Date/Time (Note if correction):
Dept. Affected: Natural Resources

Title: Relating to regulations that may govern the conduct of small businesses.
RDU: Resource Development
Component: Commissioner's Office

Sponsor: Rep. Meyer
Requester: House L&C
Component No. 423

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services	39.5	39.5	39.5	39.5	39.5	39.5
Travel						
Contractual	25.0	25.0	25.0	25.0	25.0	25.0
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**64.5**	**64.5**	**64.5**	**64.5**	**64.5**	**64.5**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match	19.2	19.2	19.2	19.2	19.2	19.2
1004 GF	42.8	42.8	42.8	42.8	42.8	42.8
1005 GF/Program Receipts						
1037 GF/Mental Health						
1021 ARLF	2.5	2.5	2.5	2.5	2.5	2.5
TOTAL	**64.5**	**64.5**	**64.5**	**64.5**	**64.5**	**64.5**

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

DNR Divisions anticipate fiscal impact with implementation of this legislation. Impact is to personal services associated with additional preparation work on regulation packages and/or contracts for ecomonic analysis services outside of DNR expertise.

Prepared by: Janet Baxter, Legislative Liaison
Phone 465-4730
Division: Commissioner's Office
Date/Time 3/3/2005

Approved by: Tom Irwin, Commissioner
Date 3/3/2005
Agency: Natural Resources

(Revised 9/23/2004 OMB)

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FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 4
Bill Version: CSHB 33(L&C)
(H) Publish Date: 3/17/05

Revision Date/Time (Note if correction):
Title: **Effect of Regulations on Small Businesses**

Department: **Labor and Workforce Development**
RDU: **Office of the Commissioner**
Component: **Commissioner's Office**

Sponsor: **Representative Meyer**
Requester: **House L&C**

Component Number: **340**

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services	35.8	35.8	35.8	35.8	35.8	35.8
Travel						
Contractual	18.3	18.3	18.3	18.3	18.3	18.3
Supplies	7.0	1.5	1.5	1.5	1.5	1.5
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**61.1**	**55.6**	**55.6**	**55.6**	**55.6**	**55.6**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	20.5	19.1	19.1	19.1	19.1	19.1
1004 GF	10.4	9.0	9.0	9.0	9.0	9.0
1007 Interagency Receipts						
1157 Worker Safety Account	15.1	13.7	13.7	13.7	13.7	13.7
1172 Building Safety Account	10.4	9.1	9.1	9.1	9.1	9.1
1032 Fishermen's Fund	4.7	4.7	4.7	4.7	4.7	4.7
TOTAL	**61.1**	**55.6**	**55.6**	**55.6**	**55.6**	**55.6**

Estimate of any current year (FY2005) cost: None
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time	1	1	1	1	1	1
Temporary						

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

See Attached.

Prepared by: **Guy Bell, Deputy Commissioner** Phone: **465-2700**
Division: **Office of the Commissioner** Date/Time: **3/3/05 10:59 AM**
Approved by: **Greg O'Claray, Commissioner** Date: **3/3/2005**
Agency: **Department of Labor and Workforce Development**

(Revised 9/23/2004 OMB)

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STATE OF ALASKA
2005 LEGISLATIVE SESSION

BILL VERSION: CSHB 33(L&C)

ANALYSIS: (continued)

HB 33 requires a study of the economic impact on small business of every regulatory change before the change can be adopted. In addition, an extensive regulatory flexibility analysis must be completed for each regulation change and alternatives must be evaluated and documented. This information must be compiled into a report that will be used to justify the adoption of the regulations.

This bill will impact three divisions in the Department of Labor and Workforce Development: Labor Standards and Safety, Workers' Compensation, and Employment Security. To prepare the extensive analysis and the economic effect statements a part time Regulations Specialist II is required. The position will be located in the Commissioner's Office.

The total FY 06 actual cost to the department is estimated to be $61.1. This includes personal services of $35.8, travel, postage, printing and telephone costs of $18.3, and $7.0 for supplies. The supplies funding includes costs for a computer and office furnishings required in the first year only.

This bill will impact the Labor Standards & Safety (LS&S) Division's Occupational Safety & Health (OSH), Mechanical Inspection and Wage & Hour programs. These LS&S programs have extensive regulations, both adopted directly and for the OSH program adopted by reference to the federal regulations. Total cost for LS&S is estimated at $41.7. Funding would be OSH $20.9 ($10.4 Federal/$10.5 Worker Safety Account), $10.4 Mechanical Inspection (Building Safety Account) and $10.4 Wage & Hour (General Fund).

This bill will impact the Workers' Compensation Division's Workers' Compensation and Fishermen's Fund programs. The total estimated cost of $9.3 would be funded from the Worker Safety Account ($4.6) and the Fishermen's Fund ($4.7).

This bill will impact the Employment Security Division's Unemployment Insurance program. The division estimates that the provisions of the bill will increase costs by approximately $10.1 annually which would be funded by federal receipts.

This bill has an effective date of January 1, 2006. However, to establish the procedures and to develop the required analysis and reports to comply with the provisions of the bill, the department needs to add the requested position at the beginning of the fiscal year.

NOTE: Since the department will not receive increased federal funding to cover the cost of this legislation, the increased federal cost will need to be absorbed within existing federal grant levels.

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: CSHB 33(L&C)
(H) Publish Date: 3/17/05
Revision Date/Time (Note if correction):
Dept. Affected: Health & Social Services

Title: RELATING TO THE EFFECT OF REGULATIONS ON SMALL BUSINESSES
RDU: Departmental Support Services
Component: Commissioner's Office

Sponsor: MEYER
Requester: HOUSE (L&C)
Component No. 317

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services	162.6	162.6	162.6	162.6	162.6	162.6
Travel	10.0	10.0	10.0	10.0	10.0	10.0
Contractual	30.0	30.0	30.0	30.0	30.0	30.0
Supplies	15.0	10.0	10.0	10.0	10.0	10.0
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**217.6**	**212.6**	**212.6**	**212.6**	**212.6**	**212.6**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (0)						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	217.6	212.6	212.6	212.6	212.6	212.6
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
Other(Specify Type-do not abbreviate)						
TOTAL	**217.6**	**212.6**	**212.6**	**212.6**	**212.6**	**212.6**

Estimate of any current year (FY2005) cost:
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time	2	2	2	2	2	2
Part-time						
Temporary						

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

The proposed legislation will require the Department of Health and Social Services to prepare an economic effect statement and regulatory flexibility analysis documenting the impact of all department regulations on small business in Alaska.

Department regulatory projects can generally be described as falling into 4 classifications:

1. Regulations necessary to implement new legislation;
(cont. on page 2)

Prepared by: Sherry Hill, Special Assistant — Phone 465-3030
Division: Office of the Commissioner — Date/Time 03/02/2005
Approved by: Joel S. Gilbertson, Commissioner — Date 03/03/2005
Agency: Department of Health and Social Services

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STATE OF ALASKA
2005 LEGISLATIVE SESSION

BILL NO. CSHB 33(L&C)

ANALYSIS CONTINUATION
(cont. from page 1)

1. Regulations to implement cost containment strategies necessary to live within the budget appropriated by the legislature;

2. Regulations necessary to protect the public health and safety of Alaskans; and

3. Regulations necessary to comply with federal law, federal regulations, or federal funding agreements.

The capacity and expertise to prepare the detailed economic analyses envisioned in this legislation does not currently exist within the department. Virtually all department regulations affect small business in some fashion. In the absence of additional resources to comply with this new mandate, delays in implementing time-sensitive cost-containment or public health related regulations would be likely due either to the time required to prepare these analyses or delays resulting from legal challenges as to the adequacy of the analyses.

A typical example would be Medicaid cost-containment regulations where reductions in reimbursement rates to small health care providers is proposed in order to live within legislative appropriations. A public health and safety example might include requirements on small businesses to obtain criminal background checks on employees

DHSS provides many of its services through contractual or grant agreements with small business providers, or direct payment for services such as the Medicaid program. Virtually every regulation change proposed by the department would have some impact on small businesses. Currently on the Department's regulation tracking system there are 24 regulation changes underway for completion by June 30, 2005 and another 26 items already planned for FY06. Some of these proposals are very broad ranging such as cost containment items for the Medicaid program that would impact every medical provider that bills for services under the Medicaid program. Another example is the regulation changes necessary to implement new provider software (AKAIMS) that will be used for management and reporting of both substance abuse and mental health programs. Regulations will provide for standard and updated reporting requirements.

The expertise needed to assess the projected reporting, recordkeeping and other administrative costs of small businesses from this type of regulation change would require analysis by an employee with program knowledge for each department program area, analysis skills, and small business knowledge. This would require additional positions to prepare the economic effect statement and regulatory flexibility analysis for each regulatory proposal. (cont. on page 3)

STATE OF ALASKA
2005 LEGISLATIVE SESSION

BILL NO. CSHB 33(L&C)

ANALYSIS CONTINUATION
(cont. from page 2)

In addition, this type of analysis could well delay implementation of some of the Medicaid provisions or other broad range regulation changes. On cost containment proposals, especially for Medicaid programs, any resulting delay in implementation of regulations could result in significant loss of savings to the Medicaid program.

A Research Analyst III, range 18, and a Medical Assistance Administrator IV (or Project Coordinator), range 21 are proposed to perform these functions. Estimated costs would be as follows:

Personal Services	
Research Analyst III	73.7
MAA IV	88.9
Travel	10.0
Contractual	30.0
Supplies	15.0
TOTAL	217.6

To provide travel for coordination with First Health (Medicaid billing contractor), on-site review of small business requirements, coordination with department staff statewide involved in drafting regulations.

Possible contractual assistance on complex analysis, printing, telephone, computer services, lease space, DOA chargeback for Risk Mgt, HR, Dept of Law consultations, etc.

Workstation including computer and office furniture for new employees, and on-going office supply needs.

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: CSHB 33(L&C)
(H) Publish Date: 3/17/05

Revision Date/Time (Note if correction):
Dept. Affected: DPS
Title "An Act relating to regulations that may govern the conduct of small businesses . . ."
RDU Fire Prevention; AST; Statewd Supp
Component FP Operations; AST Director's Office; AK Records & Identification
Sponsor Representative Meyer
Requester House Labor & Commerce
Component No. 494; 508; 1190

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**********	**********	**********	**********	**********	**********
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type–Do not abbreviate)						
TOTAL	**********	**********	**********	**********	**********	**********

Estimate of any current year (FY2005) cost: 0.0
Check this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This bill requires agencies adopting regulations to consider the impacts of those regulations on small businesses. Agencies must prepare a economic effect statement and a regulatory flexibility analysis as defined in the bill.

At this time, the Department of Public Safety (DPS) is unable to quantify the costs that will be incurred by passage of this legislation. However, the department's regulations do impact small businesses in Alaska, and the bill will have a cost. This fiscal note assumes that the Department of Commerce, Community, and Economic Development (DCCED), as the lead agency, will develop methodologies to assist in estimating the number of small businesses by type that would be impacted by any change in a particular regulation or set of regulations. Discussion of the potential impacts on small businesses by DPS' regulations follow:

Prepared by: Joan Kasson, Program Budget Analyst IV
Phone 907-465-2640
Division Administrative Services
Date/Time 3/3/05 12:00 AM
Approved by: Commissioner William Tandeske
Date 3/3/2005
Agency Department of Public Safety

(Revised 9/23/2004 OMB)

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STATE OF ALASKA
2005 LEGISLATIVE SESSION

BILL NO. CSHB 33(L&C)

ANALYSIS CONTINUATION

The largest impact will be felt by the Division of Fire Prevention, which is responsible for the fire, building, and mechanical safety codes. These codes are lengthy and complex, and are revised approximately every two years after the adoption of revisions to the international codes by the International Code Council. Most changes are not enforced unless a new building is constructed or an existing building undergoes major renovation. Projecting how many small businesses might fall under the new provisions would be difficult. It would also be difficult to determine the cost of any particular provision in the fire, building, or mechanical code, much less the cost of all provisions that may impact any particular project. For example, if automatic fire sprinkler requirements increase, a building owner would incur an initial expense to meet those requirements, but would protect his investment and lower his fire risk over the long run. At the same time, the sprinker supplier and installer would gain revenue from this new business. An economist would be necessary each time the division revised the approximately 1,270 pages of these codes, and the required analyses would add considerable time to the regulations process.

Alaska Records and Identification will also be impacted, although to a lesser degree. This bureau regulates security guard and process server businesses, as well as providers of the handgun training required for an Alaska concealed handgun permit. The bureau also processes all criminal background checks required for employment in certain fields (i.e., school bus drivers, day care providers, security guards, etc.), for which a regulated fee is charged, sometimes paid by the employee, sometimes by the business, sometimes by a government agency, and sometimes by a non-profit organization. The regulations governing these activities are not revised as often, and in the case of security guard, process server, and handgun training, impact a relatively small number of specific private businesses. The fees for the employment related criminal records checks span a wider range of businesses. In either case, however, the department does not have the staff or knowledge to perform the required analyses. Even if DCCED provided general economic consultant assistance, DPS staff time would be required to assist them, and presumably DCCED would charge for their services.

At this time, the department does not believe current Alaska State Trooper regulations impact private businesses significantly, if at all. However, future changes in state law could change this at any time. For example, bills currently under consideration by the Twenty-fourth Alaska State Legislature would regulate the sale of certain chemicals and precursors used in the manufacture of methamphetamine. As these substances are sold by stores of all types across the state, the impact of regulations to implement a law resulting from any of these bills would fall under CSHB 33 WD 'J'.

Without additional information about how this law has been implemented in other states by agencies similar to DPS and what kind of assistance would be provided by DCCED, the department is unable to estimate what the cost will be in Alaska.

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSHB 33(L&C)
(H) Publish Date: 3/7/05

Revision Date/Time (Note if correction):
Dept. Affected: Administration

Title: "An act relaing to the effect of regulations on small businesses"
RDU: All
Component: All

Sponsor: Rep(s). Meyer, Wilson, Kelly & Neuman
Requester: Labor & Commerce
Component No.: 45

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This bill would require the department to prepare an economic effect statement and a regulatory flexibility analysis prior to adopting any regulation that is considered to have an adverse effect on small businesses. The new requirements contained in this bill will increase the work of the department and may slow the regulation adoption process. It is anticipated that the additional work will be absorbed into each division's budgets.

Prepared by: Eric Swanson, Director
Phone (907)465-5655
Division: Administrative Services
Date/Time 3/3/05 11:49 AM
Approved by: Mike Tibbles, Deputy Commissioner
Date 3/3/2005
Agency: Department of Administration

(Revised 9/23/2004 OMB)

COMMITTEE COPY

HB

41

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: January 10, 2005 **FURTHER REFERRALS: Finance**

Date of Committee Action: February 7, 2005

The JUDICIARY Committee considered: **HB 41**

HOUSE BILL NO. 41 **ASSAULT ON SCHOOL EMPLOYEES**

"An Act relating to minimum periods of imprisonment for the crime of assault in the fourth degree committed against an employee of an elementary, junior high, or secondary school who was engaged in the performance of school duties at the time of the assault."

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB 41 (JUD)

For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [ ] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW **FISCAL NOTES** *Assigned by Chief Clerk's Office				
List by Dept(s):	*FN#	Fiscal	Indet.	Zero
LAW				✓
ADM				✓
EED				✓
COR				✓

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	FN#	Fiscal	Indet.	Zero

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
Tom Anderson	ANDERSON	X			
Mary Greenberg	Greenberg			✓	
Gara	Gara			✓	
John Coghill	Coghill			✓	
Kevin McCabe	McCabe			X	
Chair: Beth Kerttula	McGuire	✓			
Chair:					

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB41-LAW-CDCO-1-14-
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: LAW
Title "An Act relating to minimum periods of imprisonment for the crime of assault in the fourth degree..."
RDU CRIMINAL
Component Criminal Justice Litigation
Sponsor Rep. Lynn and Rep. McGuire
Requester House Judiciary
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This bill amends AS 12.55.135(d) by adding a new subsection that imposes a 30 day sentence for assault in the fourth degree if the assault is committed against an employee of an elementary, junior high, or secondary school while the employee was engaged in the performance of school duties. Most assaults in schools are committed by juveniles, and there aren't enough cases to result in a fiscal impact on the Department of Law as a result of passage of this legislation.

Prepared by: Kathryn Daughhetee, Director
Phone 465-3673
Division Administrative Services Division
Date/Time 1/14/05 4:10 PM
Approved by: Kathryn Daughhetee for Gregg D. Renkes, Attorney General
Date 1/14/2005
Agency Department of Law

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 41
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Administration
Title: An act relaing to minimum sentence for assault on school employee...
RDU: Legal and Advocacy Services
Component: Public Defender Agency
Sponsor: Reps. Lynn & McGuire
Requester: House Judiciary
Component No.: 1631

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This bill would require a mandatory minimum sentence for an assault in the fourth degree committed against any school employee. The Public Defender Agency believes this bill will have a minimal fiscal impact on the operations of the Agency.

Prepared by: Linda K. Wilson, Deputy Director
Phone (907)334-4416
Division: Public Defender Agency
Date/Time 1/14/05 9:26 AM
Approved by: Michael Tibbles, Deputy Commissioner
Date 1/14/2005
Agency: Department of Administration

(Revised 9/23/2004 OMB)

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number: HB041-EED-ESS-01-18-05
Bill Version: HB 41
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Education & Early Development
Title: An act relating to minimum periods of imprisonment for the crime of assault in the fourth degree
RDU: ESS
Component: Executive Administration
Sponsor: Rep Lynn & Rep McGuire
Requester: Judiciary
Component No.: 2736

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type–Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) If funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

There is no financial impact related to this legislation with the Department of Education & Early Development. Rather this legislation extends imprisonment to those who would assault an educator while performing duties at the time of the assault.

Prepared by: Eddy Jeans, Director
Phone 465-8679
Division: School Finance
Date/Time 1/18/05 3:31 PM
Approved by: Karen Rehfeld, Deputy Comissioner
Date 1/18/2005
Agency: Education & Early Development

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 41
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Corrections
Title: An Act relating to minimum periods of imprisonment for assault crime against school employees
RDU: Institutional Facilities
Component: Institution Director's Office
Sponsor: Representatives Lynn and McGuire
Requester: Judiciary, Finance
Component No.: 524

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES ( )	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0
Other (Specify Type--Do not abbreviate)	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time	0	0	0	0	0	0
Part-time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

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

Due to the extremely small number of potential cases, the Department of Corrections does not anticipate a fiscal impact from the passage of this legislation.

Prepared by: Sharleen Griffin, Acting Director
Phone 465-4641
Division: Administrative Services
Date/Time 1/20/05 12:57 PM
Approved by: Portia Parker, Deputy Commissioner
Date 1/20/2005
Agency: Department of Corrections

ɔgan after game

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has white teeth."
at Logan "had a bright

- *Anchorage Daily News*

Airman got in the middle of shootout

■ **FATALITY:** Gunfire erupted at trailer court during confrontation.

By LUCAS WALL
Anchorage Daily News

The 19-year-old man shot to death Sunday in a Fairbanks trailer park was an Air Force airman who got in the middle of a shootout involving more than 20 people, including several other airmen and Army soldiers, Alaska State Troopers said Tuesday.

Troopers and three local police departments responded to the Lake View Trailer Court about 12:25 a.m. Terry Hachtel died while en route to Fairbanks Memorial Hospital in a private vehicle.

Seven trooper investigators are working the case with help from State Crime Lab technicians, the Air Force Office of Special Investigations and the Army Criminal Investigation Division.

Troopers spokesman Greg Wilkinson said events began Friday night at a party in a Fairbanks residence. There was a fight there involving military personnel and civilians, but Wilkinson said he didn't know what it was about.

The night after, a group of 20 or so people including Hachtel went to the trailer, which the Lake View manager said is owned by David Causey. Troopers said the owner was home at the time but wouldn't say how many others were with him.

The group wanted revenge for what happened the previous night, Wilkinson said, and several people tried to enter the trailer. Gunfire erupted between those inside and outside the trailer, and Hachtel was struck in the chest.

Wilkinson said he didn't know how many people fired shots or if Hachtel was among the shooters. One firearm was recovered from inside the trailer and one from outside, he said. He didn't know the types, but said neither was a military weapon.

About 10 strings of green and orange yarn were strung up outside the trailer Monday as investigators apparently tried to plot bullet trajectory.

"We're trying to establish who fired first," Wilkinson said.

Troopers hope to conclude their investigation within the next two weeks and forward findings to the Fairbanks district attorney's office.

Lt. Esmeralda Silvestre, an Eielson spokeswoman, said Air Force investigators won't comment on the matter. Hachtel's hometown was listed as Fort Ord, Calif., an Army base 5 miles north of Monterey. He is a native of Roy, Utah.

Hachtel joined the Air Force in May 2000 and had been stationed at Eielson since November 2000, Silvestre said. He worked in the 354th Munitions Flight, responsible for taking trailers of bombs and bullets from storage to the flight line for loading onto aircraft.

The Air Force held a memorial service for Hachtel Tuesday afternoon at the base chapel.

■ The Associated Press contributed to this story. Reporter Lucas Wall can be reached at lwall@adn.com or 257-4321.

1/15/02 ADN

to be broadcast
ɔ, TV, the Internet

annual State of the
ıska Legislature at 7
cast live on several
tions.
ıs can be seen on Alas-
-TV Juneau, KUAC-TV
'V Bethel), the Alaska
ɔystem (ARCS TV) and
Anchorage, and Chan-
otna.
ə, the cable-TV service
also televise the event.
ıs in the Gavel to Gavel
at www.ktoo.org/

ıe broadcast on Alaska
ations and live-
t at www.state.ak.us.

Anchorage Daily News

Mom pleads not guilty to assaulting girl's teacher

■ **CHARGES:** Woman pulled Taku teacher's hair, tore phone off wall, police say.

By NICOLE TSONG
Anchorage Daily News

A mother who police say attacked her daughter's Taku Elementary teacher pleaded not guilty on Tuesday in Anchorage District Court to charges of assault.

Angel S. Carter, 36, of Anchorage faces two counts of fourth-degree misdemeanor assault and one count of malicious destruction of property.

The maximum penalty for one assault charge is one year in jail and a $5,000 fine, while destroying property carries a maximum penalty of six months in jail and a $1,000 fine. Her trial was set for March 11.


Carter

Carter is free on her own recognizance. Judge Stephanie Rhoades also ordered her to stay away from the teacher and Anchorage School District property.

Anchorage police say Carter walked into the fifth-grade classroom on Dec. 13 and asked teacher Bonnie Lucca for documented daily reports on her daughter's behavior. At the time, the teacher was working on an assignment with students. When Lucca told Carter she couldn't speak with her until class ended and asked her to leave, Carter became furious and attacked, pushing Lucca and pulling her hair, police said.

Lucca tried to call for help, but Carter grabbed the classroom telephone and tore it off the wall, police said. Other teachers separated the two.

Lucca suffered minor injuries, including a scratch on her face and bruises on her arm and leg. She could not be reached for comment.

In an interview five days after the incident, Carter said she lost her temper that day because of ongoing issues with Lucca. She said her daughter was having behavioral and academic problems, so she asked Lucca to try daily progress reports for two weeks.

"I was asking for something daily, just for a short period of time, and she would always tell me, 'I don't have time, I'm not going to give this to you.'"

Carter, who also could not be reached for comment Tuesday, said at the time she was sorry the incident happened in front of children.

But "you don't deny a parent from wanting their child to excel," she said.

■ Nicole Tsong can be reached at ntsong@adn.com or 257-4450.

ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair
Rep. Tom Anderson, Vice-Chair
Rep. John Coghill
Rep. Nancy Dahlstrom
Rep. Pete Kott
Rep. Les Gara
Rep. Max Gruenberg

State Capitol, Room 120
Juneau, AK 99801-1182
(907) 465-4990
Fax (907) 465-6592

House Judiciary Committee

Memorandum

To: Leg. Legal

From: Vanessa Tondini, Committee Aide
House Judiciary Committee

Date: February 7, 2005

Re: CS Request

Please create a final draft House Judiciary Committee Substitute for work order # 23-LS0307\A, Hb 41, incorporating the attached one amendment. The bill was passed out of committee today.

If you have any questions, please call me at 4990.
Thank you!

AMENDMENT # 1 - PASSED

OFFERED IN THE
HOUSE JUDICIARY COMMITTEE

BY REP. MCGUIRE

TO: HB 41

Page 2, Line 4:

After "school duties"

Insert "while on school grounds, on a school bus, at a school-sponsored event, or in the administrative offices of a school district"

Gove

Amendment #2 - FAILS

Page 2, line 7 insert:

The court may determine a shorter sentence is ~~not~~ justified upon proof, under AS 12.55.155, that any of the factors in AS 12.55.155(d)(1-17) apply.

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

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

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

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

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

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

(8) *[Repealed, § 42 ch 143 SLA 1982.]*

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

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

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

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

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

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

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

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

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

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

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

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

(h) In this section, "serious provocation" has the meaning given in AS 11.41.115(f).

(§ 12 ch 166 SLA 1978; am §§ 39 — 41 ch 102 SLA 1980; am §§ 19, 20 ch 45 SLA 1982;

Alaska State Legislature

Chair
Military and Veterans Affairs Committee

Member
Education Committee
State Affairs Committee
Labor and Commerce Committee
Joint Armed Services Committee
Econ Dev, Int'l Trade & Tourism

Finance Subcommittees

A Communication From
REPRESENTATIVE BOB LYNN
District 31 Anchorage

Session:
Alaska State Capitol
Juneau, AK 99801-1182

Phone: (907) 465-4931
Fax: (907) 465-4316
Toll Free: (800) 870-4391

Interim:
716 W. 4th Ave., #330
Anchorage, AK 99501-2133

Phone: (907) 269-0205
Fax: (907) 269-0207
Representative_Bob_Lynn@legis.state.ak.us

January 12, 2005

To: Representative Lesil McGuire, Chairman
Judiciary Committee

Fr: Representative Bob Lynn

Re: HB 41
"An Act relating to minimum periods of imprisonment for the crime of assault in the fourth degree committed against an employee of an elementary, junior high, or secondary school who was engaged in the performance of school duties at the time of the assault."

Please schedule HB 41 to be heard in the Judiciary Committee at your earliest convenience. Attached is a copy of the Bill and supporting documents. Thank you.

Alaska State Legislature

Chair
Military and Veterans Affairs Committee

Member
Education Committee
State Affairs Committee
Labor and Commerce Committee
Joint Armed Services Committee
Econ Dev, Int'l Trade & Tourism

Finance Subcommittees

A Communication From
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Representative_Bob_Lynn@legis.state.ak.us

SPONSOR STATEMENT
HB 41

State Statute provides for specific terms of imprisonment for crimes committed against certain public employees, such as peace officers, firefighters, etc., in the performance of their official duties. School employees who, each day, work with our most precious resource, our children, deserve the same level of respect and protection under the law.

This bill revises sentencing guidelines so that an individual convicted as an adult of assault on a school employee during, or because of, the performance of official duties, will receive a *mandatory* minimum term of imprisonment. This would be similar to that imposed upon an individual who assaults a peace officer, fire fighter, correctional employee, emergency medical technician, paramedic, ambulance attendance or other emergency responder engaged in the performance of official duties at the time of the offense.

Schools must be safe for teachers and other school employees, as well as for children. This bill adds a giant step toward that safety. Your support of HB 41 is requested.

Angry parent punches schoolteacher

ATTACK: Mother assaults Fairview Elementary teacher; district will pursue charges.

By KATIE PESZNECKER
Anchorage Daily News

(Published: October 15, 2003)

The mother of a Fairview Elementary School student was cited for misdemeanor assault Monday after she confronted her son's teacher in a school hallway and hit the man several times.

Police said the teacher had broken up a fight between two sixth-graders earlier in the day, placing one, Cassaundra L. West's son, in a "bear hug" to pull him off the other student. Principal Lois Mance called West, 39, and asked her to come to school to discuss the incident, said Superintendent Carol Comeau.

According to police and school officials, West arrived after school hours and attacked the 40-year-old teacher outside his classroom. She punched him three times, police said.

Comeau said she met with the Fairview teacher Tuesday. He was shaken up, she said, and she assured him the district will pursue charges.

"This is absolutely intolerable," Comeau said. "Our employees should feel safe wherever they are, and nobody has a right to assault an Anchorage employee for any reason. Assaulting school personnel is illegal and she will be prosecuted to the full extent of the law."

In an interview Tuesday, West said she didn't go to the school intending to hit her son's teacher. She said she and her son arrived at the school about 3:45 p.m. While they were there, she said, her son told her he had felt "choked" under the teacher's restraint.

West said she felt overcome with anger and went up to the classroom. When she arrived, she said, she asked the teacher if they could talk. She wanted to be polite, she said.

West said the teacher immediately left the room and suggested they go to the office. He was walking away, with West swearing at him, according to police and West's own account.

"Excuse me," West said she called after him. "I want to know why you put your hands on my kid."

She then jumped on him and hit him, West said. A second teacher intervened and the principal came on the scene.

"To put your hands on somebody's child, it doesn't make sense," West said Tuesday evening. "I was tripped out."

School staff members called police.

West had left in her vehicle when officers arrived, McGee said. Police found her at her home and cited her.

The contract for district teachers says they may "use reasonable and necessary physical force on a student to protect the teacher, a student(s) or others from physical injury" and "in any extraordinary case of breach of discipline, to restrain a physically disruptive student."

"Had a student been attacking another student and the teacher stood by and just yelled at the kid, somebody would now hold that teacher responsible for not intervening to prevent injury," said Bob Roses, president of the Anchorage Education Association teachers union. "You have to err on the side of caution."

The teacher did not want to be identified or interviewed, Roses said. "He wants this thing to go away." Police and school officials also refused to identify the teacher.

West has lived in Alaska for eight years and said it hasn't been without trouble. She has been cited several times for minor crimes ranging from assault to theft and said she spent three years in prison on a drug conviction.

She said hitting the teacher was wrong.

"But wasn't it wrong when he touched (my son)?" said West, sipping apple juice at her apartment and wearing a red and white T-shirt that read "Beware! Attitude out of control."

West said she plans to look into filing charges against the teacher.

If someone thinks a teacher has behaved inappropriately, there are procedures in place to investigate that, Roses said.

"The real problem here is the parent coming in and deciding to attack a teacher," he said. "It is never appropriate for any (parent) to take matters into their own hand."

Monday's assault is only the second time an Anchorage teacher has been assaulted at school, district officials say. A Taku Elementary mother in December 2001 assaulted her daughter's teacher in front of a classroom of children. That woman, Angel Carter, was sentenced to 90 days in jail.

Daily News reporter Katie Pesznecker can be reached at kpesznecker@adn.com.

Juneau Empire
Web posted Sunday, December 16, 2001

State Briefs

Parent charged with attacking teacher

ANCHORAGE - The mother of an Anchorage fifth-grader is accused of attacking her daughter's teacher in the classroom.

Angel Carter, 36, has been cited for misdemeanor assault and malicious destruction of property, but has not been taken into custody, police said.

Carter walked into Bonnie Lucca's classroom at Taku Elementary School on Thursday morning and asked the teacher if they could discuss her daughter's grades, police said. At the time, Lucca was working on an assignment with her students.

When Lucca told Carter she couldn't speak with her until class ended and asked her to leave, Carter became furious, pushing the teacher and pulling her hair, police said.

Lucca tried to call for help, but Carter tore the classroom telephone off the wall, police said.

Lucca suffered minor injuries. The School District has banned Carter from school grounds.

Anchorage Daily News (AK)
March 2, 2004
Section: Alaska
Edition: Final
Page: B1

Assault nets jail for mom

SENTENCE: Woman who punched teacher gets 120 days.

TATABOLINE BRANT
Anchorage Daily News
Staff

A mother who punched a Fairview Elementary School teacher last fall outside his classroom was sentenced Friday to 120 days in jail and 10 years of probation -- the maximum probation for misdemeanor assault, court records say. Cassaundra L. West, 39, was also fined $1,000, forbidden to have contact with the fifth-grade teacher she assaulted, and ordered to stay off Anchorage School District property unless given specific permission to the contrary.

The stiff sentence pleased School District Superintendent Carol Comeau, who said the misdemeanor assault was serious. Comeau is pushing for a state law to establish mandatory minimum jail sentences of 30 to 60 days for people convicted of assaulting school employees.

"I very much appreciate the support of the prosecutor and the Police Department in dealing with this issue," Comeau said. "I can't emphasize strongly enough how I want all our school employees to feel safe while they're on duty at work."

The assault took place around 4 p.m. Oct. 13. West had been called to the school after her son got into a fight and was restrained by a fifth-grade teacher. West confronted the instructor outside his classroom, swore at him and then punched him three times, according to police and West.

West said in an interview in October that she did not go to the school intending to hit anyone but that she was overcome with anger when her son said he felt he had been choked by the teacher. Comeau said Monday that district officials investigated the teacher's actions in restraining the boy and that he was found to have done nothing wrong.

West has convictions for drug, larceny and false reporting offenses and a history of losing her temper, court records show.
About six months before the incident at the school, she was arrested for malicious destruction of property for pouring water on the electrical components of her ex-boyfriend's television. She also cut the line to the intercom in his apartment used for buzzing people in, and cracked one of his windows, the documents say. West was ordered to complete an anger management course but never did, court records show.

West could not be reached Monday, but she said in the October interview that hitting the teacher was wrong. "But wasn't it wrong when he touched (my son)?" she said.

Assistant Municipal Attorney Richard Felton said West's sentence was in line with the 90-day jail term Angel Carter was given two years ago after she assaulted a Taku Elementary School teacher.

"I think it's a fair sentence," he said. "There has to be a bright line drawn."

Daily News reporter Tataboline Brant can be reached at tbrant@adn.com or 257-4321.

Juneau Empire
Web posted Wednesday, January 16, 2002

State Briefs

Mom pleads innocent in assault on her daughter's teacher

ANCHORAGE - An Anchorage mother who police say attacked her daughter's teacher pleaded innocent Tuesday in Anchorage District Court to charges of assault.

Angel S. Carter, 36, faces two counts of fourth-degree misdemeanor assault and one count of malicious destruction of property. Her trial is set for March 11.

Carter is free on her own recognizance and has been ordered by a judge to stay away from the teacher and Anchorage School District property.

Anchorage police say Carter walked into the fifth-grade classroom at Taku Elementary School on Dec. 13 and asked teacher Bonnie Lucca for documented daily reports on her daughter's behavior. At the time, the teacher was working on an assignment with students. Lucca told Carter she couldn't speak with her until class ended and asked her to leave, police said. Carter became furious and pushed Lucca and pulled her hair, police said.

Lucca tried to call for help, but Carter grabbed the classroom telephone and tore it off the wall, police said. Other teachers separated the two. Lucca suffered minor injuries, including a scratch and bruises.

Kenai Peninsula Online

Web posted Sunday, March 24, 2002

Anchorage mother sentenced for assaulting fifth-grade teacher

ANCHORAGE (AP) -- A judge sentenced an Anchorage mother to 90 days in jail for assaulting her daughter's teacher in front of a class of fifth-graders.

Prosecutors said Angel Carter in December walked into Bonnie Lucca's classroom at Taku Elementary School and grabbed Lucca after the teacher motioned for her to keep quiet. Carter then hit Lucca and smashed a telephone against her head.

Carter, 36, pleaded guilty Friday to two counts of misdemeanor assault and one count of malicious destruction of property. She also was ordered not to contact teachers without written permission from prosecutors.

"To bring violence in the classroom to children is so horrible, so insidious and unforgivable that I think a serious jail sentence would be warranted," Alaska District Judge Peter Ashman told Carter, whose head remained bowed as he spoke.

Ashman accepted the plea agreement and sentenced Carter to three months in jail. If Carter stays out of trouble during a year of probation, the conviction will be cleared from her record, said municipal attorney Bill Greene.

Although the judge felt Carter's punishment should be more harsh, not accepting the agreement would mean returning the case to trial status. That would postpone an end to the case, he said, and would not be fair to Lucca or her students.

"In real terms, what they'll know is she'll get 90 days in jail, and maybe that's enough," Ashman said.

Carter has no prior record.

During the hearing, she apologized to Superintendent Carol Comeau, Lucca and Taku's principal, Karlyn Daenzer.

"I hope something positive can come out of something negative," she said, turning in her seat to look at them.

Students heard a videotaped apology from Carter in class on Thursday.

During the hearing, Lucca told the judge her version of events.

Earlier that week in December, Carter had approached Lucca, asking for daily progress reports on her daughter. Lucca refused, saying she only had time to do

weekly reports. Substitute teachers for Lucca also told Lucca that Carter tried to intimidate them, and Taku's office staff said Carter had threatened to hurt Lucca.

Another teacher was leading the class Dec. 13 when Carter walked into the classroom with her daughter. Lucca said she motioned with her hand for Carter to stay silent, but the parent came face-to-face with her and started yelling. Then she grabbed Lucca and said they had to go in the hallway, Lucca said.

When Lucca resisted, Carter shoved her into a corner and started hitting her, the teacher said. Lucca yelled for help, and tried to use the telephone to call the police, but Carter ripped it off the wall and hit her with it, she said.

Carter's daughter was moved to another classroom after the incident.

ECS StateNotes

Safety/Crime/Violence

Education Commission of the States • 700 Broadway, Suite 1200 • Denver, CO 80203-3460 • 303-299-3600 • fax 303-296-8332 • www.ecs.org

Teachers: Protections/Limits on Liability

March 1998

ECS Information Clearinghouse

State	Legislation	Limits on teacher action	Assaults against teachers	Other rights of teachers and school employees
AL	HB 470/SB 367; enacted 7-95 S 79 (Acts 94-794); enacted 5-94	Teachers granted immunity, as long as their actions are within the boundaries of local board policy	Warrant of arrest issued against anyone assaulting teacher; offender prosecuted Felony offense	Legal support provided by board; exempt from child-abuse charges when acting within parameters of written board policies; immunity when reporting suspected drug abuse
AR	HB 1422; enacted 4-95		Must be reported by principals to the appropriate local law enforcement agency	
FL	96-293; became law 5-96 without governor's signature		Reclassification of offenses for person committing assault on an elected official or employee of a school district, private school, state-supported school or state university. Any student found to have committed assault on a school employee (as above) – a violation of 784.081, Florida Statutes – shall be expelled and placed in an	Child who attacks school employee to be expelled and placed in an alternative school setting for at least one year

			alternative setting for a minimum of 1 year.	
GA	20-2-1000; enacted 4-95	Teacher free from threat of civil damages when disciplining student, "except for acts or omissions of willful or wanton misconduct"		Legal fees (if teacher/defendant found innocent) paid by plaintiff; county or local board to provide legal support for educator, except in cases when educator violated board policy
IA	Safe Schools Bill; enacted 5-94 HF 2383; enacted 6-94	Teachers may use "reasonable force" to maintain order	Students who commit a violent act against a school employee are to be automatically suspended School board may choose to expel student	Those prosecuting teachers for use of excessive force must present "clear and convincing" evidence of abuse, rather than a "preponderance" of evidence Schools authorized to share information regarding students who wish to transfer school; employees are given leave for injuries incurred during a violent episode at school
IN	enacted 5-95			Legislation allows suspensions once limited to five days to be increased to ten days; Teachers can keep students from their areas of supervision for up to five days; Monies collected from fines to be used to purchase metal detectors and other safety equipment; Schools may enact dress codes
IN	SB 73; enacted 3-96		Punished by school principal by means of up to 120 days of community service or by assigning juvenile court counseling conducted in the presence of a representative of the school corporation; fines assessed for crimes committed with weapons	
MD	HB 298; enacted 1-96		School staff may "take reasonable action necessary to prevent violence"	County board will compensate staff member for medical expenses incurred while breaking up violence; County board will provide legal counsel for staff member who has taken "reasonable action necessary to prevent violence"
MI	PA 158; enacted 6-94		Any person who assaults another person with less than the intent to commit murder or to inflict great bodily harm, with a gun,	A parent of a minor is guilty of a misdemeanor if he or she has custody of the minor, the minor is found in possession of a weapon in a weapon-free school zone, and

			revolver, pistol, knife, iron bar, club, brass knuckles or other dangerous weapon in a weapon-free school zone is guilty of a felony punishable by one or more of the following: 1. imprisonment for not more than four years 2. community service for not more than 150 hours 3. fine of not more than $6,000	the parent is aware that the minor would violate the firearms act or acts to further the violation; The misdemeanor is punishable by one or more of the following: 1. a fine of not more than $2,000 2. community service for not more than 100 hours 3. probation; Anyone in possession of a weapon in a weapon-free school zone is guilty of a misdemeanor punishable by one or more of the following: 1. imprisonment for not more than 93 days 2. community service of not more than 100 hours 3. fine of not more than $2,000
NC	HB 496; enacted 6-95			Offense for assaulting a school bus driver
NC				Amends GS 115c-391 to: 1. permit expulsion of student 14 years or older who had been adjudicated delinquent for committing offense that would be felony if committed by adult 2. require suspension of 365 days for any student who brings firearm onto school property
NH	HB 1286; enacted 6-96		Automatic expulsion for student who assaults teacher	
NV	392.465; enacted 6-94	Corporal punishment prohibited in public schools, when defined as the intentional infliction of physical pain or physical restraint as a disciplinary technique for pupils	Unlawful to threaten or attack teachers within a school building or on school property, in school transportation vehicles and places where pupils or school employees are involved in school-sponsored activities	Teachers may use reasonable force to maintain order; School employee may defend himself if attacked by pupil
	AB 370; enacted 6-94			Provides an additional penalty for felonies committed on school property; prohibits probation for any person convicted of using a firearm to commit a crime; makes various changes relating to criminal gangs to provisions governing education, parole and proceedings in juvenile court; removes the limitation on the civil liability of parents from the delinquent acts of a minor
	AB 385; enacted 6-95		Requires the expulsion or suspension from school of certain pupils committing an	

			a[illegible]ault on an employee of the school	
NY	S 1410; proposed 3-96, pending as of 7-22-96		Would make assaults on teachers and other school employees felonies	Would give educational workers the same protections currently afforded police officers and firefighters
	SB 5157; proposed 3-96, pending as of 7-22-96			Would allow teachers to suspend students for up to five days; would improve instructional mandates for the education of at-risk students; teachers would be authorized to unilaterally identify offensive student behavior, determine guilt, and dispense punishment;
	SB 5160; proposed 3-96, pending as of 7-22-96			Would mandate districts to establish separate schools or set aside norms for instruction of disruptive students, and dictate when students must be assigned to these segregated settings
				School employees granted criminal and civil immunity when reporting suspected incidents of violence;
				District may not take retaliatory action against the employee for reporting such incidents;
				The employee may sue the director for taking retaliatory action
OR	HB 2487A; enacted 7-95		A school superintendent may ask that a student's driving privileges be revoked for bringing a weapon to school, assault, harassment, menacing, use of threat or intimidation	Public schools allowed more latitude in student suspension and discipline;
				Teachers may include considerations of attendance when deciding upon grades;
				Students who bring weapons to school may be expelled for one calendar year
TX	Compact for Safe Schools; active 6-94		Students who perpetrate violent acts removed from the regular school program	
	380.1312, effective 7-96	Teachers allowed reasonable physical force to maintain control		
UT	SB 230; enacted 6-94			Schools notified when pupil is adjudicated for a violent offense;

				school districts must notify principals who must pass on information to **teachers** on a need-to-know basis; Board of education must decide upon process of dissemination of information; Leaders must be notified when a student is discovered on school property or at a school-sponsored event with a dangerous weapon
VA	22.1-279.1.1; enacted 3-95 Notice of Juvenile Arrest; enacted 5-95 HB 1041; proposed 1-96, pending as of 7-22-96 SB 472	**Teachers** forbidden to exercise corporal punishment, except when needed to maintain order		Requires the intake officer to notify the division superintendent whenever a juvenile is arrested and charged with a delinquent act involving death, weapons, drugs, **assaults**, woundings, arson, or burglary Codifies a Virginia Supreme Court decision by granting immunity from civil damages to public school **teachers** when acting in good faith within their scope of employment while supervising, caring for or disciplining students, unless the acts or omission were the result of gross negligence or willful misconduct Same wording as above, ends at "employment"

NEA-ALASKA

Affiliated with the National Education Association

January 19, 2005

Representative Bob Lynn
State Capitol, Room 415
Juneau AK 99801

Dear Representative Lynn:

Parents have always sent their children to school feeling their children are in the safest place they could be away from home. Because of the acts of violence in public schools around the country and in our state in recent years, the safety of a child or a school employee in the school environment has increasingly been questioned.

Safe schools and classrooms are absolutely essential for student success. In 2000, the legislature passed HB 253, sponsored by then Representative Fred Dyson, requiring school disciplinary and safety programs. We commend that effort. We believe more must be done.

One of the issues addressed at past Delegate Assemblies has been to continue the NEA-Alaska position that *NEA-Alaska shall seek legislation making the consequences of an assault of an educational employee the same as though the assault were to occur on a police officer.* Your introduction of House Bill (HB 41) accomplishes this task and is appreciated by the members of NEA-Alaska. **We are in support of HB 41.**

NEA-Alaska looks forward to HB 41 being heard in the committee process and will be ready to testify in support of this legislation.

Sincerely,

Bill

Bill Bjork, President

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JUNEAU OFFICE • 114 Second Street • Juneau, Alaska 99801 • (907) 586-3090 • FAX: (907) 586-2744
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FAIRBANKS NORTH STAR BOROUGH SCHOOL DISTRICT

(907) 452-2000 520 Fifth Avenue Fairbanks, AK 99701-4756 www.northstar.k12.ak.us

January 18, 2005

The Honorable John Coghill, Jr.
The Honorable Bob Lynn
Alaska House of Representatives
State Capitol
Juneau, Alaska 99801

Dear Representatives Coghill & Lynn:

On behalf of the Fairbanks North Star Borough School District, I would like to express my support for HB 41 – Assault on School Employees.

This measure could deter people from seeking out district employees during working hours and/or the performance of school duties, allowing employees to concentrate on our main objective - the education of our children.

If there is any other information you desire or if you have questions, please do not hesitate to contact my office.

Sincerely yours,

Ann E. Shortt, Ed. D.
Superintendent of Schools
/plh

Enclosure

STATE OFFICE
ALASKA PEACE OFFICERS ASSOCIATION

P.O. Box 240106 Anchorage, Alaska 99524-0106 Phone (907) 277-0515 Fax (907) 272-5355

January 14, 2005

Representative Bob Lynn
House of Representatives
State Capitol
Juneau AK 99801-1182

Dear Representative Lynn;

On behalf of the Alaska Peace Officers Association (APOA), I would like to thank you for introducing HB 41, an act relating to the crime of assault.

The APOA State Board's Legislative Committee recently reviewed this proposed legislation and decided to unanimously support this bill.

Your proposed bill calls for more stringent consequences for those who would assault a school employee while in the performance of their official school duties. We believe this to be appropriate as children often view the agression and must also deal with the aftermath of fear and uncertainty. There is no room for violence or intimidation in any school.

We thank you for addressing this issue. Please contact the APOA office in Anchorage at 277-0515 if there is anything our organization can do to assist in the passage of this bill.

Sincerely,

Angella Long
State President

ORIGINAL
IN
MAIL

ASSOCIATION OF ALASKA SCHOOL BOARDS

Advocates for Alaska's Youth

January 19, 2005

Statement of the Association of Alaska School Boards
On HB 41
By Carl Rose, Executive Director

The 51 member school districts of AASB have endorsed mandatory minimum sentences for persons convicted of assault on school employees while they are at work on school property. The 60-day sentences proposed in HB 41 may serve as a deterrent to such incidents. If not, the penalty fits the seriousness of such crimes. Our member districts have worked diligently to make Alaska public schools safe places for our children to attend classes. HB 41 would be another tool that we could use to ensure the safety of our children and our employees.

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Alaska Council of School Administrators

Resolution 04-4

ASSAULT OF SCHOOL EMPLOYEES

WHEREAS, State statute provides for specific terms of imprisonment for crimes committed against certain public employees, peace officers, firefighters, etc. in the performance of their official duties; and

WHEREAS, school employees deserve the same level of respect and protection under the law; now

THEREFORE IT IS RESOLVED that the Alaska Council of School Administrators urges that Alaska's criminal code or sentencing guidelines be revised so that an adult convicted of assault on a school employee during or because of the performance of official duties will receive a mandatory minimum term of imprisonment similar to that imposed upon an adult who assaults a uniformed or otherwise clearly identified peace officer, firefighter, correctional employee, emergency medical technician, paramedic, ambulance attendant or other emergency responder engaged in the performance of official duties at the time of the offense.

Adopted by the Alaska Council of School Administrators (AASA, AAESP, AASSP and ALASBO) October and December 2004.

the victim, there was at least some evidence to support a finding that defendant's feet were not dangerous instruments, and because the defendant's use of a dangerous instrument was therefore in dispute, the trial court erred in denying defendant's conviction for assault in the second degree. Willett v. State, 836 P.2d 955 (Alaska Ct. App. 1992).

Fourth-degree assault as lesser included offense of first-degree sexual assault. — See Nathaniel v. State, 668 P.2d 851 (Alaska Ct. App. 1983).

Fourth-degree assault as a component of sexual assualt. — Under either a sufficiency-of-the-evidence or a double-jeopardy analysis, sexual assault defendant's separate conviction for fourth-degree assault was improper; where the victim testified that defendant's act of running to the door placed her in fear that he was going to lock the door and recommence a sexual assault, the fourth-degree assault was simply a component of the sexual assault, and, moreover, the State did not prove the culpable mental state. David v. State, Ct. App. Op. No. 4862 (File No. A-8408), P.3d (Alaska Ct. App. Apr. 28, 2004).

Fourth-degree assault as lesser included offense of attempted sexual assault in the first degree. — See Baden v. State, 667 P.2d 1275 (Alaska Ct. App. 1983).

Fourth-degree assault as lesser included offense of robbery in the second degree. — Conviction for robbery in the second degree was reversed where there was at least some evidence presented at trial to justify finding that the defendant was guilty of assault but not robbery, so that a lesser included offense instruction on assault was required. Marker v. State, 692 P.2d 977 (Alaska Ct. App. 1984).

Cross-examination of psychiatrist. — Allowing the prosecutor to cross-examine a psychiatrist by reference to defendant's prior convictions for driving while intoxicated was not an abuse of discretion, where defendant, by putting his mens rea directly in issue through the witness's expert testimony, opened the witness up to cross-examination about the basis for his opinion. Jansen v. State, 764 P.2d 308 (Alaska Ct. App. 1988).

Instructions. — In prosecution for fourth-degree assault, since there was evidence from which the jury could infer that defendant believed he had to kick his uncle to prevent harm to his daughter, and that this belief was reasonable, he was entitled to an instruction on defense of a third person as justification for his conduct. David v. State, 698 P.2d 1233 (Alaska Ct. App. 1985).

Trial court did not abuse its discretion in refusing to instruct the jury on the lesser-included offense of assault in the fourth degree at defendant's trial for sexual assault in the first degree, where there was no evidence of a disputed fact to distinguish sexual assault from assault in the fourth degree, and a finding of guilt on the sexual assault offense would have been inconsistent with an acquittal on a fourth-degree assault charge. Dolchok v. State, 763 P.2d 977 (Alaska Ct. App. 1988).

Introduction into evidence of tape recording of incident not erroneous and conviction upheld. — See O'Neill v. State, 675 P.2d 1288 (Alaska Ct. App. 1984).

Conviction and sentence upheld. — See Contreras v. State, 675 P.2d 654 (Alaska Ct. App. 1984).

Sentence found excessive. — Composite sentence of 41 years for convictions of sexual assault in the first degree, kidnapping, three counts of assault in the third degree and one count of assault in the fourth degree was excessive; the defendant should not have received a sentence in excess of 30 years. Patterson v. State, 689 P.2d 146 (Alaska Ct. App. 1984).

Sentence affirmed. — See Afcan v. State, 711 P.2d 1198 (Alaska Ct. App. 1986).

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

Applied in Bidwell v. State, 656 P.2d 592 (Alaska Ct. App. 1983); Jackson v. State, 657 P.2d 405 (Alaska Ct. App. 1983); Huitt v. State, 678 P.2d 415 (Alaska Ct. App. 1984); Olp v. State, 738 P.2d 1117 (Alaska Ct. App. 1987).

Quoted in Maynard v. State, 652 P.2d 489 (Alaska Ct. App. 1982); Michael v. State, 767 P.2d 193 (Alaska Ct. App. 1988).

Stated in State v. Williams, 855 P.2d 1337 (Alaska Ct. App. 1993); Sosa v. State, 4 P.3d 951 (Alaska 2000).

Cited in Folger v. State, 648 P.2d 111 (Alaska Ct. App. 1982); Kelly v. State, 652 P.2d 112 (Alaska Ct. App. 1982); Moxie v. State, 662 P.2d 990 (Alaska Ct. App. 1983); Davis v. State, 684 P.2d 147 (Alaska Ct. App. 1984); Norbert v. State, 718 P.2d 160 (Alaska Ct. App. 1986); Weston v. State, 656 P.2d 1186 (Alaska Ct. App. 1982); Noel v. State, 754 P.2d 280 (Alaska Ct. App. 1988); Alfred v. State, 758 P.2d 130 (Alaska Ct. App. 1988); Jones v. State, 765 P.2d 107 (Alaska Ct. App. 1988); State v. Hernandez, 877 P.2d 1309 (Alaska Ct. App. 1994); Samaniego v. City of Kodiak, 2 P.3d 78 (Alaska 2000); Griffin v. State, 9 P.3d 301 (Alaska Ct. App. 2000); Heaps v. State, Ct. App. Op. No. 1741 (File No. A-7472), P.3d (Alaska Ct. App. 2001); Hutchings v. State, 53 P.3d 1132 (Alaska Ct. App. 2002); Nelson v. State, 68 P.3d 402 (Alaska Ct. App. 2003); Bingaman v. State, 76 P.3d 398 (Alaska Ct. App. 2003); Dayton v. State, 78 P.3d 270 (Alaska Ct. App. 2003).

Collateral references. — Standard for judging conduct of minor motorist charged with gross negligence, recklessness, wilful or wanton misconduct, or the like, under guest statute or similar common-law rule, 97 ALR2d 861.

Sec. 11.41.250. Reckless endangerment. (a) A person commits the crime of reckless endangerment if the person recklessly engages in conduct which creates a substantial risk of serious physical injury to another person.

(b) Reckless endangerment is a class A misdemeanor. (§ 3 ch 166 SLA 1978)

Sec. 11.81.640. Application of AS 11.81.600 — 11.81.630. AS 11.81.600 — 11.81.630 apply only to this title. (§ 10 ch 166 SLA 1978)

NOTES TO DECISIONS

Stated in Neitzel v. State, 655 P.2d 325 (Alaska Ct. App. 1982).
Cited in Brown v. State, 739 P.2d 182 (Alaska Ct. App. 1987); Cole v. State, 828 P.2d 175 (Alaska Ct. App. 1992); Alvarez v. Ketchikan Gateway Borough, 91 P.3d 289 (Alaska Ct. App. 2004).

Article 6. Definitions.

Section
900. Definitions

Sec. 11.81.900. Definitions. (a) For purposes of this title, unless the context requires otherwise,

(1) a person acts "intentionally" with respect to a result described by a provision of law defining an offense when the person's conscious objective is to cause that result; when intentionally causing a particular result is an element of an offense, that intent need not be the person's only objective;

(2) a person acts "knowingly" with respect to conduct or to a circumstance described by a provision of law defining an offense when the person is aware that the conduct is of that nature or that the circumstance exists; when knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless the person actually believes it does not exist; a person who is unaware of conduct or a circumstance of which the person would have been aware had that person not been intoxicated acts knowingly with respect to that conduct or circumstance;

(3) a person acts "recklessly" with respect to a result or to a circumstance described by a provision of law defining an offense when the person is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation; a person who is unaware of a risk of which the person would have been aware had that person not been intoxicated acts recklessly with respect to that risk;

(4) a person acts with "criminal negligence" with respect to a result or to a circumstance described by a provision of law defining an offense when the person fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

(b) In this title, unless otherwise specified or unless the context requires otherwise,

(1) "access device" means a card, credit card, plate, code, account number, algorithm, or identification number, including a social security number, electronic serial number, or password, that is capable of being used, alone or in conjunction with another access device or identification document, to obtain property or services, or that can be used to initiate a transfer of property;

(2) "affirmative defense" means that

(A) some evidence must be admitted which places in issue the defense; and

(B) the defendant has the burden of establishing the defense by a preponderance of the evidence;

(3) "animal" means a vertebrate living creature not a human being, but does not include fish;

(4) "benefit" means a present or future gain or advantage to the beneficiary or to third person pursuant to the desire or consent of the beneficiary;

(5) "building", in addition to its usual meaning, includes any propelled vehicle structure adapted for overnight accommodation of persons or for carrying on busines when a building consists of separate units, including apartment units, offices, or rent rooms, each unit is considered a separate building;

(6) "cannabis" has the meaning ascribed to it in AS 11.71.900(10), (11), and (14);

(7) "conduct" means an act or omission and its accompanying mental state;

(8) "controlled substance" has the meaning ascribed to it in AS 11.71.900(4);

(9) "correctional facility" means premises, or a portion of premises, used for tl confinement of persons under official detention;

(10) "credit card" means any instrument or device, whether known as a credit car credit plate, courtesy card, or identification card or by any other name, issued with without fee by an issuer for the use of the cardholder in obtaining property or services credit;

(11) "crime" means an offense for which a sentence of imprisonment is authorized; crime is either a felony or a misdemeanor;

(12) "crime involving domestic violence" has the meaning given in AS 18.66.990;

(13) "criminal street gang" means a group of three or more persons

(A) who have in common a name or identifying sign, symbol, tattoo or other physic marking, style of dress, or use of hand signs; and

(B) who, individually, jointly, or in combination, have committed or attempted commit, within the preceding three years, for the benefit of, at the direction of, or association with the group, two or more offenses under any of, or any combination of, tl following:

(i) AS 11.41;

(ii) AS 11.46; or

(iii) a felony offense.

(14) "culpable mental state" means "intentionally", "knowingly", "recklessly", or wit "criminal negligence", as those terms are defined in (a) of this section;

(15) "dangerous instrument" means any deadly weapon or anything that, under tl circumstances in which it is used, attempted to be used, or threatened to be used, capable of causing death or serious physical injury;

(16) "deadly force" means force that the person uses with the intent of causing, or us under circumstances that the person knows create a substantial risk of causing, death serious physical injury; "deadly force" includes intentionally discharging or pointing firearm in the direction of another person or in the direction in which another person believed to be and intentionally placing another person in fear of imminent seriou physical injury by means of a dangerous instrument;

(17) "deadly weapon" means any firearm, or anything designed for and capable causing death or serious physical injury, including a knife, an axe, a club, metal knuckle or an explosive;

(18) "deception" means to knowingly

(A) create or confirm another's false impression that the defendant does not believe be true, including false impressions as to law or value and false impressions as intention or other state of mind;

(B) fail to correct another's false impression that the defendant previously has create or confirmed;

(C) prevent another from acquiring information pertinent to the disposition of tl property or service involved;

(D) sell or otherwise transfer or encumber property and fail to disclose a lien, adver claim, or other legal impediment to the enjoyment of the property, whether or not tha impediment is a matter of official record; or

(E) promise performance that the defendant does not intend to perform or knows will not be performed;

(19) "defense", other than an affirmative defense, means that

(A) some evidence must be admitted which places in issue the defense; and

(B) the state then has the burden of disproving the existence of the defense beyond a reasonable doubt;

(20) "defensive weapon" means an electric stun gun, or a device to dispense mace or a similar chemical agent, that is not designed to cause death or serious physical injury;

(21) "drug" has the meaning ascribed to it in AS 11.71.900(9);

(22) "dwelling" means a building that is designed for use or is used as a person's permanent or temporary home or place of lodging;

(23) "explosive" means a chemical compound, mixture, or device that is commonly used or intended for the purpose of producing a chemical reaction resulting in a substantially instantaneous release of gas and heat, including dynamite, blasting powder, nitroglycerin, blasting caps, and nitrojelly, but excluding salable fireworks as defined in AS 18.72.050, black powder, smokeless powder, small arms ammunition, and small arms ammunition primers;

(24) "felony" means a crime for which a sentence of imprisonment for a term of more than one year is authorized;

(25) "fiduciary" means a trustee, guardian, executor, administrator, receiver, or any other person carrying on functions of trust on behalf of another person or organization;

(26) "firearm" means a weapon, including a pistol, revolver, rifle, or shotgun, whether loaded or unloaded, operable or inoperable, designed for discharging a shot capable of causing death or serious physical injury;

(27) "force" means any bodily impact, restraint, or confinement or the threat of imminent bodily impact, restraint, or confinement, "force" includes deadly and nondeadly force;

(28) "government" means the United States, any state or any municipality or other political subdivision within the United States or its territories; any department, agency, or subdivision of any of the foregoing; an agency carrying out the functions of government; or any corporation or agency formed under interstate compact or international treaty;

(29) "highway" means a public road, road right-of-way, street, alley, bridge, walk, trail, tunnel, path, or similar or related facility, as well as ferries and similar or related facilities;

(30) "identification document" means a paper, instrument, or other article used to establish the identity of a person; "identification document" includes a social security card, driver's license, non-driver's identification, birth certificate, passport, employee identification, or hunting or fishing license;

(31) "includes" means "includes but is not limited to";

(32) "incompetent person" means a person who is impaired by reason of mental illness or mental deficiency to the extent that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning that person;

(33) "intoxicated" means intoxicated from the use of a drug or alcohol;

(34) "law" includes statutes and regulations;

(35) "leased" includes "rented";

(36) "metal knuckles" means a device that consists of finger rings or guards made of a hard substance and designed, made, or adapted for inflicting serious physical injury or death by striking a person;

(37) "misdemeanor" means a crime for which a sentence of imprisonment for a term of more than one year may not be imposed;

(38) "nondeadly force" means force other than deadly force;

(39) "offense" means conduct for which a sentence of imprisonment or fine is authorized; an offense is either a crime or a violation;

(40) "official detention" means custody, arrest, surrender in lieu of arrest, or actual or constructive restraint under an order of a court in a criminal or juvenile proceeding, other than an order of conditional bail release;

(41) "official proceeding" means a proceeding heard before a legislative, judicial, administrative, or other governmental body or official authorized to hear evidence under oath;

(42) "omission" means a failure to perform an act for which a duty of performance is imposed by law;

(43) "organization" means a legal entity, including a corporation, company, association, firm, partnership, joint stock company, foundation, institution, government, society, union, club, church, or any other group of persons organized for any purpose;

(44) "peace officer" means a public servant vested by law with a duty to maintain public order or to make arrests, whether the duty extends to all offenses or is limited to a specific class of offenses or offenders;

(45) "person" means a natural person and, when appropriate, an organization, government, or governmental instrumentality;

(46) "physical injury" means a physical pain or an impairment of physical condition;

(47) "police dog" means a dog used in police work under the control of a peace officer;

(48) "possess" means having physical possession or the exercise of dominion or control over property;

(49) "premises" means real property and any building;

(50) "propelled vehicle" means a device upon which or by which a person or property is or may be transported, and which is self-propelled, including automobiles, vessels, airplanes, motorcycles, snow machines, all-terrain vehicles, sailboats, and construction equipment;

(51) "property" means an article, substance, or thing of value, including money, tangible and intangible personal property including data or information stored in a computer program, system, or network, real property, an access device, a domestic pet or livestock regardless of value, choses-in-action, and evidence of debt or of contract; a commodity of a public utility such as gas, electricity, steam, or water constitutes property, but the supplying of such a commodity to premises from an outside source by means of wires, pipes, conduits, or other equipment is considered a rendition of a service rather than a sale or delivery of property;

(52) "public place" means a place to which the public or a substantial group of persons has access and includes highways, transportation facilities, schools, places of amusement or business, parks, playgrounds, prisons, and hallways, lobbies, and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence;

(53) "public record" means a document, paper, book, letter, drawing, map, plat, photo, photographic file, motion picture, film, microfilm, microphotograph, exhibit, magnetic or paper tape, punched card or other document of any other material, regardless of physical form or characteristic, developed or received under law or in connection with the transaction of official business and preserved or appropriate for preservation by any agency, municipality, or any body subject to the open meeting provision of AS 44.62.310, as evidence of the organization, function, policies, decisions, procedures, operations, or other activities of the state or municipality or because of the informational value in it; it also includes staff manuals and instructions to staff that affect the public;

(54) "public servant" means each of the following, whether compensated or not, but does not include jurors or witnesses:

(A) an officer or employee of the state, a municipality or other political subdivision of the state, or a governmental instrumentality of the state, including legislators, members of the judiciary, and peace officers;

(B) a person acting as an advisor, consultant, or assistant at the request of, the direction of, or under contract with the state, a municipality or other political subdivision

f the state, or another governmental instrumentality; in this subparagraph "person" ıcludes an employee of the person;

(C) a person who serves as a member of the board or commission created by statute or y legislative, judicial or administrative action by the state, a municipality or other olitical subdivision of the state, or a governmental instrumentality;

(D) a person nominated, elected, appointed, employed, or designated to act in a apacity defined in (A) — (C) of this paragraph, but who does not occupy the position;

(55) a "renunciation" is not "voluntary and complete" if it is substantially motivated, in 'hole or in part, by

(A) a belief that circumstances exist which increase the probability of detection or pprehension of the defendant or another participant in the criminal enterprise, or which ender more difficult the accomplishment of the criminal purpose; or

(B) a decision to postpone the criminal conduct until another time or to transfer the riminal effort to another victim or another but similar objective;

(56) "serious physical injury" means

(A) physical injury caused by an act performed under circumstances that create a ubstantial risk of death; or

(B) physical injury that causes serious and protracted disfigurement, protracted npairment of health, protracted loss or impairment of the function of a body member or rgan, or that unlawfully terminates a pregnancy;

(57) "services" includes labor, professional services, transportation, telephone or other ɔmmunications service, entertainment, including cable, subscription, or pay television r other telecommunications service, the supplying of food, lodging, or other accommoations in hotels, restaurants, or elsewhere, admission to exhibitions, the use of a ɔmputer, computer time, a computer system, a computer program, a computer network, r any part of a computer system or network, and the supplying of equipment for use;

(58) "sexual contact" means

(A) the defendant's

(i) knowingly touching, directly or through clothing, the victim's genitals, anus, or ɛmale breast; or

(ii) knowingly causing the victim to touch, directly or through clothing, the defendant's r victim's genitals, anus, or female breast;

(B) but "sexual contact" does not include acts

(i) that may reasonably be construed to be normal caretaker responsibilities for a ɔild, interactions with a child, or affection for a child;

(ii) performed for the purpose of administering a recognized and lawful form of 'eatment that is reasonably adapted to promoting the physical or mental health of the erson being treated; or

(iii) that are a necessary part of a search of a person committed to the custody of the 'epartment of Corrections or the Department of Health and Social Services;

(59) "sexual penetration"

(A) means genital intercourse, cunnilingus, fellatio, anal intercourse, or an intrusion, owever slight, of an object or any part of a person's body into the genital or anal opening f another person's body; each party to any of the acts described in this subparagraph is ɔnsidered to be engaged in sexual penetration;

(B) does not include acts

(i) performed for the purpose of administering a recognized and lawful form of 'eatment that is reasonably adapted to promoting the physical health of the person ɛing treated; or

(ii) that are a necessary part of a search of a person committed to the custody of the epartment of Corrections or the Department of Health and Social Services;

(60) "solicits" includes "commands";

(61) "threat" means a menace, however communicated, to engage in conduct describe in AS 11.41.520(a)(1) — (7) but under AS 11.41.520(a)(1) includes all threats to inflic physical injury on anyone;

(62) "violation" is a noncriminal offense punishable only by a fine, but not b imprisonment or other penalty; conviction of a violation does not give rise to an disability or legal disadvantage based on conviction of a crime; a person charged with violation is not entitled

(A) to a trial by jury; or

(B) to have a public defender or other counsel appointed at public expense to represen the person;

(63) "voluntary act" means a bodily movement performed consciously as a result c effort and determination, and includes the possession of property if the defendant wa aware of the physical possession or control for a sufficient period to have been able t terminate it. (§ 10 ch 166 SLA 1978; am §§ 29 — 32 ch 102 SLA 1980; am §§ 12 — 1 ch 45 SLA 1982; am §§ 12 — 15 ch 143 SLA 1982; am § 2 ch 54 SLA 1983; am § 5 ch 7 SLA 1984; am § 3 ch 114 SLA 1984; am §§ 1, 2 ch 116 SLA 1984; am § 1 ch 171 SL 1990; am § 10 ch 59 SLA 1991; am § 3 ch 91 SLA 1991; am § 5 ch 60 SLA 1996; am § ch 86 SLA 1998; am §§ 4, 5 ch 33 SLA 2000; am §§ 16, 17 ch 65 SLA 2000; am § 22 c 35 SLA 2003; am § 3 ch 139 SLA 2004)

Revisor's notes. — Subsection (b) was reorganized in 1983, 1991, 1996, 1998, 2000 and 2004 to maintain alphabetical order. Paragraph (3) was enacted as paragraph (63) and renumbered in 2004.

Cross references. — See general definitions in AS 01.10.060.

For legislative purpose of the 1991 amendment to paragraph (b)(35) (now (b)(40)), see § 1, ch. 91, SLA 1991 in the Temporary and Special Acts.

Effect of amendments. — The 1998 amendment, effective June 13, 1998, added paragraph (b)(10) (now (b)(12)).

The first 2000 amendment, effective August 9, 2000, added items (b)(57)(B)(iii) and (b)(58)(B)(ii) [now (b)(58)(B)(iii) and (b)(59)(B)(ii)] and made related stylistic changes.

The second 2000 amendment, effective May 23, 2000, in subsection (b) substituted "an access device" for "a credit card" near the middle of paragraph (50) [now (51)] and added paragraphs (1) and (29) [now (30)].

The 2003 amendment, effective June 3, 2003, mad stylistic changes in paragraph (b)(58) [now paragrap (b)(59)].

The 2004 amendment, effective September 2 2004, inserted paragraph (b)(3).

Editor's notes. — Section 12, ch. 60, SLA 199 provides that the definition of "criminal street gang as added by § 5, ch. 60, SLA 1996, applies "to an ac that occurs on or after September 1, 1996, except tha references to previous offenses refer to acts occurrin before, on, or after September 1, 1996."

For related article, see Stern, Consciousness c Wrongdoing: Mens Rea in Alaska, 1984 Alaska La Rev. 1.

Legislative history reports. — For a report o Chapter 102, SLA 1980 (HCS CSSB 511), see 198 Senate Journal Supplement, No. 44, May 29, 1980, o 1980 House Journal Supplement, No. 79, May 2 1980.

NOTES TO DECISIONS

Annotator's notes. — Many of the cases in the notes below were decided under former AS 11.75.030, which provided for the division of crimes into felonies and misdemeanors.

Mere civil negligence not basis for criminal conviction. — The definitions contained in the Revised Criminal Code for both recklessness (paragraph (a)(3) of this section) and criminal negligence (paragraph (a)(4) of this section), which require "gross deviation" from the standard of care that "a reasonable person would observe in the situation" were expressly formulated to preclude mere civil negligence from forming the basis for a criminal conviction. Andrew v. State, 653 P.2d 1063 (Alaska Ct. App. 1982).

Paragraph (a)(3) provision as to intoxication is constitutional. — Due process is not violated by the provision in paragraph (a)(3) that intoxication is not to be considered in determining recklessness with regard to circumstances surrounding one's conduct. Neitzel v. State, 655 P.2d 325 (Alaska Ct. App. 1982).

Applicability to second-degree murder statute. — The term "intentionally" as used in AS 11.41.110(a)(2) is not used "with respect to a result" and thus is not governed by the definition of "intentionally" in AS 11.81.900(a)(1), but should be given the meaning assigned to "knowingly" in AS 11.41.110(a)(2) with respect to conduct ("performance of an act which results in death"). Neitzel v. State, 655 P.2d 325 (Alaska Ct. App. 1982).

Criminally negligent homicide scheme not unconstitutionally vague. — Alaska's criminally negligent homicide scheme proscribed by this section and AS 11.41.130(a) is not unconstitutionally vague with respect to, inter alia, the term "gross deviation", as its meaning is well within the comprehension of the average juror. Panther v. Hames, 991 F.2d 576 (9th Cir. 1993).

Applicability to robbery statute. — Court did not err, in defendant's robbery case, by denying his motion to dismiss where defendant grabbed the vic

tim's purse and tugged until she fell down, because that conduct constituted bodily impact. Butts v. State, 53 P.3d 609 (Alaska Ct. App. 2002).

Applicability to theft by receiving statute. — The definition of recklessness in paragraph (a)(3) of this section is applicable to term "reckless disregard" in AS 11.46.130(a), the theft by receiving statute. Andrew v. State, 653 P.2d 1063 (Alaska Ct. App. 1982).

No decriminalization of escapes by 1978 criminal code revision. — When the criminal code was revised in 1978, the commentary stated that the revised code made three significant changes in the escape laws; there was no mention of the decriminalization of escapes by persons confined in lieu of bail, and the absence of such a comment indicates the legislature's intent not to change the effect of the law in that regard. Andrejko v. State, 695 P.2d 246 (Alaska Ct. App. 1985).

Only anonymous phone calls without any legitimate intent prohibited. — When AS 11.61.120(a)(4) (harassment by making anonymous telephone call) is read in conjunction with paragraph (a)(1) of this section, the statute is theoretically broad enough to punish political speech or other legitimate communication upon proof that one of the speaker's subsidiary motives was to annoy the listener. Because the scope of the statute is potentially so broad, AS 11.61.120(a)(4) must be interpreted to prohibit telephone calls only when the call has no legitimate communicative purpose, when the caller's speech is devoid of any substantive information, and the caller's sole intention is to annoy or harass the recipient. McKillop v. State, 857 P.2d 358 (Alaska Ct. App. 1993).

"Knowingly". — One who remains "deliberately ignorant of illegal activity," is necessarily "aware of a substantial probability of its existence," and so, acts "knowingly" under subdivision (a)(2). Dawson v. State, 894 P.2d 672 (Alaska Ct. App. 1995).

A defendant who inadvertently encounters another person in a public place has not "knowingly" approached or appeared within sight of that person. Petersen v. State, 930 P.2d 414 (Alaska Ct. App. 1996).

A conviction for third-degree weapons misconduct under AS 11.61.200(a)(6) does not require the State to present evidence that defendant possessed the handgun with the specific intent that the weapon be untraceable. Collins v. State, 977 P.2d 741 (Alaska Ct. App. 1999).

If a person is subject to a protective order containing a provision listed in AS 18.66.100(c)(1)-(7), when a person commits the crime of violating the protective order, the state must prove that the defendant acted "knowingly" as that term is defined in paragraph (a)(2). Strane v. State, 16 P.3d 745 (Alaska Ct. App. 2001).

Under the intoxication clause of paragraph (a)(2), unawareness caused by intoxication is deemed to be awareness for purposes of assessing whether a defendant acted "knowingly." Hutchison v. State, 27 P.3d 774 (Alaska Ct. App. 2001).

Benefit. — A public defender's agreement to accept meals, marijuana, a trip and a promise to build a cabin from a criminal defendant fell within the definition of "benefit" for purposes of the bribery statute, AS 11.56.110. Bachlet v. State, 941 P.2d 200 (Alaska Ct. App. 1997).

"Building." — Walk-in cooler in store building was not a separate unit, but a storage room within the single-business structure. Arabie v. State, 699 P.2d 890 (Alaska Ct. App. 1985).

Paragraph (b)(3) provides examples of what types of units are "separate units": apartments, offices, and rented rooms. This list is illustrative but not definitive, and does not exhaust the list of what would be considered "separate units" for purposes of burglary. Pushruk v. State, 780 P.2d 1044 (Alaska Ct. App. 1989).

There is nothing in the statutory definition of building, or the examples given of separate units which would require separate owners, in order to have separate units. Pushruk v. State, 780 P.2d 1044 (Alaska Ct. App. 1989).

A person who rents out a portion of his residence can reserve a right of privacy in certain rooms of the house and these rooms can constitute separate buildings within the meaning of paragraph (b)(3). A renter who breaks into those rooms and steals property from them commits burglary. Wesolic v. State, 837 P.2d 130 (Alaska Ct. App. 1992).

Freezer trailer which defendants forcibly entered and from which they took bread products, which was standing, self-enclosed metal structure, fit the definition of a "building." Austin v. State, 883 P.2d 992 (Alaska Ct. App. 1994).

Although the statute does not define the terms "adapted" and "for carrying on business," the theft of a fax machine from a real estate agent's unoccupied automobile might constitute burglary. United States v. Sparks, 265 F.3d 825 (9th Cir. 2001).

Pursuant to subsection (b)(4), unlawful entry of a propelled vehicle, with intent to commit a crime in that vehicle, constitutes the crime of burglary only if the propelled vehicle is adapted for overnight accommodation of persons, or for carrying on business. Timothy v. State, 90 P.3d 177 (Alaska Ct. App. 2004).

Terms "building" and "premises" in AS 11.46.310, paragraph (b)(3) of this section and 11.46.350 are used interchangeably. Arabie v. State, 699 P.2d 890 (Alaska Ct. App. 1985).

Credit card numbers. — Policy considerations and case law support the conclusion that a credit card number is included in the definition of "credit card." State v. Morgan, 985 P.2d 1022 (Alaska Ct. App. 1999).

"Dangerous instrument". — While feet are not dangerous instruments per se, they may become so, however they are shod, if used in such a way as to be capable of causing death or serious physical injury. Wettanen v. State, 656 P.2d 1213 (Alaska Ct. App. 1983).

Before a hand may be deemed a "dangerous instrument," the state must present particularized evidence from which reasonable jurors could conclude beyond a reasonable doubt that the manner in which the hand was used in the case at issue posed an actual and substantial risk of causing death or serious physical injury, rather than a risk that was merely hypothetical or abstract. Konrad v. State, 763 P.2d 1369 (Alaska Ct. App. 1988).

The use of a dangerous instrument is not necessarily an element of manslaughter, even though it is safe to assume that the vast majority of manslaughter cases will involve the use of an object or implement that falls within the definition of a dangerous instrument. Krasovich v. State, 731 P.2d 598 (Alaska Ct. App. 1987).

The use of a dangerous instrument is characteristic of manslaughter, and the automobile is a dangerous instrument characteristically used in committing the offense. Krasovich v. State, 731 P.2d 598 (Alaska Ct. App. 1987).

A knife meets the definition of "dangerous instru-

Article 5. General Principles of Criminal Liability.

Sec. 11.81.600. General requirements of culpability. (a) The minimal requirement for criminal liability is the performance by a person of conduct that includes a voluntary act or the omission to perform an act that the person is capable of performing.

(b) A person is not guilty of an offense unless the person acts with a culpable mental state, except that no culpable mental state must be proved

(1) if the description of the offense does not specify a culpable mental state and the offense is

(A) a violation; or

(B) designated as one of "strict liability"; or

(2) if a legislative intent to dispense with the culpable mental state requirement is present. (§ 10 ch 166 SLA 1978; am § 27 ch 102 SLA 1980)

Legislative history reports. — For a report on Chapter 102, SLA 1980 (HCS CSSB 511), see 1980 Senate Journal Supplement, No. 44, May 29, 1980, or 1980 House Journal Supplement, No. 79, May 2 1980.

NOTES TO DECISIONS

Culpable mental state requirement. — Subsection (b) generally requires criminal acts to be performed with an accompanying culpable mental state, but the provision allows exceptions when the legislature has clearly expressed its intent to apply strict liability to a specific element of a crime. Noblit v. State, 808 P.2d 280 (Alaska Ct. App. 1991).

Since no portion of AS 11.56.740 expressly designates the crime as one of strict liability, and the wording of the statute gives no other indication that the legislature wished to dispense with proof of a culpable mental state, the rule of statutory construction obliged the appellate court to construe the statute as requiring proof of culpable mental state. Strane v. State, 981 P.2d 122 (Alaska Ct. App. 1999).

For discussion of culpable mental states relating to violation of fish and game laws, see Reynolds v. State, 655 P.2d 1313 (Alaska Ct. App. 1982).

Applied in Bell v. State, 668 P.2d 829 (Alaska Ct. App. 1983).

Quoted in Neitzel v. State, 655 P.2d 325 (Alaska Ct. App. 1982); Hart v. State, 702 P.2d 651 (Alaska Ct. App. 1985); Kinney v. State, 927 P.2d 1289 (Alaska Ct. App. 1996); State v. Simpson, 53 P.3d 165 (Alaska Ct. App. 2002).

Stated in Ortberg v. State, 751 P.2d 1368 (Alaska Ct. App. 1988).

Cited in Allen v. State, 759 P.2d 541 (Alaska Ct. App. 1988); Gudmundson v. State, 763 P.2d 13[illegible] (Alaska Ct. App. 1988); R.J M. v. State, 940 P.2d 8[illegible] (Alaska 1997); Alvarez v. Ketchikan Gateway Borough, 91 P.3d 289 (Alaska Ct. App. 2004).

Sec. 11.81.610. Construction of statutes with respect to culpability. (a) *[Repealed, § 44 ch 102 SLA 1980.]*

(b) Except as provided in AS 11.81.600(b), if a provision of law defining an offense does not prescribe a culpable mental state, the culpable mental state that must be proved with respect to

(1) conduct is "knowingly"; and

(2) a circumstance or a result is "recklessly."

(c) When a provision of law provides that criminal negligence suffices to establish a element of an offense, that element is also established if a person acts intentionally, knowingly, or recklessly. If acting recklessly suffices to establish an element, that element also is established if a person acts intentionally or knowingly. If acting knowingly suffices to establish an element, that element is also established if a person acts intentionally. (§ 10 ch 166 SLA 1978; am § 44 ch 102 SLA 1980)

NOTES TO DECISIONS

Subsection (b) applies to AS 11.51.120. Taylor v. State, 710 P.2d 1019 (Alaska Ct. App. 1985).

Subsection (b) applies to second-degree criminal trespass statute. — Since AS 11.46.330 is silent regarding mens rea, this section is implicated. Johnson v. State, 739 P.2d 781 (Alaska Ct. App. 1987).

Application of subsection (b) to second-degree murder statute. — Since AS 11.41.110(a)(2) does not specifically establish a mental element for the result ("death") or the surrounding circumstances ("under circumstances manifesting an extreme indifference to the value of human life") involved in second-degree murder, a "reckless" mental state is to be imputed to those two factors based on application of subsection (b) of this section. Neitzel v. State, 655 P.2d 325 (Alaska Ct. App. 1982).

Subsection (b) inapplicable to fish and game offenses. — Subsection (b) does not govern the interpretation of offenses defined in Title 16: For fish and game offenses under that title and its regulations, civil negligence, rather than recklessness, is the default culpable mental state to be applied. Orr-Hickey v. State, 973 P.2d 612 (Alaska Ct. App. 1999).

For discussion of culpable mental states relating to violation of fish and game laws, see Reynolds v. State, 655 P.2d 1313 (Alaska Ct. App. 1982).

Applied in Afcan v. State, 711 P.2d 1198 (Alaska Ct. App. 1986).

Quoted in Gregory v. State, 717 P.2d 428 (Alaska Ct. App. 1986); Michael v. State, 767 P.2d 193 (Alaska Ct. App. 1988); Cole v. State, 828 P.2d 175 (Alaska Ct. App. 1992); Knix v. State, 922 P.2d 913 (Alaska Ct. App. 1996).

Stated in Ortberg v. State, 751 P.2d 1368 (Alaska Ct. App. 1988); Strane v. State, 16 P.3d 745 (Alaska Ct. App. 2001).

Cited in Baden v. State, 667 P.2d 1275 (Alaska Ct. App. 1983); Allen v. State, 759 P.2d 541 (Alaska Ct. App. 1988); Strane v. State, 981 P.2d 122 (Alaska Ct. App. 1999); Riley v. State, 60 P.3d 204 (Alaska Ct. App. 2002).

Sec. 11.81.615. Offenses defined by age or value. Whenever a provision of law defining an offense requires a determination of the age of the victim or the value of property or services, it is not a defense to the lowest class of offense established by the evidence that the age of the victim is less than the age which would make the offense a higher class of offense or that the value of the property or services exceeds the value which would make the offense a higher class of offense, and a person may be charged and convicted accordingly. (§ 10 ch 166 SLA 1978)

NOTES TO DECISIONS

Sexual offender convicted of lesser degree of offense. — The legislature intended this section to permit a court or jury to convict a sexual offender of a lesser degree of offense despite the fact that the evidence reasonably (or even convincingly) demonstrates that the defendant committed a greater degree of offense because the victim was younger than alleged. Thiessen v. State, 844 P.2d 1137 (Alaska Ct. App. 1993).

Restitution based on actual loss. — Where a defendant is charged with a lesser offense but the evidence establishes that he committed a greater offense, a restitutionary award based on the actual loss to the victim is appropriate, even though the loss exceeds the maximum property-value figure which defines the lesser offense. Fee v. State, 656 P.2d 1202 (Alaska Ct. App. 1982).

Sec. 11.81.620. Effect of ignorance or mistake upon liability. (a) Knowledge, recklessness, or criminal negligence as to whether conduct constitutes an offense, or knowledge, recklessness, or criminal negligence as to the existence, meaning, or application of the provision of law defining an offense, is not an element of an offense unless the provision of law clearly so provides. Use of the phrase "intent to commit a crime", "intent to promote or facilitate the commission of a crime", or like terminology in a provision of law does not require that the defendant act with a culpable mental state as to the criminality of the conduct that is the object of the defendant's intent.

(b) A person is not relieved of criminal liability for conduct because the person engages in the conduct under a mistaken belief of fact, unless

(1) the factual mistake is a reasonable one that negates the culpable mental state required for the commission of the offense;

(2) the provision of law defining the offense or a related provision of law expressly provides that the factual mistake constitutes a defense or exemption; or

(3) the factual mistake is a reasonable one that supports a defense of justification as provided in AS 11.81.320 -- 11.81.430. (§ 10 ch 166 SLA 1978; am § 28 ch 102 SLA 1980)

HB

54

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: January 10, 2005 **FURTHER REFERRALS: Finance**

Date of Committee Action: April 1, 2005

The JUDICIARY Committee considered: **HB 54**

HOUSE BILL NO. 54 **BAIL REVIEW**

"An Act relating to bail review."

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB 54 (JUD)
For Senate Bills with new title: [ ] Technical Title [ ] New Title: HCR_____ **[ ] Same Title [X] New Title**

[ ] attach amendments
[ ] add new referral to _____Committee
[ ] Letter of Intent_____Committee

List of Abbrev for Depts.:
ADM
CED
COR
CRT
EED
DEC
DFG
GOV
HSS
LEG
LAW
LWF
MVA
DNR
DPS
REV
DOT
UA

NEW **FISCAL NOTES** *Assigned by Chief Clerk's Office				
List by Dept(s):	***FN#**	**Fiscal**	**Indet.**	**Zero**
CRT				✓
COR				✓
LAW				✓

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	**FN#**	**Fiscal**	**Indet.**	**Zero**

Signing with recommendations	**Printed Last Name**	**DP**	**DNP**	**NR**	**AM**
	ANDERSON	X			
	WAHLSTROM	X			
	COGHILL	✓			
Chair:	MCGUIRE	X			
Chair:					

ALASKA STATE LEGISLATURE

Rep. Lesil McGuire, Chair
Rep. Tom Anderson, Vice-Chair
Rep. John Coghill
Rep. Nancy Dahlstrom
Rep. Pete Kott
Rep. Les Gara
Rep. Max Gruenberg

State Capitol, Room 120
Juneau, AK 99801-1182
(907) 465-4990
Fax (907) 465-6592

House Judiciary Committee

Memorandum

To: Leg. Legal

From: Vanessa Tondini, Committee Aide
House Judiciary Committee

Date: April 1, 2005

Re: CS Request

Please create a final draft House Judiciary Committee Substitute for work order # 24-LS0271\Y, HB 54, incorporating the attached amendment, 24-LS0271\Y.2. The bill was passed out of committee today.

If you have any questions, please call me at 4990.
Thank you!

24-LS0271\Y
Luckhaupt
3/21/05

CS FOR HOUSE BILL NO. 54( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - FIRST SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES SAMUELS AND STOLTZE, Hawker

A BILL

FOR AN ACT ENTITLED

"An Act relating to bail review; relating to the introduction of the victim and the defendant or minor to the jury; amending Rule 27, Alaska Rules of Criminal Procedures; amending Rule 21, Alaska Delinquency Rules; and providing for an effective date."

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

*** Section 1.** AS 12.30.020 is amended by adding a new subsection to read:

(j) If a person remains in custody after review of conditions by a judicial officer under (f) of this section, a subsequent review of conditions may be held at the request of the person. Unless the prosecuting authority stipulates otherwise, a judicial officer may not schedule a bail review hearing under this subsection unless

(1) the person provides to the court and the prosecuting authority a written statement that information not considered at the previous review will be presented, and includes a description of the new information;

(2) the prosecuting authority has at least 48 hours' notice before the

New Text Underlined [DELETED TEXT BRACKETED]

time set for the review requested under this subsection; and

(3) at least 48 hours have elapsed between the previous review and the time set for the review requested under this subsection.

*** Sec. 2.** AS 12.30.030(a) is amended to read:

(a) A person who remains in custody after a review provided for in AS 12.30.020(f) **or (j)** may move the court having original jurisdiction over the offense to amend the order. The motion shall be determined promptly.

*** Sec. 3.** AS 12.45 is amended by adding a new section to article 1 to read:

Sec. 12.45.015. Introduction of victim and defendant to jury. (a) During jury selection or as part of an opening statement at trial, the prosecuting attorney may introduce the victim to the jury, and the attorney for the defendant may introduce the defendant to the jury.

(b) In this section, "victim" has the meaning given in AS 12.55.185.

*** Sec. 4.** AS 47.12.110 is amended by adding a new subsection to read:

(f) During jury selection or as part of an opening statement at the hearing, the attorney representing the department may introduce the victim to the jury, and the attorney for the minor may introduce the minor to the jury.

*** Sec. 5.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENT. Section 3 of this Act has the effect of amending Rule 27, Alaska Rules of Criminal Procedure, by changing the order of proceedings of a trial before a jury.

*** Sec. 6.** The uncodified law of the State of Alaska is amended by adding a new section to read:

INDIRECT COURT RULE AMENDMENT. Section 4 of this Act has the effect of amending Rule 21, Alaska Delinquency Rules, by allowing the introduction of the victim and the minor at an adjudication hearing.

*** Sec. 7.** This Act takes effect immediately under AS 01.10.070(c).

24-LS0271\Y.2
Luckhaupt
3/30/05

AMENDMENT - PASSED

OFFERED IN THE HOUSE BY REPRESENTATIVE GRUENBERG

TO: CSHB 54( ), Draft Version "Y"

Page 2, following line 27:

Insert a new bill section to read:

"* **Sec. 7.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. AS 12.45.015, added by sec. 3 of this Act, takes effect only if sec. 5 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

* **Sec. 8.** The uncodified law of the State of Alaska is amended by adding a new section to read:

CONDITIONAL EFFECT. AS 47.12.110(f), added by sec. 4 of this Act, takes effect only if sec. 6 of this Act receives the two-thirds majority vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska."

Renumber the following bill section accordingly.

REPRESENTATIVE RALPH SAMUELS

HOUSE DISTRICT 29

CS HB 54
Sponsor Statement

"An Act relating to bail review; relating to the introduction of the victim and the defendant or minor to the jury; amending Rule 27, Alaska Rules of Criminal Procedures; amending Rule 21, Alaska Delinquency Rules; and providing for an effective date."

Current Alaska law says that a person charged with an unclassified crime or a class A felony may make an application to the court to review the bail conditions and argue for reductions for the amount of bail every 24 hours without limitation. This poses logistical problems for all parties involved, given the short amount of time to prepare for each new bail hearing.

HB 54 establishes three requirements designed to alleviate calendaring strain on the court system and the district attorney's office while also protecting crime victims' rights and reducing same day notice of hearings. First, in order to calendar a subsequent bail hearing, the accused must submit in writing, that there exists new information for the court's consideration that was not considered at prior bail hearings. Second, the district attorney is given 48 hours notice in which to notify the victim of the hearing. Finally, hearings may not be set everyday; rather there will be a 48-hour period between calendared bail hearings. These provisions balance the rights of the accused with the rights of crime victims and accommodate for the schedules of both the district attorney's office and the court system.

HB 54 also outlines by statute that a victim may be introduced to a jury during the opening statement at a trial or during the jury selection process. This is to ensure that the courts recognize the right of the prosecution to introduce the victim at the appropriate time. The bill, if passed, would cause indirect court rule changes to Rule 27, Criminal Procedure and Rule 21, Delinquency Rules.

Email: Representative_Ralph_Samuels@legis.state.ak.us
Session: Alaska State Capitol, Juneau, Alaska 99801-1182 • Phone: (907) 465-2095 Fax: (907) 465-3810
Interim: 716 W. 4th Ave., Anchorage, Alaska 99501-2133 • Phone: (907) 269-0240 Fax: (907) 269-0242

STATE OFFICE
ALASKA PEACE OFFICERS ASSOCIATION

P.O. Box 240106 Anchorage, Alaska 99524-0106 Phone (907) 277-0515 Fax (907) 272-5355

February 11, 2005

Representative Ralph Samuels
House of Representatives
State Capitol
Juneau AK 99801-1182

Dear Representative Samuels:

On behalf of the Alaska Peace Officers Association (APOA), I would like to thank you for introducing House Bill 54, relating to bail review.

The APOA State Board and Legislative Committee recently reviewed this proposed legislation and decided to unanimously support this bill.

The proposed bill closes a loophole and helps to stem frivolous bail hearings. The courts are already under tremendous pressure in trying to schedule the ever-burgeoning case load. This legislation is a step toward easing the court calendar.

Thank you for addressing this issue. Please contact the APOA office in Anchorage at 277-0515 if there is anything our organization can do to assist in the passage of this bill.

Sincerely,

Angella Long
State President

cc: Rep. Bill Stoltze

BwA in bill packet -

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 54
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected:

Title: Bail Review
BRU: Alaska Court System
Component: Trial Courts

Sponsor: Representatives Samuels and Stoltz
Requester:
Component No.: 768

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

The court system does not anticipate any fiscal impact from the passage of HB 54.

Prepared by: Douglas Wooliver, Administrative Attorney — Phone 463-4750
Division: Alaska Court System — Date/Time 3/24/05 9:08 AM
Approved by: Doug Wooliver for Stephanie Cole, Administrative Director — Date 3/24/2005
Agency: Alaska Court System

(Revised 9/2002 OMB)

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 54
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Corrections
Title "An act relating to bail review."
RDU Institutional Facilities
Component Institution Director's Office
Sponsor Representatives Samuels, Stoltze, Hawker
Requester Judiciary, Finance
Component No. 524

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services	0.0	0.0	0.0	0.0	0.0	0.0
Travel	0.0	0.0	0.0	0.0	0.0	0.0
Contractual	0.0	0.0	0.0	0.0	0.0	0.0
Supplies	0.0	0.0	0.0	0.0	0.0	0.0
Equipment	0.0	0.0	0.0	0.0	0.0	0.0
Land & Structures	0.0	0.0	0.0	0.0	0.0	0.0
Grants & Claims	0.0	0.0	0.0	0.0	0.0	0.0
Miscellaneous	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CHANGE IN REVENUES ( )	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1037 GF/Mental Health	0.0	0.0	0.0	0.0	0.0	0.0
Other (Specify Type--Do not abbreviate)	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time	0	0	0	0	0	0
Part-time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

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

The Department of Corrections does not anticipate a significant fiscal impact with the passage of this legislation.

Prepared by: Sharleen Griffin, Acting Director
Phone 465-4641
Division Administrative Services
Date/Time 3/26/05 9:49 AM
Approved by: Portia C.K. Parker, Deputy Commissioner
Date 3/26/2005
Agency Department of Corrections

(Revised 9/23/2004 OMB)

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB54-LAW-CDCO-3-29-
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: LAW
Title "An Act relating to bail review."
RDU CRIMINAL
Component Criminal Justice Litigation
Sponsor Representative Samuels and Stoltze
Requester House Judiciary
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This bill adds a new subsection under AS 12.30.020 (Code of Criminal Procedures - Bail - Release before trial.) relating to review of bail conditions.The proposal would adopt requirements regarding the notice and timing before a subsequent bail hearing could be scheduled. It also requires the person in custody to provide a written statement that information not considered in the previous review will be presented, including a description of the new information.

Passage of this legislation will have no fiscal impact on the Department of Law.

Prepared by: Kathryn Daughhetee, Director
Phone 465-3673
Division Administrative Services Division
Date/Time 3/29/05 4:16 PM
Approved by: K. Daughhetee for Scott Nordstrand, Acting Attorney General
Date 3/29/2005
Agency Department of Law

(Revised 9/23/2004 OMB)

HB

78

REPRESENTATIVE RALPH SAMUELS

HOUSE DISTRICT 29

Memorandum

Date: January 18, 2005

To: Representative Lesil McGuire
Chair, House Judiciary Committee

From: Representative Ralph Samuels

RE: Hearing Request for HB 78

Please schedule a hearing for HB 78 at your earliest convenience.

Attached you will find:

1. **HB 78**
2. **Sponsor Statement**
3. **Sectional analysis**
4. **Presumptive terms/ranges chart**

Email: Representative_Ralph_Samuels@legis.state.ak.us
Session: Alaska State Capitol, Juneau, Alaska 99801-1182 • Phone: (907) 465-2095 Fax: (907) 465-3810
Interim: 716 W. 4th Ave., Anchorage, Alaska 99501-2133 • Phone: (907) 269-0240 Fax: (907) 269-0242

REPRESENTATIVE RALPH SAMUELS

HOUSE DISTRICT 29

House Bill 78
Sponsor Statement

"An Act relating to criminal law and procedure, criminal sentences, and probation and parole; and providing for an effective date."

HB 78 relates to the content of indictments, sentencing, probation, and parole.

This bill would

- amend Alaska law to conform to the United States Supreme Court opinion in *Blakely v. Washington*;
- make it easier for judges to consider all relevant factors in sentencing;
- allow judges to impose probation in all felony cases; and
- make probation supervision more effective by allowing the police greater arrest authority over probationers.

In particular, this bill modifies the laws governing the presumptive sentencing of felony offenders in Alaska, as a result of *Blakely v. Washington*, a decision by the United States Supreme Court announced in June 2004. The requirements of *Blakely* are imposed by the federal constitution, and therefore must be followed in circumstances in which they apply. Through careful amendment of Alaska sentencing laws, however, we can avoid the worst consequences of *Blakely*, which often prevent judges from considering all relevant factors in sentencing and unduly complicate the criminal justice process.

In fixing the problems created by *Blakely*, the bill gives judges broader sentencing discretion in felony cases, and allows them to consider all relevant circumstances in setting a sentence within the ranges established in this bill. In addition, the bill gives judges broader authority to impose a period of probation supervision, which in some cases they are not able to do under current Alaska law, thus providing better protection for the public and better assistance to the offender in reintegrating into the community.

The current felony sentencing statutes use the phrase "presumptive term" to establish a specific fixed term of imprisonment that in essence acts as both the minimum and maximum sentence that can be imposed, unless the court finds specific statutory mitigating or aggravating factors. Thus, current law attempts to specify the one presumptively "right" sentence for all felony crimes within each class of offenses.

Under this proposed bill, the new phrase "presumptive range" will be used to describe the wider choice of time periods that will be available to judges in imposing sentences for different offenders and for different types of crimes within each class of offenses. The bill grants judges broad discretion to select a time period within these ranges that will further the purposes of criminal sentencing set out in AS 12.55.005, which have been the hallmark of sentencing in

Email: Representative_Ralph_Samuels@legis.state.ak.us
Session: Alaska State Capitol, Juneau, Alaska 99801-1182 • Phone: (907) 465-2095 Fax: (907) 465-3810
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Alaska since at least 1970, when they were first announced by the Alaska Supreme Court in *State v. Chaney,* 477 P.2d 441 (Alaska 1970).

When imposing a sentence within a statutory presumptive range to take into account the *Chaney* criteria and the considerations in AS 12.55.005 and 12.55.015, this bill leaves it for the sentencing judge to determine the weight to be given the facts and circumstances present in the case. If the court selects a sentence within the presumptive range, it is not required to find the existence of a statutorily listed aggravating or mitigating factor.

For a judge to impose a sentence *above* the presumptive range, the state must comply with *Blakely v. Washington* and prove the existence of certain statutory aggravating factors to a jury beyond a reasonable doubt. (There are some statutorily listed aggravating factors, however, to which *Blakely* does not apply, and those may be established as they have been for many years under current law.) This bill leaves it to the courts to develop procedures for presenting aggravating factors to the trial jury. In addition, because the rule in *Blakely* applies only at trial, the bill makes it clear that it is not necessary for the state to present aggravating factors to the grand jury. This is the law in Alaska as announced by the Alaska Supreme Court, and this bill now codifies this rule. *State v. Malloy,* 46 P.3d 949 (Alaska 2002). This makes sense because the full extent of the aggravated nature of a crime may not be known at the grand jury stage at the very beginning of a case. As long as there is notice to the defense that the state seeks to present aggravating factors to the trial jury, no useful purpose is served by further complicating the grand jury process by presenting evidence of aggravating factors at that time.

For a judge to impose a sentence *below* the presumptive range, the bill makes no change to current law, and allows a lower sentence if the defense provides clear and convincing evidence of statutory mitigating factors. The bill also retains the current function of the statutory three-judge panel, which acts as a "safety net" in unusual cases to impose an even lower sentence if necessary to prevent manifest injustice. The bill retains the concept that has existed in current law since 1980, which makes presumptively sentenced offenders generally ineligible for parole during the longest single presumptive sentence. However, as is the case in current law, the bill allows parole consideration for prisoners with enhanced sentences above the presumptive ranges, and some consecutive sentences, thus providing another safety net for prisoners with lengthy sentences who have been truly rehabilitated to be paroled.

The bill recognizes that it is often valuable to suspend a portion of the sentence, and to have prisoners under parole supervision, so as to provide further guidance and supervision to offenders, and to deter future misconduct. Thus, the bill contains important provisions relating to probation and parole. Under current presumptive sentencing laws, for most crimes if the judge finds no listed aggravating or mitigating factors present in the case, the judge cannot impose a period of probation supervision, and thus after the offender leaves prison he is subject only to, at most, the authority of the parole board which in some cases is limited. Thus, unlike current law, this bill does not require a judge to find aggravating or mitigating factors in order to suspend a period of imprisonment and impose probation. As long as the total sentence, comprised of active plus suspended jail time, is within a presumptive range, the judge has discretion to suspend a portion of the sentence.

The bill also addresses the authority of probation/parole officers and police officers in connection with offenders released on probation or parole. Because it is nearly impossible for judges to anticipate every condition of probation that will be necessary during an offender's time under community supervision, this bill gives judges the authority to delegate a greater level of authority to probation officers. Under current law, it is not clear whether probation officers can set additional conditions of probation without further proceedings in court, and this bill gives probation officers that authority.

In addition, the bill takes a practical approach to the supervision of persons on probation and parole, by giving police officers the explicit authority to detain or arrest these ex-offenders for certain types of violations of conditions imposed by the courts or the parole board. There are far more law enforcement officers patrolling the streets than probation/parole officers, and the legislature has previously recognized the value of having village public safety officers monitor persons on probation or parole in villages. Under this bill, when a certified police officer has reasonable suspicion that a probationer or parolee is violating conditions, they can temporarily detain the person to investigate, and can arrest if there is probable cause that conditions were violated. These provisions are warranted in light of a recent opinion by the Alaska Court of Appeals that suppressed evidence found on a parolee after he was stopped by police for violating a parole condition that clearly prohibited this convicted felony drunk driver from being in a bar. *Reichel v. State,* ___ F.3d ___ (Alaska App.) (Op. No. 1955, Nov. 12, 2004).

The bill also repeals and reenacts AS 33.16.090, and amends AS 33.16.100, so as to reorganize and make more specific eligibility for parole, and to recognize the authority of the board to deny prisoners' consideration for parole if they have already been denied parole.

The bill also limits the ability of judges to impose "periodic" sentences, in which the judge allows the offender to periodically leave prison and then return to prison. This type of sentence significantly restricts with the ability of prison officials to manage the prison population and to transfer prisoners so as to make the best and most efficient use of prison resources. Most judges are appropriately deferential to the serious difficulties faced by Alaska prison officials, but some judges use their ability to order "periodic" sentences to allow offenders to go on what amounts to judicially ordered and unsupervised furloughs from prison. There is a proper place for prison furloughs, but that type of rehabilitative program is best left to prison officials, who can adopt equitable policies that take into account the specific security risks posed by each prisoner and the likely benefits of the furlough.

I urge your support of this bill.

Sectional Analysis of House Bill 78

Section 1 makes it clear that an indictment is valid as long as it complies with all rules of court, even if it does not allege aggravating factors that may later have to be proven to a jury to justify a higher sentence. At the grand jury stage, the state may not be aware of all aggravating factors, and therefore it is unreasonable to expect the indictment to list them. The *Blakely* decision did not require indictments to list aggravating factors, and due process is satisfied as long as the defendant has adequate notice of the factors in advance of trial, which is set out in Section 21 of the bill.

Section 2 limits the ability of judges to order "periodic" sentences, in which the offender periodically leaves prison and then returns to prison. This type of sentence significantly restricts with the ability of prison officials to manage the prison population and to transfer prisoners so as to make the best and most efficient use of prison resources. Most judges are appropriately deferential to the difficulties faced by Alaska prison officials, but some judges use their ability to order "periodic" sentences to allow offenders to go on what amounts to judicially-ordered and unsupervised furloughs from prison. There is a proper place for prison furloughs, but that is best left to prison officials, who can adopt equitable policies that take into account the specific security risks posed by each prisoner and the likely benefits of the furlough. The original intent of "periodic" sentences was to allow defendants to, for example, maintain their employment during the week, and serve a sentence on weekends, or to be released for fishing season and returned to prison when the season is over. The bill thus explicitly limits periodic sentences for employment purposes when necessary to pay a fine or restitution. This bill does not interfere with the court's authority under AS 12.55.025(c) to postpone the beginning date for service of a sentence, which allows defendants to complete school or get their affairs in order before they enter prison.

Section 3 is a technical amendment to remove a reference to a statute repealed by the bill.

Sections 4 and 5 amend statutes that contain the phrases "presumptive term" or "presumptive sentence" and substitute or add the new concept of "presumptive range" that is adopted in this bill.

Section 6 codifies current practice by giving judges the explicit authority to delegate a greater level of authority to probation officers in connection with offenders released on probation or parole. Under current statutes, the Alaska court of appeals has indicated that it is not clear if judges can allow probation officers to set additional conditions of probation without further proceedings in court, and this bill gives judges that authority.

Section 7 makes it clear that the higher courts in Alaska cannot reverse that sentence as excessive if a judge imposes a sentence within a statutory range specified in this bill, or imposes a consecutive sentence required by law.

Sections 8 to 12 change the existing presumptive terms into presumptive ranges, and create ranges where no presumptive term previously existed. The best way to understand these sections is to refer to the chart attached to this sectional analysis. The numbers in parentheses shows the existing presumptive term, and the numbers in bold show the range adopted by the bill. In general, the lower the presumptive term in existing law, the narrower the range adopted by this bill. Thus, with only minor exceptions, if the existing presumptive term is zero, one or two

years, the bill adopts a range of two years. With presumptive terms of three, four or five years, the bill adopts a range of three years. With presumptive terms of six, seven, eight or ten years, the bill adopts a range of four years. Higher presumptive terms result in ranges of five or ten years.

Section 13 requires that, in the absence of aggravating or mitigating factors, the total term of imprisonment must fall within the range and the active term of imprisonment (the time actually served in prison) must also fall within the range. Thus, if the range is five to eight years, the judge could impose a sentence of eight years with three years suspended, thus the total sentence (eight years) is within the range, and the active term (eight minus three suspended = five years) is also within the range. However, the judge could not impose a sentence of ten years with three suspended because the total sentence is above the range, nor could the judge impose eight years with four suspended because the active term is below the range.

Section 14 defines the phrase "presumptive term" for purposes of the consecutive sentencing statute, as the middle of the presumptive range. This phrase is used in the consecutive sentencing statute to mandate certain amounts of consecutive sentences for convictions relating to multiple victims or multiple offenses.

Section 15 is a conforming technical amendment.

Section 16 specifies that aggravating or mitigating factors allow judges to impose a sentence outside of the presumptive ranges, and specifies how the allowable amount of that adjustment.

Sections 17-19 contain conforming amendments to account for the change in terminology from presumptive "term" to presumptive "range."

Section 18 also adds one aggravating factor that allows judges to impose an aggravated sentence if the offender has a long misdemeanor record, specified as five or more convictions for class A misdemeanor crimes. By requiring convictions for class A misdemeanors, the aggravating factor would not be triggered by convictions for many petty offenses such as disorderly conduct and harassment, which are class B misdemeanors, nor by violations such as minor consuming and traffic offenses.

Section 20 specifies that, as in current law, aggravating and mitigating factors that are part of the elements of the offense cannot also be used to justify a sentence outside of the applicable range.

Section 21 conforms Alaska law to the Supreme Court's *Blakely* decision. There are a small number of aggravating factors that are not required under *Blakely* to be proven to a jury beyond a reasonable doubt, and those are specified in proposed AS 12.55.155(f)(1). Those factors must, however, be found by a judge by clear and convincing evidence, as under current law. Proposed AS 12.55.155(f)(2) requires, for all other aggravating factors, that in order to justify a sentence above the presumptive range, a jury must find the existence of that factor beyond a reasonable doubt. This provision also specifies when the state must provide the defendant with notice that it intends to establish one of these aggravating factors.

Sections 22 – 25 relate to the "safety net" that allows a three-judge panel to approve sentences outside of the ranges. These sections make no change in existing law, but contain conforming

amendments to account for the change in terminology from presumptive "term" to presumptive "range."

Sections 26, 30 and 31 give police officers the explicit authority to detain or arrest these probationers and parolees for certain types of violations of conditions imposed by the courts or the parole board. Under this bill, when a certified police officer has reasonable suspicion that a probationer or parolee is violating certain specified conditions, they can temporarily detain the person to investigate, and can arrest if there is probable cause that conditions were violated.

Section 27 is a conforming amendment to account for the change in terminology from presumptive "term" to presumptive "range."

Section 28 amends the parole eligibility statute to take into account the change in terminology from presumptive "term" to presumptive "range," and to re-organize the eligibility criteria to make the provisions more understandable and to statutorily adopt certain provisions that exist in parole board administrative regulations.

Section 29 makes it clear that if the parole board has already considered a prisoner for discretionary parole release, and has denied release, the board has the authority to also deny a prisoner further consideration for parole. The state's position is that the parole board already has this authority inherent in its discretion to consider prisoners for parole release. However, because the authority is not explicit, the question is often litigated by *pro se* prisoners.

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB78-LAW-CDCO-1-21-
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: LAW
Title "An Act relating to the content of indictments, sentencing, probation, and parole..."
RDU CRIMINAL
Component CDCO
Sponsor Representative Samuels
Requester House Judiciary
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2006	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2005) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

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

This bill modifies the laws governing the presumptive sentencing of felony offenders in Alaska, in response to *Blakely v. Washington*, a decision by the U.S. Supreme Court announced in June 2004. By careful amendment of Alaska's sentencing laws this legislation seeks to avoid the worst consequences of *Blakely*, which could prevent judges from considering all relevant factors in sentencing and causing undue complications in the criminal justice process. The Department of Law does not anticipate a fiscal impact from passage of this legislation.

Prepared by: Kathryn A. Daughhetee, Director
Phone 465-5427
Division Administrative Services
Date/Time 1/21/05 8:42 AM
Approved by: Kathryn Daughhetee for Gregg D. Renkes, Attorney General
Date 1/21/2005
Agency Department of Law

(Revised 9/23/2004 OMB)

Current "presumptive" terms compared to presumptive ranges in House Bill 78

January 2005

	First Felony	First Felony (special crimes)	Second Felony	Sex Felony with a prior sex felony	Third+ Felony	Sex Felony with two prior sex felonies	Max
Unclassified Sex Offense	(8) **to 12**	weapon or serious injury (10) **12 to 16**	(15) **to 20**	(20) **to 30**	(25) **to 35**	(30) **to 40**	(40)
A Felony Sex Offense	(5) **to 8**	weapon or serious injury (10) **to 14**	(10) **12 to 16**	(15) **to 20**	(15) **to 25**	(20) **to 30**	(30)
A Felony	(5) **to 8**	weapon, serious injury, or police victim (7) **to 11**	(10) **to 14**	n/a	(15) **to 20**	n/a	(20)
B Felony Sex Offense	(0, but 1 to 3 by court-made law) **2 to 4**	n/a	(5) **to 8**	(10) **to 14**	(10) **to 14**	(15) **to 20**	(20)
B Felony	(0, but 1 to 3 by court-made law) **1 to 3**	crim neg hom of child: (0, but 1 to 3 by court-made law) **2 to 4**	(4) **to 7**	n/a	(6) **to 10**	n/a	(10)
C Felony Sex Offense	(0) **1 to 2**	n/a	(2) **to 5**	(3) **to 6**	(3) **to 6**	(6) **to 10**	(10)
C Felony	(0) **to 2**	wanton waste or same-day by guide (1) **to 2**	(2) **to 4**	n/a	(3) **to 5**	n/a	(5)

Numbers in parentheses are the current "presumptive" terms and maximums

Numbers in **bold** show the presumptive ranges in the bill

2 of 4 DOCUMENTS

RALPH HOWARD BLAKELY, Jr., Petitioner v. WASHINGTON

No. 02-1632

SUPREME COURT OF THE UNITED STATES

124 S. Ct. 2531; 159 L. Ed. 2d 403; 2004 U.S. LEXIS 4573; 72 U.S.L.W. 4546; 17 Fla. L. Weekly Fed. S 430

March 23, 2004, Argued
June 24, 2004, Decided

NOTICE: [*1]**

The LEXIS pagination of this document is subject to change pending release of the final published version.

SUBSEQUENT HISTORY: US Supreme Court rehearing denied by *Blakely v. Wash., 159 L. Ed. 2d 851, 125 S. Ct. 21, 2004 U.S. LEXIS 4887 (U.S., Aug. 23, 2004)*

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF WASHINGTON, DIVISION 3. *State v. Blakely, 111 Wn. App. 851, 47 P.3d 149, (2002)*

DISPOSITION: Reversed and remanded.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner pled guilty to kidnapping his estranged wife. Pursuant to state law, the trial court imposed an "exceptional" sentence of 90 months after making a judicial determination that he acted with deliberate cruelty. Petitioner appealed, arguing the sentencing procedure violated his Sixth Amendment right to trial by jury. The State Court of Appeals affirmed, and the Washington Supreme Court denied discretionary review. Certiorari was granted.

OVERVIEW: Petitioner was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with "deliberate cruelty." The facts supporting that finding were neither admitted by petitioner nor found by a jury. The judge in the case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. Those facts alone were insufficient because a reason offered to justify an exceptional sentence could be considered only if it took into account factors other than those which were used in computing the standard range sentence for the offense, which in this case included the elements of second-degree kidnapping and the use of a firearm. Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed. The jury's verdict alone did not authorize the sentence. The judge acquired that authority only upon finding some additional fact. Because the State's sentencing procedure did not comply with the Sixth Amendment, petitioner's sentence was invalid.

OUTCOME: The judgment of the Washington Court of Appeals was reversed, and the case was remanded for further proceedings.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Sentencing > Sentencing Guidelines Generally
[HN1] In Washington, second-degree kidnapping is a class B felony. *Wash. Rev. Code Ann. § 9A.40.030(3).*

Criminal Law & Procedure > Sentencing > Sentencing Ranges
[HN2] See *Wash. Rev. Code Ann. § 9A.20.021(1)(b).*

Criminal Law & Procedure > Sentencing > Sentencing Ranges

[HN3] Washington's Sentencing Reform Act specifies, for an offense of second-degree kidnapping with a firearm, a "standard range" of 49 to 53 months. *Wash. Rev. Code Ann. § 9.94A.320.* A judge may impose a sentence above the standard range if he finds substantial and compelling reasons justifying an exceptional sentence. *Wash. Rev. Code Ann. § 9.94A.120(2).* The Act lists aggravating factors that justify such a departure, which it recites to be illustrative rather than exhaustive. *Wash. Rev. Code Ann. § 9.94A.390.* Nevertheless, a reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense.

Criminal Law & Procedure > Appeals > Standards of Review > Clearly Erroneous Review
Criminal Law & Procedure > Sentencing > Adjustments
[HN4] When a judge imposes an exceptional sentence, he must set forth findings of fact and conclusions of law supporting it. *Wash. Rev. Code Ann. § 9.94A.120(3).* A reviewing court will reverse the sentence if it finds that under a clearly erroneous standard there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence. *Wash. Rev. Code Ann. § 9.94A.210(4).*

Criminal Law & Procedure > Sentencing > Imposition > Factors
[HN5] Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Jury Trial
[HN6] The truth of every accusation against a defendant should afterwards be confirmed by the unanimous suffrage of 12 of his equals and neighbors.

Criminal Law & Procedure > Sentencing > Imposition > Factors
[HN7] An accusation which lacks any particular fact which the law makes essential to the punishment is no accusation within the requirements of the common law, and it is no accusation in reason.

Criminal Law & Procedure > Sentencing > Imposition > Factors
[HN8] The "statutory maximum" for Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.

Criminal Law & Procedure > Sentencing > Imposition > Factors
[HN9] For Apprendi purposes, the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority.

Criminal Law & Procedure > Sentencing > Departures
[HN10] *Wash. Rev. Code Ann. § 9.94A.390(2)(h)(i)*-(iii) lists domestic violence as grounds for departure only when combined with some other aggravating factor.

Constitutional Law > Criminal Process > Impartial Jury
[HN11] The Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury.

Criminal Law & Procedure > Sentencing > Imposition > Factors
Criminal Law & Procedure > Sentencing > Adjustments
[HN12] When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding. If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial.

Constitutional Law > Criminal Process > Impartial Jury
Criminal Law & Procedure > Sentencing > Imposition > Factors
[HN13] Every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment.

SYLLABUS:

[409]** Petitioner pleaded guilty to kidnaping his estranged wife. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months, but the judge imposed a 90-month sentence after finding that petitioner had acted with deliberate cruelty, a statutorily enumerated ground for departing from the standard range. The Washington Court of Appeals affirmed,

rejecting petitioner's argument that the sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence.

Held: **[***2]**

Because the facts supporting petitioner's exceptional sentence were neither admitted by petitioner nor found by a jury, the sentence violated his *Sixth Amendment* right to trial by jury.

(a) This case requires the Court to apply the rule of *Apprendi v. New Jersey, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348*, that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The relevant statutory maximum for *Apprendi* purposes is the maximum a judge may impose based solely on the facts reflected in the jury verdict or admitted by the defendant. Here, the judge could not have imposed the 90-month sentence based solely on the facts admitted in the guilty plea, because Washington law requires an exceptional sentence to be based on factors other than those used in computing the standard-range sentence. Petitioner's sentence is not analogous to those upheld in *McMillan v. Pennsylvania, 477 U.S. 79, 91 L. Ed. 2d 67, 106 S. Ct. 2411*, and *Williams v. New York, 337 U.S. 241, 93 L. Ed. 1337, 69 S. Ct. 1079*, which were not greater than what state law authorized based **[***3]** on the verdict alone. Regardless of whether the judge's authority to impose the enhanced sentence depends on a judge's finding a specified fact, one of several specified facts, or *any* aggravating fact, it remains the case that the jury's verdict alone does not authorize the sentence.

(b) This Court's commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the fundamental constitutional right of jury trial.

[410]** (c) This case is not about the constitutionality of determinate sentencing, but only about how it can be implemented in a way that respects the *Sixth Amendment*. The Framers' paradigm for criminal justice is the common-law ideal of limited state power accomplished by strict division of authority between judge and jury. That can be preserved without abandoning determinate sentencing and at no sacrifice of fairness to the defendant. *111 Wn. App. 851, 47 P.3d 149*

, reversed and remanded.

COUNSEL:

Jeffrey L. Fisher argued the cause for petitioner.

John D. Knodell, Jr. argued the cause for respondent.

Michael R. Dreeben argued the cause for the United States, as amicus curiae, by special leave of court.

JUDGES: Scalia, J., delivered the opinion of the Court, in which Stevens, Souter, Thomas, and Ginsburg, JJ., joined. O'Connor, J., filed a dissenting opinion, **[***4]** in which Breyer, J., joined, and in which Rehnquist, C. J., and Kennedy, J., joined except as to Part IV-B. Kennedy, J., filed a dissenting opinion, in which Breyer, J., joined. Breyer, J., filed a dissenting opinion, in which O'Connor, J., joined.

OPINIONBY: SCALIA

OPINION: **[*2534]** Justice **Scalia** delivered the opinion of the Court.

[LEdHR1A]** [1A] Petitioner Ralph Howard Blakely, Jr., pleaded guilty to the kidnaping of his estranged wife. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months. Pursuant to state law, the court imposed an "exceptional" sentence of 90 months after making a judicial determination that he had acted with "deliberate cruelty." App. 40, 49. We consider whether this violated petitioner's *Sixth Amendment* right to trial by jury.

I

Petitioner married his wife Yolanda in 1973. He was evidently a difficult man to live with, having been diagnosed at various times with psychological and personality disorders including paranoid schizophrenia. His wife ultimately filed for divorce. In 1998, he abducted her from their orchard home in Grant County, Washington, binding her with duct tape and forcing her at knifepoint into a wooden box in the bed of his pickup truck. **[***5]** In the process, he implored her to dismiss the divorce suit and related trust proceedings.

When the couple's 13-year-old son Ralphy returned home from school, petitioner ordered him to follow in another car, threatening to harm Yolanda with a shotgun if he did not do so. Ralphy escaped and sought help when they stopped at a gas station, but petitioner continued on with Yolanda to a friend's house in Montana. He was finally arrested after the friend called the police.

The State charged petitioner with first-degree kidnaping, *Wash. Rev. Code Ann. § 9A.40.020(1)* (2000). n1 Upon reaching a plea agreement, however, it reduced the charge to second-degree kidnaping involving domestic violence and use of a firearm, see *§ § 9A.40.030(1), 10.99.020(3)(p), 9.94A.125.* n2 Petitioner

entered a guilty plea [*2535] admitting [**411] the elements of second-degree kidnaping and the domestic-violence and firearm allegations, but no other relevant facts.

n1 Parts of Washington's criminal code have been recodified and amended. We cite throughout the provisions in effect at the time of sentencing.

n2 Petitioner further agreed to an additional charge of second-degree assault involving domestic violence, *Wash. Rev. Code Ann. § § 9A.36.021(1)(c), 10.99.020(3)(b)* (2000). The 14-month sentence on that count ran concurrently and is not relevant here.

[***6]

[**LEdHR2] [2] [**LEdHR3] [3] The case then proceeded to sentencing. [HN1] In Washington, second-degree kidnaping is a class B felony. *§ 9A.40.030(3).* State law provides that [HN2] "[n]o person convicted of a [class B] felony shall be punished by confinement . . . exceeding . . a term of ten years." *§ 9A.20.021(1)(b).* Other provisions of state law, however, further limit the range of sentences a judge may impose. [HN3] *Washington's Sentencing Reform Act* specifies, for petitioner's offense of second-degree kidnaping with a firearm, a "standard range" of 49 to 53 months. See *§ 9.94A.320* (seriousness level V for second-degree kidnaping); App. 27 (offender score 2 based on *§ 9.94A.360*); *§ 9.94A.310(1)*, box 2-V (standard range of 13-17 months); *§ 9.94A.310(3)(b)* (36-month firearm enhancement). n3 A judge may impose a sentence above the standard range if he finds "substantial and compelling reasons justifying an exceptional sentence." *§ 9.94A.120(2).* The Act lists aggravating factors that justify such a departure, which it recites to be illustrative rather than exhaustive. *§ 9.94A.390.* Nevertheless, "[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those [***7] which are used in computing the standard range sentence for the offense." *State v. Gore, 143 Wn.2d 288, 315-316, 21 P.3d 262, 277 (2001).* [HN4] When a judge imposes an exceptional sentence, he must set forth findings of fact and conclusions of law supporting it. *§ 9.94A.120(3).* A reviewing court will reverse the sentence if it finds that "under a clearly erroneous standard there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence." *Gore, supra, at 315, 21 P.3d, at 277* (citing *§ 9.94A.210(4)*).

n3 The domestic-violence stipulation subjected petitioner to such measures as a "no-contact" order, see *§ 10.99.040*, but did not increase the standard range of his sentence.

[**LEdHR4A] [4A] Pursuant to the plea agreement, the State recommended a sentence within the standard range of 49 to 53 months. After hearing Yolanda's description of the kidnaping, however, the judge rejected the State's recommendation and imposed an exceptional sentence of 90 months [***8] --37 months beyond the standard maximum. He justified the sentence on the ground that petitioner had acted with "deliberate cruelty," a statutorily enumerated ground for departure in domestic-violence cases. *§ 9.94A.390(2)(h)(iii).* n4

[**LEdHR4B] [4B]

n4 The judge found other aggravating factors, but the Court of Appeals questioned their validity under state law and their independent sufficiency to support the extent of the departure. See *111 Wn. App. 851, 868-870, and n 3, 47 P.3d 149, 158-159, and n 3 (2002).* It affirmed the sentence solely on the finding of domestic violence with deliberate cruelty. *Ibid.* We therefore focus only on that factor.

Faced with an unexpected increase of more than three years in his sentence, petitioner objected. The judge accordingly conducted a 3-day bench hearing featuring testimony from petitioner, Yolanda, Ralphy, a police officer, and medical experts. After the hearing, he issued 32 findings of fact, concluding:

"The defendant's motivation to commit kidnapping was complex, [***9] contributed to by his mental condition and personality disorders, the [**412] pressures of the divorce litigation, the impending trust litigation trial and anger over his troubled interpersonal relationships with his spouse and children. While he misguidedly intended to forcefully reunite his [*2536] family, his attempt to do so was subservient to his desire to terminate lawsuits and modify title ownerships to his benefit.

"The defendant's methods were more homogeneous than his motive. He used stealth and surprise, and took advantage of the victim's isolation. He immediately employed physical violence, restrained

> the victim with tape, and threatened her with injury and death to herself and others. He immediately coerced the victim into providing information by the threatening application of a knife. He violated a subsisting restraining order." App. 48-49.

The judge adhered to his initial determination of deliberate cruelty.

Petitioner appealed, arguing that this sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence. The State Court of Appeals affirmed, *111 Wn. App. 851, 870-871, 47 P.3d 149, 159 (2002)*, **[***10]** relying on the Washington Supreme Court's rejection of a similar challenge in *Gore, supra, at 311-315, 21 P.3d, at 275-277*. The Washington Supreme Court denied discretionary review. *148 Wn. 2d 1010, 62 P.3d 889 (2003)*. We granted certiorari. *540 U.S. 965, 540 U.S. 965, 157 L. Ed. 2d 309, 124 S. Ct. 429 (2003)*.

II

[LEdHR5]** [5] **[**LEdHR6]** [6] **[**LEdHR7A]** [7A] This case requires us to apply the rule we expressed in *Apprendi v. New Jersey, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000)*: [HN5] "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This rule reflects two longstanding tenets of common-law criminal jurisprudence: that [HN6] the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours," 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that [HN7] "an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason," 1 J. Bishop, Criminal Procedure § 87, p 55 (2d **[***11]** ed. 1872). n5 These principles have been acknowledged by courts and treatises **[**413]** since the earliest days of graduated sentencing; we compiled the relevant authorities in *Apprendi*, see **[*2537]** *530 U.S., at 476-483, 489-490, n 15, 147 L. Ed. 2d 435, 120 S. Ct. 2348*; *id., at 501-518, 147 L. Ed. 2d 435, 120 S. Ct. 2348* (Thomas, J., concurring), and need not repeat them here. n6

n5 Justice Breyer cites Justice O'Connor's *Apprendi* dissent for the point that this Bishop quotation means only that indictments must charge facts that trigger statutory aggravation of a common-law offense. *Post*, at ____, *159 L. Ed. 2d, at 437* (dissenting opinion). Of course, as he notes, Justice O'Connor was referring to an entirely different quotation, from *Archbold's* treatise. See *530 U.S., at 526, 147 L. Ed. 2d 435, 120 S. Ct. 2348* (citing J. Archbold, Pleading and Evidence in Criminal Cases 51, 188 (15th ed. 1862)). Justice Breyer claims the two are "similar," *post*, at ____, *159 L. Ed. 2d, at 437*, but they are as similar as chalk and cheese. Bishop was not "addressing" the "problem" of statutes that aggravate common-law offenses. *Ibid.* Rather, the entire chapter of his treatise is devoted to the point that "every fact which is legally essential to the punishment" must be charged in the indictment and proved to a jury. 1 J. Bishop, Criminal Procedure, ch. 6, pp 50-56 (2d ed. 1872). As one "example" of this principle (appearing several pages before the language we quote in text above), he notes a statute aggravating common-law assault. *Id.*, § 82, at 51-52. But nowhere is there the slightest indication that his general principle was *limited* to that example. Even Justice Breyer's academic supporters do not make *that* claim. See Bibas, Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas, *110 Yale L. J. 1097, 1131-1132 (2001)* (conceding that Bishop's treatise supports *Apprendi*, while criticizing its "natural-law theorizing"). **[***12]**

[LEdHR7B]** [7B]

n6 As to Justice O'Connor's criticism of the quantity of historical support for the *Apprendi* rule, *post*, at ____, *159 L. Ed. 2d, at 425-426* (dissenting opinion): It bears repeating that the issue between us is not *whether* the Constitution limits States' authority to reclassify elements as sentencing factors (we all agree that it does); it is only which line, ours or hers, the Constitution draws. Criticism of the quantity of evidence favoring our alternative would have some force if it were accompanied by *any* evidence favoring hers. Justice O'Connor does not even provide a coherent alternative meaning for the jury-trial guarantee, unless one considers "whatever the legislature chooses to leave to the jury, so long as it does not go too far" coherent. See *infra*, at ____ - ____, *159 L. Ed. 2d, at 415-416*.

Apprendi involved a New Jersey hate-crime statute that authorized a 20-year sentence, despite the usual 10-year maximum, if the judge found the crime to have been committed "'with a purpose to intimidate . . . because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'" *Id., at 468-469, 147 L. Ed. 2d 435, 120 S. Ct. 2348* (quoting **[***13]** *N. J. Stat. Ann. § 2C:44-3(e)* (West Supp. 1999-2000)). In *Ring v. Arizona, 536 U.S. 584, 592-593, and n 1, 153 L. Ed. 2d 556, 122 S. Ct. 2428* (2002), we applied *Apprendi* to an Arizona law that authorized the death penalty if the judge found one of ten aggravating factors. In each case, we concluded that the defendant's constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding. *Apprendi, supra, at 491-497, 147 L. Ed. 2d 435, 120 S. Ct. 2348*; *Ring, supra, at 603-609, 153 L. Ed. 2d 556, 122 S. Ct. 2428.*

[LEdHR1B]** [1B] **[**LEdHR8]** [8] In this case, petitioner was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with "deliberate cruelty." The facts supporting that finding were neither admitted by petitioner nor found by a jury. The State nevertheless contends that there was no *Apprendi* violation because the relevant "statutory maximum" is not 53 months, but the 10-year maximum for class B felonies in *§ 9A.20.021(1)(b).* It observes that no exceptional sentence may exceed that limit. See *§ 9.94A.420.* Our precedents make clear, however, that [HN8] the "statutory maximum" for *Apprendi* purposes is the maximum **[***14]** sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* See *Ring, supra, at 602, 153 L. Ed. 2d 556, 122 S. Ct. 2428* ("'the maximum he would receive if punished according to the facts reflected in the jury verdict alone'" (quoting *Apprendi, supra, at 483, 147 L. Ed. 2d 435, 120 S. Ct. 2348*)); *Harris v. United States, 536 U.S. 545, 563, 153 L. Ed. 2d 524, 122 S. Ct. 2406 (2002)* (plurality opinion) (same); cf. *Apprendi, supra, at 488, 147 L. Ed. 2d 435, 120 S. Ct. 2348* (facts admitted by the defendant). In other words, [HN9] the relevant "statutory maximum" is not the maximum sentence a judge **[**414]** may impose after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," Bishop, *supra*, § 87, at 55, and the judge exceeds his proper authority.

[LEdHR1C]** [1C] The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. Those facts alone were insufficient because, as the Washington Supreme Court has explained, "[a] reason offered to justify an exceptional **[***15]** sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense," **[*2538]** *Gore, 143 Wn.2d, at 315-316, 21 P.3d, at 277*, which in this case included the elements of second-degree kidnaping and the use of a firearm, see *§ § 9.94A.320, 9.94A.310(3)(b).* n7 Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed. See *§ 9.94A.210(4).* The "maximum sentence" is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator).

n7 The State does not contend that the domestic-violence stipulation alone supports the departure. That the [HN10] statute lists domestic violence as grounds for departure only when combined with some other aggravating factor suggests it could not. See § § *9.94A.390(2)(h)(i)-(iii).*

The **[***16]** State defends the sentence by drawing an analogy to those we upheld in *McMillan v. Pennsylvania, 477 U.S. 79, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986)*, and *Williams v. New York, 337 U.S. 241, 93 L. Ed. 1337, 69 S. Ct. 1079 (1949).* Neither case is on point. *McMillan* involved a sentencing scheme that imposed a statutory *minimum* if a judge found a particular fact. *477 U.S., at 81, 91 L. Ed. 2d 67, 106 S. Ct. 2411.* We specifically noted that the statute "does not authorize a sentence in excess of that otherwise allowed for [the underlying] offense." *Id., at 82, 91 L. Ed. 2d 67, 106 S. Ct. 2411*; cf. *Harris, supra, at 567, 153 L. Ed. 2d 524, 122 S. Ct. 2406.* *Williams* involved an indeterminate-sentencing regime that allowed a judge (but did not compel him) to rely on facts outside the trial record in determining whether to sentence a defendant to death. *337 U.S., at 242-243, and n 2, 93 L. Ed. 1337, 69 S. Ct. 1079.* The judge could have "sentenced [the defendant] to death giving no reason at all." *Id., at 252, 93 L. Ed. 1337, 69 S. Ct. 1079.* Thus, neither case involved a sentence greater than what state law authorized on the basis of the verdict alone.

[LEdHR9A]** [9A] Finally, the State tries to distinguish *Apprendi* and *Ring* by pointing out that the enumerated grounds for departure in its regime are illustrative **[***17]** rather than exhaustive. This distinction is immaterial. Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified

facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge **[**415]** acquires that authority only upon finding some additional fact. n8

[LEdHR9B]** [9B]

n8 Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence.

[LEdHR1D]** [1D] **[**LEdHR10A]** [10A] Because the State's sentencing procedure did not comply with the *Sixth Amendment*, petitioner's sentence is invalid. n9

[LEdHR10B]** [10B]

n9 The United States, as *amicus curiae*, urges us to affirm. It notes differences between Washington's sentencing regime and the Federal Sentencing Guidelines but questions whether those differences are constitutionally significant. See Brief for United States as *Amicus Curiae* 25-30. The Federal Guidelines are not before us, and we express no opinion on them.

[*18]**

III

[LEdHR1E]** [1E] Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of **[*2539]** power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. See Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 The Complete Anti-Federalist 315, 320 (H. Storing ed. 1981) (describing the jury as "secur[ing] to the people at large, their just and rightful controul in the judicial department"); John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 Works of John Adams 252, 253 (C. Adams ed. 1850) ("[T]he common people, should have as complete a control . . . in every judgment of a court of judicature" as in the legislature); Letter from Thomas Jefferson to the Abbe Arnoux (July 1 89), reprinted in 15 Papers of Thomas Jefferson 282, 283 (J. Boyd ed. 1958) ("Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it **[***19]** is better to leave them out of the Legislative"); *Jones v. United States, 526 U.S. 227, 244-248, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999)*. *Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.

Those who would reject *Apprendi* are resigned to one of two alternatives. The first is that the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels sentencing factors--no matter how much they may increase the punishment--may be found by the judge. This would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it--or of making an illegal lane change while fleeing the death scene. Not even *Apprendi*'s critics would advocate this absurd result. Cf. *530 U.S., at 552-553, 147 L. Ed. 2d 435, 120 S. Ct. 2348* (O'Connor, J., dissenting). The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some **[***20]** point did something wrong, a mere preliminary to a judicial inquisition into the facts of the **[**416]** crime the State *actually* seeks to punish. n10

n10 Justice O'Connor believes that a "built-in political check" will prevent lawmakers from manipulating offense elements in this fashion. *Post*, at ____, *159 L. Ed. 2d, at 425*. But the many immediate practical advantages of judicial factfinding, see *post*, at ____ - ____, *159 L. Ed. 2d, at 422-423*, suggest that political forces would, if anything, pull in the opposite direction. In any case, the Framers' decision to entrench the jury-trial right in the Constitution shows that they did not trust government to make political decisions in this area.

The second alternative is that legislatures may establish legally essential sentencing factors *within limits*--limits crossed when, perhaps, the sentencing factor is a "tail which wags the dog of the substantive offense." *McMillan, 477 U.S., at 88, 91 L. Ed. 2d 67, 106 S. Ct. 2411*. What this means in operation is that the law must not go *too far*--it must not exceed the judicial estimation **[***21]** of the proper role of the judge.

The subjectivity of this standard is obvious. Petitioner argued below that second-degree kidnaping with deliberate cruelty was essentially the same as first-degree kidnaping, the very charge he had avoided by pleading to a lesser offense. The court conceded this might be so but held it irrelevant. See *111 Wn. App., at 869, 47 P.3d, at 158.* n11 Petitioner's 90-month sentence **[*2540]** exceeded the 53-month standard maximum by almost 70%; the Washington Supreme Court in other cases has upheld exceptional sentences 15 times the standard maximum. See *State v. Oxborrow, 106 Wn.2d 525, 528, 533, 723 P.2d 1123, 1125, 1128 (1986)* (15-year exceptional sentence; 1-year standard maximum sentence); *State v. Branch, 129 Wn.2d 635, 650, 919 P.2d 1228, 1235 (1996)* (4-year exceptional sentence; 3-month standard maximum sentence). Did the court go *too far* in any of these cases? There is no answer that legal analysis can provide. With *too far* as the yardstick, it is always possible to disagree with such judgments and never to refute them.

n11 Another example of conversion from separate crime to sentence enhancement that Justice O'Connor evidently does not consider going "too far" is the obstruction-of-justice enhancement, see *post*, at ____ - ____, *159 L. Ed. 2d, at 423*. Why perjury during trial should be grounds for a judicial sentence enhancement on the underlying offense, rather than an entirely separate offense to be found by a jury beyond a reasonable doubt (as it has been for centuries, see 4 W. Blackstone, Commentaries on the Laws of England 136-138 (1769)), is unclear.

[*22]**

Whether the *Sixth Amendment* incorporates this manipulable standard rather than *Apprendi*'s bright-line rule depends on the plausibility of the claim that the Framers would have left definition of the scope of jury power up to judges' intuitive sense of how far is *too far*. We think that claim not plausible at all, because the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.

IV

[LEdHR11]** [11] By reversing the judgment below, we are not, as the State would have it, "find[ing] determinate sentencing schemes unconstitutional." Brief for Respondent 34. This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the *Sixth Amendment*. Several policies prompted Washington's adoption of determinate sentencing, including proportionality to the gravity of the offense and parity among defendants. See *Wash. Rev. Code Ann. § 9.94A.010* **[**417]** (2000). Nothing we have said impugns those salutary objectives.

[LEdHR12]** [12] **[**LEdHR13]** [13] Justice O'Connor argues that, because determinate sentencing schemes involving judicial factfinding entail less judicial discretion **[***23]** than indeterminate schemes, the constitutionality of the latter implies the constitutionality of the former. *Post*, at ____ - ____, *159 L. Ed. 2d, at 420-426*. This argument is flawed on a number of levels. First, [HN11] the *Sixth Amendment* by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury. Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence--and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a **[***24]** 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence--and by reason of the *Sixth Amendment* the facts bearing upon that entitlement must be found by a jury.

[*2541] But even assuming that restraint of judicial power unrelated to the jury's role is a *Sixth Amendment* objective, it is far from clear that *Apprendi* disserves that goal. Determinate judicial-factfinding schemes entail less judicial power than indeterminate schemes, but more judicial power than determinate *jury*-factfinding schemes. Whether *Apprendi* increases judicial power overall depends on what States with determinate judicial-factfinding schemes would do, given the choice between the two alternatives. Justice O'Connor simply assumes that the net effect will favor judges, but she has no empirical basis for that prediction. Indeed, what evidence we have points exactly the other way: When the Kansas Supreme Court found *Apprendi* infirmities in that State's determinate-sentencing regime in *State v. Gould, 271 Kan. 394, 404-414, 23 P.3d 801, 809-814 (2001)*, the legislature responded not by reestablishing **[***25]** indeterminate sentencing but by applying *Apprendi*'s requirements to its current regime. See Act of May 29, 2002, ch. 170, 2002 Kan. Sess. Laws pp 1018-1023

(codified at *Kan. Stat. Ann. § 21-4718* (2003 Cum. Supp.)); Brief for Kansas Appellate Defender Office as *Amicus Curiae* 3-7. The result was less, not more, judicial power.

[LEdHR14]** [14] **[**LEdHR15]** [15] **[**LEdHR16A]** [16A] Justice Breyer argues that *Apprendi* works to the detriment of criminal defendants who plead guilty by depriving them of the opportunity to argue sentencing factors to a judge. *Post*, at ____ - ____, *159 L. Ed. 2d, at 431*. But nothing prevents a defendant from waiving his *Apprendi* rights. [HN12] When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant **[**418]** either stipulates to the relevant facts or consents to judicial factfinding. See *Apprendi, 530 U.S., at 488, 147 L. Ed. 2d 435, 120 S. Ct. 2348*; *Duncan v. Louisiana, 391 U.S. 145, 158, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968)*. If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant **[***26]** evidence would prejudice him at trial. We do not understand how *Apprendi* can possibly work to the detriment of those who are free, if they think its costs outweigh its benefits, to render it inapplicable. n12

[LEdHR16B]** [16B]

n12 Justice Breyer responds that States are not *required* to give defendants the option of waiving jury trial on some elements but not others. *Post*, at ____ - ____, *159 L. Ed. 2d, at 433-434*. True enough. But why would the States that he asserts we are coercing into hard-heartedness--that is, States that *want* judge-pronounced determinate sentencing to be the norm but we won't let them--want to prevent a defendant from *choosing* that regime? Justice Breyer claims this alternative may prove "too expensive and unwieldy for States to provide," *post*, at ____, *159 L. Ed. 2d, at 434*, but there is no obvious reason why forcing defendants to choose between contesting all elements of his hypothetical 17-element robbery crime and contesting none of them is less expensive than also giving them the third option of pleading guilty to some elements and submitting the rest to judicial factfinding. Justice Breyer's argument rests entirely on a speculative prediction about the number of defendants likely to choose the first (rather than the second) option if denied the third.

[*27]**

Nor do we see any merit to Justice Breyer's contention that *Apprendi* is unfair to criminal defendants because, if States respond by enacting "17-element robbery crime[s]," prosecutors will have more elements with which to bargain. *Post*, at ____ - ____, ____, *159 L. Ed. 2d, at 431, 434* (citing Bibas, Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas, *110 Yale L. J. 1097 (2001)*). Bargaining already exists with regard to sentencing factors because defendants can either stipulate or contest the facts that make them applicable. If there is any difference between **[*2542]** bargaining over sentencing factors and bargaining over elements, the latter probably favors the defendant. Every new element that a prosecutor can threaten to charge is also an element that a defendant can threaten to contest at trial and make the prosecutor prove beyond a reasonable doubt. Moreover, given the sprawling scope of most criminal codes, and the power to affect sentences by making (even nonbinding) sentencing recommendations, there is already no shortage of *in terrorem* tools at prosecutors' disposal. See King & Klein, *Apprendi* and Plea Bargaining, *54 Stan. L. Rev. 295, 296 (2001)* ("Every prosecutorial **[***28]** bargaining chip mentioned by Professor Bibas existed pre-*Apprendi* exactly as it does post-*Apprendi*").

Any evaluation of *Apprendi*'s "fairness" to criminal defendants must compare it with the regime it replaced, in which a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment, see *21 U.S.C. § § 841(b)(1)(A), (D), [21 USCS § § 841(b)(1)(A), (D)]* n13 based not on facts proved to his peers beyond a **[**419]** reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong. We can conceive of no measure of fairness that would find more fault in the utterly speculative bargaining effects Justice Breyer identifies than in the regime he champions. Suffice it to say that, if such a measure exists, it is not the one the Framers left us with.

n13 To be sure, Justice Breyer and the other dissenters would forbid those increases of sentence that violate the constitutional principle that tail shall not wag dog. The source of this principle is entirely unclear. Its precise effect, if precise effect it has, is presumably to require that the ratio of sentencing-factor add-on to basic criminal sentence be no greater than the ratio of caudal vertebrae to body in the breed of canine