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requirements of the common law, and it is no accusation in reason." 1 Bishop, Criminal Procedure § 87, at 55. See *id.* § 88, at 56 (notice and indictment requirements ensure that before "persons held for crimes . . . shall be convicted, there shall be an allegation made against them of every element of crime which the law makes essential to the punishment to be inflicted").

Numerous high courts contemporaneously and explicitly agreed that Bishop had accurately captured the common-law understanding of what facts are elements of a crime. See, **[*512]** *e.g., Hobbs v. State, 44 Tex. 353, 354 (1875)* (favorably quoting 1 Bishop, Criminal Procedure § 81); *Maguire v. State, 47 Md. 485, 497 (1878)* (approvingly citing different Bishop treatise for the same rule); *Larney v. Cleveland, 34 Ohio St. 599, 600 (1878)* (rule and reason for rule "are well stated by Mr. Bishop"); *State v. Hayward, 83 Mo. 299, 307 (1884)* (extensively quoting § 81 of Bishop's "admirable treatise"); *Riggs v. State, 104 Ind. 261, 262, 3 N.E. 886, 887 (1885)* ("We agree with Mr. Bishop that the nature and cause of the accusation are not stated where there is no mention of the full act or series of acts for which the punishment is to be inflicted" (internal quotation marks omitted)); *State v. Perley, 86 Me. 427, 431, 30 A. 74, 75 (1894)* ("The doctrine of the court, says Mr. Bishop, is identical with that of reason, viz: that the indictment must contain an allegation of every fact which is legally essential to the punishment to be inflicted" (internal quotation marks omitted)); see also *United States v. Reese, 92 U.S. 214, 232-233, 23 L. Ed. 563 (1876)* (Clifford, J., concurring in judgment) (citing and paraphrasing 1 Bishop Criminal Procedure § 81).

C

In the half century following publication of Bishop's treatise, numerous courts applied his statement of the common-law understanding; most of them explicitly relied on his treatise. Just as in the earlier period, every fact that was by law a basis for imposing or increasing punishment (including the fact of a prior conviction) was an element. Each such fact had to be included in the accusation of the crime and proved to the jury.

Courts confronted statutes quite similar to the ones with which we have struggled since *McMillan*, and, applying the traditional rule, they found it not at all difficult to determine whether a fact was an element. In *Hobbs, supra*, the defendant was indicted for a form of burglary punishable by 2 to 5 years in prison. A separate statutory section provided for an increased **[**2375]** sentence, up to double the punishment **[*513]** to which the defendant would otherwise be subject, if the entry into the house was effected by force exceeding that incidental to burglary. The trial court instructed the jury to sentence the defendant to 2 to 10 years if it found the requisite level of force, and the jury sentenced him to 3. The Texas Supreme Court, relying on Bishop, reversed because the indictment had **[***469]** not alleged such force; even though the jury had sentenced Hobbs within the range (2 to 5 years) that was permissible under the lesser crime that the indictment had charged, the court thought it "impossible to say . . . that the erroneous charge of the court may not have had some weight in leading the jury" to impose the sentence that it did. *44 Tex. at 355.* n6 See also *Searcy v. State, 1 Tex. Ct. App. 440, 444 (1876)* (similar); *Garcia v. State, 19 Tex. Ct. App. 389, 393 (1885)* (not citing *Hobbs*, but relying on Bishop to reverse 10-year sentence for assault with a bowie-knife or dagger, where statute doubled range for assault from 2 to 7 to 4 to 14 years if the assault was committed with either weapon but where indictment had not so alleged).

> n6 The gulf between the traditional approach to determining elements and that of our recent cases is manifest when one considers how one might, from the perspective of those cases, analyze the issue in *Hobbs*. The chapter of the Texas code addressing burglary was entitled simply "Of Burglary" and began with a section explicitly defining "the offense of burglary." After a series of sections defining terms, it then set out six separate sections specifying the punishment for various kinds of burglary. The section regarding force was one of these. See 1 G. Paschal, Digest of Laws of Texas, Part II, Tit. 20, ch. 6, pp. 462-463 (4th ed. 1875). Following an approach similar to that in *Almendarez-Torres v. United States, 523 U.S. 224, 231-234, 242-246, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998)*, and *Castillo* v. *United States, ante*, at __ (slip op., at 4-5), one would likely find a clear legislative intent to make force a sentencing enhancement rather than an element.

As in earlier cases, such as *McDonald* (discussed *supra*, at 5-6), courts also used the converse of the Bishop rule to explain when a fact was not an element of the crime. In *Perley, supra*, the defendant was indicted for and convicted of robbery, which was punishable by imprisonment for life **[*514]** or any term of years. The court, relying on Bishop, *Hope*, *McDonald*, and other authority, rejected his argument that Maine's Notice Clause (which of course required all elements to be alleged) required the indictment to allege the value of the goods stolen, because the punishment did not turn on value: "There is no provision of this statute which makes the amount of property taken an essential element of the offense; and there is no statute in this State which creates

degrees in robbery, or in any way makes the punishment of the offense dependent upon the value of the property taken." *86 Me. at 432, 30 A. at 75.* The court further explained that "where the value is not essential to the punishment it need not be distinctly alleged or proved." *86 Me. at 433, 30 A. at 76.*

Reasoning similar to *Perley* and the Texas cases is evident in other cases as well. See *Jones v. State, 63 Ga. 141, 143 (1879)* (where punishment for burglary in the day is 3 to 5 years in prison and for burglary at night is 5 to 20, time of burglary is a "constituent of the offense"; indictment should "charge all that is requisite to render plain and certain every constituent of the offense"); *United States v. Woodruff, 68 F. 536, 538 (Kan. 1895)* (where embezzlement statute "contemplates that there should be an ascertainment of the exact sum for which a fine may be imposed" and jury did not determine amount, judge lacked authority to impose fine; "on such an issue the defendant is entitled to his constitutional right of trial by jury").

Courts also, again just as in the pre-Bishop period, applied the same reasoning to the fact of a prior conviction as they did to any other fact that **[***470]** aggravated the punishment **[**2376]** by law. Many, though far from all, of these courts relied on Bishop. In 1878, Maryland's high court, in *Maguire v. State, 47 Md. 485,* stated the rule and the reason for it in language indistinguishable from that of *Tuttle* a quarter century before:

"The law would seem to be well settled, that if the party be proceeded against for a second or third offence under **[*515]** the statute, and the sentence prescribed be different from the first, or severer, by reason of its being such second or third offence, the fact thus relied on must be averred in the indictment; for the settled rule is, that the indictment must contain an averment of every fact essential to justify the punishment inflicted." *Maguire, supra, at 496* (citing English cases, *Plumbly v. Commonwealth, 43 Mass. 413 (1841),* Wharton, and Bishop).

In *Goeller v. State, 119 Md. 61, 85 A. 954 (1912),* the same court reaffirmed *Maguire* and voided, as contrary to Maryland's Notice Clause, a statute that permitted the trial judge to determine the fact of a prior conviction. The court extensively quoted Bishop, who had, in the court's view, treated the subject "more fully, perhaps, than any other legal writer," and it cited, among other authorities, "a line of Massachusetts decisions" and *Riggs* (quoted *supra*, at 14). *119 Md. at 64, 85 A. at 955.* In *Larney, 34 Ohio St. at 600-601,* the Supreme Court of Ohio, in an opinion citing only Bishop, reversed a conviction under a recidivism statute where the indictment had not alleged any prior conviction. The defendant had also relied on *Plumbly, supra,* and *Kilbourn v. State, 9 Conn. 560 (1833). 34 Ohio St. at 600.)* And in *State v. Adams, 64 N.H. 440, 13 A. 785 (1888),* the court, relying on Bishop, explained that "the former conviction being a part of the description and character of the offense intended to be punished, because of the higher penalty imposed, it must be alleged." *64 N.H. at 442, 13 A. at 786.* The defendant had been "charged with an offense aggravated by its repetitious character." *Ibid.* See also *Evans v. State, 150 Ind. 651, 653, 50 N.E. 820 (1898)* (similar); *Shiflett v. Commonwealth, 114 Va. 876, 877, 77 S.E. 606, 607 (1913)* (similar).

Even without any reliance on Bishop, other courts addressing recidivism statutes employed the same reasoning as did he and the above cases -- that a crime includes any fact to which punishment attaches. One of the leading cases was **[*516]** *Wood v. People, 53 N.Y. 511 (1873).* The statute in *Wood* provided for increased punishment if the defendant had previously been convicted of a felony then discharged from the conviction. The court, repeatedly referring to "the aggravated offence," *53 N.Y. at 513, 515,* held that the facts of the prior conviction and of the discharge must be proved to the jury, for "both enter into and make a part of the offence . . . . subjecting the prisoner to the increased punishment." *53 N.Y. at 513;* see *ibid.* (fact of prior conviction was an "essential ingredient" of the offense). See also *Johnson v. People, 55 N.Y. 512, 514 (1874)* ("A more severe penalty is denounced by the statute for a second offence; and all the facts to bring the case within the statute must be [alleged in the indictment and] established on the trial"); *People v. Sickles, 156 N.Y. 541, 544-545, 51 N.E. 288, 289 (1898)* (reaffirming *Wood* and *Johnson* and explaining that "the charge is not merely that the prisoner has committed the **[***471]** offense specifically described, but that, as a former convict, his second offense has subjected him to an enhanced penalty").

Contemporaneously with the New York Court of Appeals in *Wood* and *Johnson*, state high courts in California and Pennsylvania offered similar explanations for why the fact of a prior conviction is an element. In *People v. Delany, 49 Cal. 394 (1874),* which involved a statute making petit larceny (normally a misdemeanor) a felony if committed following a prior conviction for petit larceny, the court left no doubt that the fact of the prior conviction was an element of an aggravated **[**2377]** crime consisting of petit larceny committed following a prior conviction for petit larceny:

"The particular circumstances of the offense are stated [in the indictment], and consist of the prior convictions and of the facts constituting the last larceny.

. . . . .

"The former convictions are made to adhere to and constitute a portion of the aggravated offense." *49 Cal. at 395.* [*517]

"The felony consists both of the former convictions and of the particular larceny . . . . The former convictions were a separate fact; which, taken in connection with the facts constituting the last offense, make a distinct and greater offense than that charged, exclusive of the prior convictions." *49 Cal. at 396.* n7

See also *People v. Coleman, 145 Cal. 609, 610-611, 79 P. 283, 284-285 (1904).*

n7 The court held that a general plea of "guilty" to an indictment that includes an allegation of a prior conviction applies to the fact of the prior conviction.

Similarly, in *Rauch v. Commonwealth, 78 Pa. 490 (1876),* the court applied its 1826 decision in *Smith* v. *Commonwealth,* 14 Serg. & Rawle 69, and reversed the trial court's imposition of an enhanced sentence "upon its own knowledge of its records." *78 Pa. at 494.* The court explained that "imprisonment in jail is not a lawful consequence of a mere conviction for an unlawful sale of liquors. It is the lawful consequence of a second sale only after a former conviction. On every principle of personal security and the due administration of justice, the fact which gives rightfulness to the greater punishment should appear in the record." *Ibid.* See also *78 Pa. at 495* ("But clearly the substantive offence, which draws to itself the greater punishment, is the unlawful sale after a former conviction. This, therefore, is the very offence he is called upon to defend against").

Meanwhile, Massachusetts reaffirmed its earlier decisions, striking down, in *Commonwealth v. Harrington, 130 Mass. 35 (1880),* a liquor law that provided a small fine for a first or second conviction, provided a larger fine or imprisonment up to a year for a third conviction, and specifically provided that a prior conviction need not be alleged in the complaint. The court found this law plainly inconsistent with *Tuttle* and with the State's Notice Clause, explaining that "the offence which is punishable with the higher penalty is not fully and [*518] substantially described to the defendant, if the complaint fails to set forth the former convictions which are essential features of it." *130 Mass. at 36.* n8

n8 See also *State v. Austin, 113 Mo. 538, 542, 21 S.W. 31, 32 (1893)* (prior conviction is a "material fact" of the "aggravated offense"); *Bandy v. Hehn, 10 Wyo. 167, 172-174, 67 P. 979, 980 (1902)* ("In reason, and by the great weight of authority, as the fact of a former conviction enters into the offense to the extent of aggravating it and increasing the punishment, it must be alleged in the information and proved like any other material fact, if it is sought to impose the greater penalty. The statute makes the prior conviction a part of the description and character of the offense intended to be punished" (citing *Tuttle v. Commonwealth, 68 Mass. 505 (1854)*)); *State v. Smith, 129 Iowa 709, 711-712, 106 N.W. 187, 188-189 (1906)* (similar); *State v. Scheminisky, 31 Idaho 504, 506-507, 174 P. 611, 611-612 (1918)* (similar).

Without belaboring the point any further, I simply note that this traditional understanding -- that a "crime" [***472] includes every fact that is by law a basis for imposing or increasing punishment -- continued well into the 20th century, at least until the middle of the century. See Knoll & Singer, Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of *McMillan v. Pennsylvania, 22 Seattle U. L. Rev. 1057, 1069-1081 (1999)* (surveying 20th century decisions of federal courts prior to *McMillan*); see also *People v. Ratner, 67 Cal. App. 2d Supp. 902, 153 P.2d 790, 791-793 (1944).* In fact, it is fair to say that *McMillan* began a revolution in the law regarding the definition [**2378] of "crime." Today's decision, far from being a sharp break with the past, marks nothing more than a return to the *status quo ante* -- the status quo that reflected the original meaning of the Fifth and Sixth Amendments.

III

The consequence of the above discussion for our decisions in *Almendarez-Torres* and *McMillan* should be plain enough, but a few points merit special mention. [*519]

First, it is irrelevant to the question of which facts are elements that legislatures have allowed sentencing judges discretion in determining punishment (often within extremely broad ranges). See *ante,* at 14-15; *post,* at 23-25 (O'CONNOR, J., dissenting). Bishop, immediately after setting out the traditional rule on elements, explained why:

"The reader should distinguish between the foregoing doctrine, and the doctrine . . . that, within the limits of any discretion as to the punishment which the law may have allowed, the judge, when he pronounces sentence, may suffer his discretion to be influenced by matter shown in aggravation or mitigation, not covered by the allegations of the indictment . . . . The aggravating

circumstances spoken of cannot swell the penalty above what the law has provided for the acts charged against the prisoner, and they are interposed merely to check the judicial discretion in the exercise of the permitted mercy [in finding mitigating circumstances]. This is an entirely different thing from punishing one for what is not alleged against him." 1 Bishop, Criminal Procedure § 85, at 54.

See also 1 J. Bishop, New Commentaries on the Criminal Law § § 600-601, pp. 370-371, § 948, p. 572 (8th ed. 1892) (similar). In other words, establishing what punishment is available by law and setting a specific punishment within the bounds that the law has prescribed are two different things. n9 **[*520]** Cf. 4 W. Blackstone, Commentaries on the Law of England **[***473]** 371-372 (1769) (noting judges' broad discretion in setting amount of fine and length of imprisonment for misdemeanors, but praising determinate punishment and "discretion . . . regulated by law"); *Perley, 86 Me. at 429, 432, 30 A. at 74, 75-76* (favorably discussing Bishop's rule on elements without mentioning, aside from quotation of statute in statement of facts, that defendant's conviction for robbery exposed him to imprisonment for life or any term of years). Thus, it is one thing to consider what the Constitution requires the prosecution to do in order to entitle itself to a particular kind, degree, or range of punishment of the accused, see *Woodruff, 68 F. at 536*, and quite another to consider **[**2379]** what constitutional constraints apply either to the imposition of punishment within the limits of that entitlement or to a legislature's ability to set broad ranges of punishment. In answering the former constitutional question, I need not, and do not, address the latter.

n9 This is not to deny that there may be laws on the borderline of this distinction. In *Brightwell v. State, 41 Ga. 482 (1871)*, the court stated a rule for elements equivalent to Bishop's, then held that whether a defendant had committed arson in the day or at night need not be in the indictment. The court explained that there was "no provision that arson in the night shall be punished for any different period" than arson in the day (both being punishable by 2 to 7 years in prison). *41 Ga. at 483*. Although there was a statute providing that "arson in the day time shall be punished for a less period than arson in the night time," the court concluded that it merely set "a rule for the exercise of [the sentencing judge's] discretion" by specifying a particular fact for the judge to consider along with the many others that would enter into his sentencing decision. *Ibid.* Cf. *Jones v. State, 63 Ga. 141, 143 (1879)* (whether burglary occurred in day or at night is a "constituent of the offense" because law fixes different ranges of punishment based on this fact). And the statute attached no definite consequence to that particular fact: A sentencing judge presumably could have imposed a sentence of seven years less one second for daytime arson. Finally, it is likely that the statute in *Brightwell*, given its language ("a less period") and its placement in a separate section, was read as setting out an affirmative defense or mitigating circumstance. See *Wright v. State, 113 Ga. App. 436, 437-438, 148 S.E.2d 333, 335-336 (1966)* (suggesting that it would be error to refuse to charge later version of this statute to jury upon request of defendant). See generally Archbold *52, *105-*106 (discussing rules for determining whether fact is an element or a defense).

Second, and related, one of the chief errors of *Almendarez-Torres* -- an error to which I succumbed -- was to attempt to discern whether a particular fact is traditionally (or typically) a basis for a sentencing court to increase an offender's sentence. *523 U.S. at 243-244; see id. at 230, 241.* For the **[*521]** reasons I have given, it should be clear that this approach just defines away the real issue. What matters is the way by which a fact enters into the sentence. If a fact is by law the basis for imposing or increasing punishment -- for establishing or increasing the prosecution's entitlement -- it is an element. (To put the point differently, I am aware of no historical basis for treating as a nonelement a fact that by law sets or increases punishment.) When one considers the question from this perspective, it is evident why the fact of a prior conviction is an element under a recidivism statute. Indeed, cases addressing such statutes provide some of the best discussions of what constitutes an element of a crime. One reason frequently offered for treating recidivism differently, a reason on which we relied in *Almendarez-Torres, supra, at 235*, is a concern for prejudicing the jury by informing it of the prior conviction. But this concern, of which earlier courts were well aware, does not make the traditional understanding of what an element is any less **[***474]** applicable to the fact of a prior conviction. See, *e.g., Maguire, 47 Md. at 498; Sickles, 156 N.Y. at 547, 51 N.E. at 290.* n10

n10 In addition, it has been common practice to address this concern by permitting the defendant to stipulate to the prior conviction, in which case the charge of the prior conviction is not read to the jury, or, if the defendant decides not to stipulate, to bifurcate the trial, with the jury only considering the prior conviction after it has reached a guilty verdict on the core crime. See,

e.g., 1 J. Bishop, Criminal Law § 964, at 566-567 (5th ed. 1872) (favorably discussing English practice of bifurcation); *People v. Saunders, 5 Cal. 4th 580, 587-588, 853 P.2d 1093, 1095-1096 (1993)* (detailing California approach, since 1874, of permitting stipulation and, more recently, of also permitting bifurcation).

Third, I think it clear that the common-law rule would cover the *McMillan* situation of a mandatory minimum sentence (in that case, for visible possession of a firearm during the commission of certain crimes). No doubt a defendant could, under such a scheme, find himself sentenced to the same term to which he could have been sentenced absent the mandatory minimum. The range for his underlying crime **[*522]** could be 0 to 10 years, with the mandatory minimum of 5 years, and he could be sentenced to 7. (Of course, a similar scenario is possible with an increased maximum.) But it is equally true that his expected punishment has increased as a result of the narrowed range and that the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish. The mandatory minimum "entitles the government," *Woodruff, 68 F. at 538*, to more than it would otherwise be entitled (5 to 10 years, rather than 0 to 10 and the risk of a sentence below 5). Thus, the fact triggering the mandatory minimum is part of "the punishment sought to be inflicted," Bishop, Criminal Procedure, at 50; it undoubtedly "enters into the punishment" so as to aggravate it, *id.* § 540, at 330, and is an "act to which the law affixes . . . punishment," *id.* § 80, at 51. Further, just as in *Hobbs* and *Searcy*, see *supra*, at 15-16, it is likely that the change in the range available to the judge affects his choice of sentence. Finally, in numerous cases, such as *Lacy*, *Garcia*, and *Jones*, see *supra*, at 6-7, 16, 17, the aggravating fact raised the whole range -- both the top and **[**2380]** bottom. Those courts, in holding that such a fact was an element, did not bother with any distinction between changes in the maximum and the minimum. What mattered was simply the overall increase in the punishment provided by law. And in several cases, such as *Smith* and *Woodruff*, see *supra*, at 4, 17, the very concept of maximums and minimums had no applicability, yet the same rule for elements applied. See also *Harrington* (discussed *supra*, at 20-21).

Finally, I need not in this case address the implications of the rule that I have stated for the Court's decision in *Walton v. Arizona, 497 U.S. 639, 647-649, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990)*. See *ante*, at 30-31. *Walton* did approve a scheme by which a judge, rather than a jury, determines an aggravating fact that makes a convict eligible for the death penalty, and thus eligible for a greater punishment. In this sense, that fact is an element. But that scheme exists in a unique context, for in the area of capital **[*523]** punishment, unlike any other area, we have imposed special **[***475]** constraints on a legislature's ability to determine what facts shall lead to what punishment -- we have restricted the legislature's ability to define crimes. Under our recent capital-punishment jurisprudence, neither Arizona nor any other jurisdiction could provide -- as, previously, it freely could and did -- that a person shall be death eligible automatically upon conviction for certain crimes. We have interposed a barrier between a jury finding of a capital crime and a court's ability to impose capital punishment. Whether this distinction between capital crimes and all others, or some other distinction, is sufficient to put the former outside the rule that I have stated is a question for another day. n11

n11 It is likewise unnecessary to consider whether (and, if so, how) the rule regarding elements applies to the Sentencing Guidelines, given the unique status that they have under *Mistretta v. United States, 488 U.S. 361, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989)*. But it may be that this special status is irrelevant, because the Guidelines "have the force and effect of laws." *488 U.S. at 413* (SCALIA, J., dissenting).

* * *

For the foregoing reasons, as well as those given in the Court's opinion, I agree that the New Jersey procedure at issue is unconstitutional.

DISSENTBY: O'CONNOR; BREYER

DISSENT:

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE BREYER join, dissenting.

Last Term, in *Jones v. United States, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999)*, this Court found that our prior cases suggested the following principle: "Under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *526 U.S. at 243, n. 6.* At the time, JUSTICE KENNEDY rightly criticized the Court for its failure to explain **[*524]** the origins, contours, or consequences of its purported constitutional principle; for the inconsistency of that

principle with our prior cases; and for the serious doubt that the holding cast on sentencing systems employed by the *Federal Government and States alike. 526 U.S. at 254, 264-272* (dissenting opinion). Today, in what will surely be remembered as a watershed change in constitutional law, the Court imposes as a constitutional rule the principle it first identified in *Jones*.

I

Our Court has long recognized that not every fact that bears on a defendant's punishment need be charged in an indictment, submitted to a jury, and proved by the government beyond a reasonable doubt. Rather, we have held that the "legislature's definition of the elements of **[**2381]** the offense is usually dispositive." *McMillan v. Pennsylvania, 477 U.S. 79, 85, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986)*; see also *Almendarez-Torres v. United States, 523 U.S. 224, 228, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998); Patterson v. New York, 432 U.S. 197, 210, 211, n. 12, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977)*. Although we have recognized that "there are obviously constitutional limits beyond which the States may not go in this regard," *432 U.S. at 210*, and that "in certain limited circumstances *Winship*'s reasonable-doubt **[***476]** requirement applies to facts not formally identified as elements of the offense charged," *McMillan, supra, at 86*, we have proceeded with caution before deciding that a certain fact must be treated as an offense element despite the legislature's choice not to characterize it as such. We have therefore declined to establish any bright-line rule for making such judgments and have instead approached each case individually, sifting through the considerations most relevant to determining whether the legislature has acted properly within its broad power to define crimes and their punishments or instead has sought to evade the constitutional requirements associated with the characterization of a fact as an offense element. See, *e.g., Monge v. California, 524 U.S. 721, 728-729, 141 L. Ed. 2d 615, 118 S. Ct. 2246 (1998); McMillan, supra, at 86.* **[*525]**

In one bold stroke the Court today casts aside our traditional cautious approach and instead embraces a universal and seemingly bright-line rule limiting the power of Congress and state legislatures to define criminal offenses and the sentences that follow from convictions thereunder. The Court states: "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." *Ante*, at 24. In its opinion, the Court marshals virtually no authority to support its extraordinary rule. Indeed, it is remarkable that the Court cannot identify a *single instance*, in the over 200 years since the ratification of the Bill of Rights, that our Court has applied, as a constitutional requirement, the rule it announces today.

According to the Court, its constitutional rule "emerges from our history and case law." *Ante*, at 26. None of the history contained in the Court's opinion requires the rule it ultimately adopts. The history cited by the Court can be divided into two categories: first, evidence that judges at common law had virtually no discretion in sentencing, *ante*, at 11-13, and, second, statements from a 19th-century criminal procedure treatise that the government must charge in an indictment and prove at trial the elements of a statutory offense for the defendant to be sentenced to the punishment attached to that statutory offense, *ante*, at 13-14. The relevance of the first category of evidence can be easily dismissed. Indeed, the Court does not even claim that the historical evidence of nondiscretionary sentencing at common law supports its "increase in the maximum penalty" rule. Rather, almost as quickly as it recites that historical practice, the Court rejects its relevance to the constitutional question presented here due to the conflicting American practice of judges exercising sentencing discretion and our decisions recognizing the legitimacy of that American practice. See *ante*, at 14-15 (citing *Williams v. New York, 337 U.S. 241, 246, 93 L. Ed. 1337, 69 S. Ct. 1079 (1949)*). Even if the Court were to **[*526]** claim that the common-law history on this point did bear on the instant case, one wonders why the historical practice of judges pronouncing judgments in cases between private parties is relevant at all to the question of criminal punishment presented here. See *ante*, at 12-13 (quoting 3 W. Blackstone, Commentaries on the Laws of England 396 (1768), which **[***477]** pertains to "remedies prescribed by law for the redress of injuries"). **[**2382]**

Apparently, then, the historical practice on which the Court places so much reliance consists of only two quotations taken from an 1862 criminal procedure treatise. See *ante*, at 13-14 (quoting J. Archbold, Pleading and Evidence in Criminal Cases 51, 188 (15th ed. 1862)). A closer examination of the two statements reveals that neither supports the Court's "increase in the maximum penalty" rule. Both of the excerpts pertain to circumstances in which a common-law felony had also been made a separate statutory offense carrying a greater penalty. Taken together, the statements from the Archbold treatise demonstrate nothing more than the unremarkable proposition that a defendant could receive the greater statutory punishment only if the indictment expressly charged and the prosecutor proved the facts that made up the statutory offense, as opposed to simply those facts that made up the common-law offense. See *id.* at 51 (indictment); *id.* at 188 (proof). In other words, for the defendant to receive the statutory punishment, the

prosecutor had to charge in the indictment and prove at trial *the elements* of the statutory offense. To the extent there is any doubt about the precise meaning of the treatise excerpts, that doubt is dispelled by looking to the treatise sections from which the excerpts are drawn and the broader principle each section is meant to illustrate. See *id.* at 43 ("Every offence consists of certain acts done or omitted under certain circumstances; and in an indictment for the offence, it is not sufficient to charge the defendant generally with having committed it, . . . but all the facts and circumstances constituting **[*527]** the offence must be specially set forth"); *id.* at 180 ("Every offence consists of certain acts done or omitted, under certain circumstances, all of which must be stated in the indictment . . . and be proved as laid"). And, to the extent further clarification is needed, the authority cited by the Archbold treatise to support its stated proposition with respect to the requirements of an indictment demonstrates that the treatise excerpts mean only that the prosecutor must charge and then prove at trial *the elements* of the statutory offense. See 2 M. Hale, Pleas of the Crown *170 (hereinafter Hale) ("An indictment grounded upon an offense made by act of parliament must by express words bring the offense within the substantial description made in the act of parliament"). No Member of this Court questions the proposition that a State must charge in the indictment and prove at trial beyond a reasonable doubt the actual elements of the offense. This case, however, concerns the distinct question of when a fact that bears on a defendant's punishment, but which the legislature has not classified as an element of the charged offense, must nevertheless be treated as an offense element. The excerpts drawn from the Archbold treatise do not speak to this question at all. The history on which the Court's opinion relies provides no support for its "increase in the maximum penalty" rule.

In his concurring opinion, JUSTICE THOMAS cites additional historical evidence that, in his view, dictates an even broader rule than that set forth in the Court's opinion. The history cited by JUSTICE THOMAS does not require, as a matter of federal constitutional law, the application of the **[***478]** rule he advocates. To understand why, it is important to focus on the basis for JUSTICE THOMAS' argument. First, he claims that the Fifth and Sixth Amendments "codified" pre-existing common law. Second, he contends that the relevant common law treated any fact that served to increase a defendant's punishment as an element of an offense. See *ante*, at 2-4. Even if JUSTICE THOMAS' first assertion were **[*528]** correct -- a proposition this Court has not before embraced -- he fails to gather the evidence necessary to support his second assertion. Indeed, for an opinion that purports to be founded upon the original understanding of the Fifth and Sixth Amendments, JUSTICE THOMAS' concurrence **[**2383]** is notable for its failure to discuss any historical practice, or to cite any decisions, predating (or contemporary with) the ratification of the Bill of Rights. Rather, JUSTICE THOMAS divines the common-law understanding of the Fifth and Sixth Amendment rights by consulting decisions rendered by American courts well after the ratification of the Bill of Rights, ranging primarily from the 1840's to the 1890's. Whatever those decisions might reveal about the way American state courts resolved questions regarding the distinction between a crime and its punishment under general rules of criminal pleading or their own state constitutions, the decisions fail to demonstrate any settled understanding with respect to the definition of a crime under the relevant, preexisting common law. Thus, there is a crucial disconnect between the historical evidence JUSTICE THOMAS cites and the proposition he seeks to establish with that evidence.

An examination of the decisions cited by JUSTICE THOMAS makes clear that they did not involve a simple application of a long-settled common-law rule that any fact that increases punishment must constitute an offense element. That would have been unlikely, for there does not appear to have been any such common-law rule. The most relevant common-law principles in this area were that an indictment must charge the elements of the relevant offense and must do so with certainty. See, *e.g.*, 2 Hale *182 ("Touching the thing wherein or of which the offense is committed, there is required a certainty in an indictment"); *id.* at *183 ("The fact itself must be certainly set down in an indictment"); *id.* at *184 ("The offense itself must be alledged, and the manner of it"). Those principles, of course, say little about when a specific fact constitutes an element of the offense. **[*529]**

JUSTICE THOMAS is correct to note that American courts in the 19th century came to confront this question in their cases, and often treated facts that served to increase punishment as elements of the relevant statutory offenses. To the extent JUSTICE THOMAS' broader rule can be drawn from those decisions, the rule was one of those courts' own invention, and not a previously existing rule that would have been "codified" by the ratification of the Fifth and Sixth Amendments. Few of the decisions cited by JUSTICE THOMAS indicate a reliance on pre-existing common-law principles. In fact, the converse rule that he identifies in the 19th American cases -- that a fact that does not make a difference in punishment need not be charged in an indictment, see, *e.g.*, *Larned v. Commonwealth, 53 Mass. 240, 242-244 (1847)* -- was assuredly created by American courts, given that English courts of roughly the same period followed a contrary rule. See, *e.g.*, *Rex* v. **[***479]** *Marshall*, 1 Moody C. C. 158, *168 Eng. Rep.*

1224 (1827). JUSTICE THOMAS' collection of state-court opinions is therefore of marginal assistance in determining the original understanding of the Fifth and Sixth Amendments. While the decisions JUSTICE THOMAS cites provide some authority for the rule he advocates, they certainly do not control our resolution of the *federal constitutional* question presented in the instant case and cannot, standing alone, justify overruling three decades' worth of decisions by this Court.

In contrast to JUSTICE THOMAS, the Court asserts that its rule is supported by "our cases in this area." *Ante*, at 23. That the Court begins its review of our precedent with a quotation from a dissenting opinion speaks volumes about the support that actually can be drawn from our cases for the "increase in the maximum penalty" rule announced today. See *ante*, at 17-18 (quoting *Almendarez-Torres, 523 U.S. at 251* (SCALIA, J., dissenting)). The Court then cites our decision in *Mullaney v. Wilbur, 421 U.S. 684, 44 L. Ed. 2d 508, 95 S. Ct. 1881 (1975)*, to demonstrate the "lesson" that due process and jury protections **[*530]** extend beyond those factual determinations that affect a defendant's guilt or innocence. *Ante*, at 18. The Court explains *Mullaney* as having held that the due process proof-beyond-a-reasonable-doubt **[**2384]** requirement applies to those factual determinations that, under a State's criminal law, make a difference in the degree of punishment the defendant receives. *Ante*, at 18. The Court chooses to ignore, however, the decision we issued two years later, *Patterson v. New York, 432 U.S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977)*, which clearly rejected the Court's broad reading of *Mullaney*.

In *Patterson*, the jury found the defendant guilty of second-degree murder. Under New York law, the fact that a person intentionally killed another while under the influence of extreme emotional disturbance distinguished the reduced offense of first-degree manslaughter from the more serious offense of second-degree murder. Thus, the presence or absence of this one fact was the defining factor separating a greater from a lesser punishment. Under New York law, however, the State did not need to prove the absence of extreme emotional disturbance beyond a reasonable doubt. Rather, state law imposed the burden of proving the presence of extreme emotional disturbance on the defendant, and required that the fact be proved by a preponderance of the evidence. *432 U.S. at 198-200*. We rejected Patterson's due process challenge to his conviction:

"We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch." *432 U.S. at 210*. **[*531]**

Although we characterized the factual determination under New York law as one going to the mitigation of culpability, *432 U.S. at 206*, **[***480]** as opposed to the aggravation of the punishment, it is difficult to understand why the rule adopted by the Court in today's case (or the broader rule advocated by JUSTICE THOMAS) would not require the overruling of *Patterson*. Unless the Court is willing to defer to a legislature's formal definition of the elements of an offense, it is clear that the fact that Patterson did not act under the influence of extreme emotional disturbance, in substance, "increased the penalty for [his] crime beyond the prescribed statutory maximum" for first-degree manslaughter. *Ante*, at 24. Nonetheless, we held that New York's requirement that the defendant, rather than the State, bear the burden of proof on this factual determination comported with the Fourteenth Amendment's Due Process Clause. *Patterson, 432 U.S. at 205-211, 216;* see also *id. at 204-205* (reaffirming *Leland v. Oregon, 343 U.S. 790, 96 L. Ed. 1302, 72 S. Ct. 1002 (1952)*, which upheld against due process challenge Oregon's requirement that the defendant, rather than the State, bear the burden on factual determination of defendant's insanity).

Patterson is important because it plainly refutes the Court's expansive reading of *Mullaney*. Indeed, the defendant in *Patterson* characterized *Mullaney* exactly as the Court has today and we *rejected* that interpretation:

"*Mullaney*'s holding, it is argued, is that the State may not permit the blameworthiness of an act *or the severity of punishment authorized for its commission* to depend on the presence or absence of an identified fact without assuming the burden of proving the presence or absence of that fact, as the case may be, beyond a reasonable doubt. In our view, the *Mullaney* holding should not be so broadly read." *Patterson, 432 U.S at 214 215* (emphasis added) (footnote omitted). **[*532]**

We explained *Mullaney* instead as holding only "that a State must prove every **[**2385]** ingredient of an offense beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offense." *432 U.S. at 215*. Because nothing had been presumed against Patterson under New York law, we found no due process violation. *432 U.S. at 216*. Ever since our decision in *Patterson*, we have consistently explained the holding in *Mullaney* in these limited terms and have rejected the broad interpretation the Court gives *Mullaney* today. See *Jones, 526 U.S. at 241* ("We identified the use of a presumption to establish an

essential ingredient of the offense as the curse of the Maine law [in *Mullaney*]"); *Almendarez-Torres, 523 U.S. at 240* ("[*Mullaney*] suggests that Congress cannot permit judges to increase a sentence in light of recidivism, or any other factor, not set forth in an indictment and proved to a jury beyond a reasonable doubt. This Court's later case, . . . *Patterson* v. *New York*, however, makes absolutely clear that such a reading of *Mullaney* is wrong"); *McMillan, 477 U.S. at 84* (same).

The case law from which the Court claims that its rule emerges consists **[***481]** of only one other decision -- *McMillan* v. *Pennsylvania*. The Court's reliance on *McMillan* is also puzzling, given that our holding in that case points to the rejection of the Court's rule. There, we considered a Pennsylvania statute that subjected a defendant to a mandatory minimum sentence of five years' imprisonment if a judge found, by a preponderance of the evidence, that the defendant had visibly possessed a firearm during the commission of the offense for which he had been convicted. *Id. at 81.* The petitioners claimed that the Fourteenth Amendment's Due Process Clause and the Sixth Amendment's jury trial guarantee (as incorporated by the Fourteenth Amendment) required the State to prove to the jury beyond a reasonable **[*533]** doubt that they had visibly possessed firearms. We rejected both constitutional claims. *Id. at 84-91, 93.*

The essential holding of *McMillan* conflicts with at least two of the several formulations the Court gives to the rule it announces today. First, the Court endorses the following principle: "'It is unconstitutional for a legislature to remove from the jury the assessment of facts *that increase the prescribed range of penalties* to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.'" *Ante*, at 24 (emphasis added) (quoting *Jones, 526 U.S. at 252-253* (STEVENS, J., concurring)). Second, the Court endorses the rule as restated in JUSTICE SCALIA's concurring opinion in *Jones*. See *ante*, at 24. There, JUSTICE SCALIA wrote: "It is unconstitutional to remove from the jury the assessment of facts *that alter the congressionally prescribed range of penalties* to which a criminal defendant is exposed." *Jones, 526 U.S. at 253* (emphasis added). Thus, the Court appears to hold that any fact that increases or alters *the range* of penalties to which a defendant is exposed -- which, by definition, must include increases or alterations to either the minimum or maximum penalties -- must be proved to a jury beyond a reasonable doubt. In *McMillan*, however, we rejected such a rule to the extent it concerned those facts that increase or alter the minimum penalty to which a defendant is exposed. Accordingly, it is incumbent on the Court not only to admit that it is overruling *McMillan*, but also to explain why such a course of action is appropriate under normal principles of *stare decisis*.

The Court's opinion does neither. Instead, it attempts to lay claim to *McMillan* as support for its "increase in the maximum penalty" rule. According to the Court, *McMillan* acknowledged that permitting a judge to make findings that expose a defendant to greater or additional punishment "may raise serious constitutional **[**2386]** concern." *Ante*, at 20. We said nothing of the sort in *McMillan*. To the contrary, we **[*534]** began our discussion of the petitioners' constitutional claims by emphasizing that we had already "rejected the claim that whenever a State links the 'severity of punishment' to 'the presence or absence of an identified fact' the State must prove that fact beyond a reasonable doubt." *477 U.S. at 84* (quoting *Patterson, 432 U.S. at 214).* We then reaffirmed the rule set forth in *Patterson* -- "that in determining what facts must be proved beyond a **[***482]** reasonable doubt the state legislature's definition of the elements of the offense is usually dispositive." *McMillan, 477 U.S. at 85.* Although we acknowledged that there are constitutional limits to the State's power to define crimes and prescribe penalties, we found no need to establish those outer boundaries in *McMillan* because "several factors" persuaded us that the Pennsylvania statute did not exceed those limits, however those limits might be defined. *Id. at 86.* The Court's assertion that *McMillan* supports the application of its bright-line rule in this area is, therefore, unfounded.

The Court nevertheless claims to find support for its rule in our discussion of one factor in *McMillan* -- namely, our statement that the petitioners' claim would have had "at least more superficial appeal" if the firearm possession finding had exposed them to greater or additional punishment. *Id. at 88.* To say that a claim may have had "more superficial appeal" is, of course, a far cry from saying that a claim would have been upheld. Moreover, we made that statement in the context of examining one of several factors that, in combination, ultimately gave "no doubt that Pennsylvania's [statute fell] on the permissible side of the constitutional line." *Id. at 91.* The confidence of that conclusion belies any argument that our ruling would have been different had the Pennsylvania statute instead increased the maximum penalty to which the petitioners were exposed. In short, it is clear that we did not articulate any bright-line rule that States must prove to a jury beyond a reasonable doubt any fact that exposes a defendant to a greater punishment. **[*535]** Such a rule would have been in substantial tension with both our earlier acknowledgment that *Patterson* rejected such a rule, see *477 U.S. at 84*, and our recognition that a state legislature's definition of the elements is normally dispositive, see *477 U.S. at 85*.

If any single rule can be derived from *McMillan*, it is not the Court's "increase in the maximum penalty" principle, but rather the following: When a State takes a fact that has always been considered by sentencing courts to bear on punishment, and dictates the precise weight that a court should give that fact in setting a defendant's sentence, the relevant fact need not be proved to a jury beyond a reasonable doubt as would an element of the offense. See *477 U.S. at 89-90.*

Apart from *Mullaney* and *McMillan*, the Court does not claim to find support for its rule in any other pre-*Jones* decision. Thus, the Court is in error when it says that its rule emerges from our case law. Nevertheless, even if one were willing to assume that *Mullaney* and *McMillan* lend some support for the Court's position, that feeble foundation is shattered by several of our precedents directly addressing the issue. The only one of those decisions that the Court addresses at any length is *Almendarez-Torres*. There, we squarely rejected the "increase in the maximum penalty" rule: "Petitioner also argues, in essence, that this Court should simply adopt a rule that any significant increase in a statutory maximum sentence would trigger a constitutional 'elements' requirement. We have explained why we believe the Constitution, as interpreted **[***483]** in *McMillan* and earlier cases, does not impose that requirement." *523 U.S. at 247.* Whether *Almendarez-Torres* **[**2387]** directly refuted the "increase in the maximum penalty" rule was extensively debated in *Jones*, and that debate need not be repeated here. See *526 U.S. at 248-249; id. at 268-270* (KENNEDY, J., dissenting). I continue to agree with JUSTICE KENNEDY that *Almendarez-Torres* constituted a clear repudiation of the rule the Court adopts today. See *Jones, supra, at 268* (dissenting **[*536]** opinion). My understanding is bolstered by *Monge* v. *California*, a decision relegated to a footnote by the Court today. In *Monge*, in reasoning essential to our holding, we reiterated that "the Court has rejected an absolute rule that an enhancement constitutes an element of the offense any time that it increases the maximum sentence to which a defendant is exposed." *524 U.S. at 729* (citing *Almendarez-Torres*). At the very least, *Monge* demonstrates that *Almendarez-Torres* was not an "exceptional departure" from "historic practice." *Ante*, at 21.

Of all the decisions that refute the Court's "increase in the maximum penalty" rule, perhaps none is as important as *Walton v. Arizona, 497 U.S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990).* There, a jury found Walton, the petitioner, guilty of first-degree murder. Under Arizona law, a trial court conducts a separate sentencing hearing to determine whether a defendant convicted of first-degree murder should receive the death penalty or life imprisonment. See *497 U.S. at 643* (citing Ariz. Rev. Stat. Ann. § 13-703(B) (1989)). At that sentencing hearing, the judge, rather than the jury, must determine the existence or nonexistence of the statutory aggravating and mitigating factors. See *Walton, 497 U.S. at 643* (quoting § 13-703(B)). The Arizona statute directs the judge to "'impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in [the statute] and that there are no mitigating circumstances sufficiently substantial to call for leniency.'" *Id. at 644* (quoting § 13-703(E)). Thus, under Arizona law, a defendant convicted of first-degree murder can be sentenced to death *only if* the judge finds the existence of a statutory aggravating factor.

Walton challenged the Arizona capital sentencing scheme, arguing that the Constitution requires that the jury, and not the judge, make the factual determination of the existence or nonexistence of the statutory aggravating factors. We rejected that contention: "'Any argument that the Constitution requires that a jury impose the sentence of death or **[*537]** make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court.'" *497 U.S. at 647* (quoting *Clemons v. Mississippi, 494 U.S. 738, 745, 108 L. Ed. 2d 725, 110 S. Ct. 1441 (1990)).* Relying in part on our decisions rejecting challenges to Florida's capital sentencing scheme, which also provided for sentencing by the trial judge, we added that "'the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury.'" *Walton, supra,* **[***484]** *at 648* (quoting *Hildwin v. Florida, 490 U.S. 638, 640-641, 104 L. Ed. 2d 728, 109 S. Ct. 2055 (1989) (per curiam)).*

While the Court can cite no decision that would require its "increase in the maximum penalty" rule, *Walton* plainly rejects it. Under Arizona law, the fact that a statutory aggravating circumstance exists in the defendant's case "'increases the maximum penalty for [the] crime'" of first-degree murder to death. *Ante*, at 9 (quoting *Jones, 526 U.S. at 243, n. 6).* If the judge does not find the existence of a statutory aggravating circumstance, the maximum punishment authorized by the jury's guilty verdict is life imprisonment. Thus, using the terminology that the Court itself employs to describe the constitutional fault in the New Jersey sentencing scheme presented here, under Arizona law, the judge's finding that **[**2388]** a statutory aggravating circumstance exists "exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Ante*, at 16 (emphasis in original). Even JUSTICE THOMAS, whose vote is necessary to the Court's opinion today, agrees on this point. See *ante*, at 26. If a State can remove from the jury a factual determination that makes the difference between life and

death, as *Walton* holds that it can, it is inconceivable why a State cannot do the same with respect to a factual determination that results in only a 10-year increase in the maximum sentence to which a defendant is exposed. **[*538]**

The distinction of *Walton* offered by the Court today is baffling, to say the least. The key to that distinction is the Court's claim that, in Arizona, the jury makes all of the findings necessary to expose the defendant to a death sentence. See *ante*, at 31 (quoting *Almendarez-Torres, 523 U.S. at 257, n. 2* (SCALIA, J., dissenting)). As explained above, that claim is demonstrably untrue. A defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty. Indeed, at the time *Walton* was decided, the author of the Court's opinion today understood well the issue at stake. See *Walton, 497 U.S. at 709* (STEVENS, J., dissenting) ("Under Arizona law, as construed by Arizona's highest court, a first-degree murder is not punishable by a death sentence until at least one statutory aggravating circumstance has been proved"). In any event, the extent of our holding in *Walton* should have been perfectly obvious from the face of our decision. We upheld the Arizona scheme specifically on the ground that the Constitution does not require the jury to make the factual findings that serve as the "'prerequisite to imposition of [a death] sentence,'" *497 U.S. at 647* (quoting *Clemons, 494 U.S. at 745*), or "'the specific findings authorizing the imposition of the sentence of death,'" *Walton, supra, at 648* (quoting *Hildwin, 497 U.S. at 640-641*). If the Court does not intend **[***485]** to overrule *Walton*, one would be hard pressed to tell from the opinion it issues today.

The distinction of *Walton* offered by JUSTICE THOMAS is equally difficult to comprehend. According to JUSTICE THOMAS, because the Constitution requires state legislatures to narrow sentencing discretion in the capital-punishment context, facts that expose a convicted defendant to a capital sentence may be different from all other facts that expose a defendant to a more severe sentence. See *ante*, at 26-27. **[*539]** JUSTICE THOMAS gives no specific reason for excepting capital defendants from the constitutional protections he would extend to defendants generally, and none is readily apparent. If JUSTICE THOMAS means to say that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence, his reasoning is without precedent in our constitutional jurisprudence.

In sum, the Court's statement that its "increase in the maximum penalty" rule emerges from the history and case law that it cites is simply incorrect. To make such a claim, the Court finds it necessary to rely on irrelevant historical evidence, to ignore our controlling precedent (*e.g., Patterson*), and to offer unprincipled and inexplicable distinctions between its decision and previous cases addressing the same subject in the capital sentencing context (*e.g., Walton*). The Court has failed to **[**2389]** offer any meaningful justification for deviating from years of cases both suggesting and holding that application of the "increase in the maximum penalty" rule is not required by the Constitution.

II

That the Court's rule is unsupported by the history and case law it cites is reason enough to reject such a substantial departure from our settled jurisprudence. Significantly, the Court also fails to explain adequately why the Due Process Clauses of the Fifth and Fourteenth Amendments and the jury trial guarantee of the Sixth Amendment require application of its rule. Upon closer examination, it is possible that the Court's "increase in the maximum penalty" rule rests on a meaningless formalism that accords, at best, marginal protection for the constitutional rights that it seeks to effectuate. **[*540]**

Any discussion of either the constitutional necessity or the likely effect of the Court's rule must begin, of course, with an understanding of what exactly that rule is. As was the case in *Jones*, however, that discussion is complicated here by the Court's failure to clarify the contours of the constitutional principle underlying its decision. See *Jones, 526 U.S. at 267* (KENNEDY, J., dissenting). In fact, there appear to be several plausible interpretations of the constitutional principle on which the Court's decision rests.

For example, under one reading, the Court appears to hold that the Constitution requires that a fact be submitted to a jury and proved beyond a reasonable doubt only if that fact, as a formal matter, extends the range of punishment *beyond the prescribed statutory maximum*. See, *e.g., ante*, at 24. A State could, however, remove from **[***486]** the jury (and subject to a standard of proof below "beyond a reasonable doubt") the assessment of those facts that define narrower ranges of punishment, *within the overall statutory range*, to which the defendant may be sentenced. See, *e.g., ante*, at 28, n. 19. Thus, apparently New Jersey could cure its sentencing scheme, and achieve virtually the same results, by drafting its weapons possession statute in the following manner: First, New Jersey could prescribe, in

the weapons possession statute itself, a range of 5 to 20 years' imprisonment for one who commits that criminal offense. Second, New Jersey could provide that only those defendants convicted under the statute who are found by a judge, by a preponderance of the evidence, to have acted with a purpose to intimidate an individual on the basis of race may receive a sentence greater than 10 years' imprisonment.

The Court's proffered distinction of *Walton* v. *Arizona* suggests that it means to announce a rule of only this limited effect. The Court claims the Arizona capital sentencing scheme is consistent with the constitutional principle underlying today's decision because Arizona's first-degree murder statute itself authorizes both life imprisonment and **[*541]** the death penalty. See *Ariz. Rev. Stat. Ann. § 13-1105(C)* (1989). "'Once a *jury* has found the defendant *guilty* of *all the elements* of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.'" *Ante*, at 31 (emphasis in original) (quoting *Almendarez-Torres, 523 U.S. at 257, n. 2* (SCALIA, J., dissenting)). Of course, as explained above, an Arizona sentencing judge can impose the maximum penalty of death only if the judge first makes a statutorily required finding that at least one aggravating factor exists in the defendant's case. Thus, the Arizona first-degree murder statute authorizes a maximum penalty of death only in a formal sense. In real terms, however, the Arizona sentencing scheme removes from the jury the assessment of a fact that determines whether the defendant can receive that maximum punishment. **[**2390]** The only difference, then, between the Arizona scheme and the New Jersey scheme we consider here -- apart from the magnitude of punishment at stake -- is that New Jersey has not prescribed the 20-year maximum penalty in the same statute that it defines the crime to be punished. It is difficult to understand, and the Court does not explain, why the Constitution would require a state legislature to follow such a meaningless and formalistic difference in drafting its criminal statutes.

Under another reading of the Court's decision, it may mean only that the Constitution requires that a fact be submitted to a jury and proved beyond a reasonable doubt if it, as a formal matter, *increases* the range of punishment *beyond that which could legally be imposed absent that fact*. See, *e.g.*, *ante*, at 16, 24. A State could, however, remove from the jury (and subject to a standard of proof below "beyond a reasonable doubt") the assessment of those facts that, as a formal matter, *decrease* the range of punishment *below that which could legally be imposed absent that fact*. Thus, consistent with our decision in *Patterson*, New **[*542]** Jersey could cure its sentencing scheme, and achieve virtually the same results, by drafting **[***487]** its weapons possession statute in the following manner: First, New Jersey could prescribe, in the weapons possession statute itself, a range of 5 to 20 years' imprisonment for one who commits that criminal offense. Second, New Jersey could provide that a defendant convicted under the statute whom a judge finds, by a preponderance of the evidence, *not* to have acted with a purpose to intimidate an individual on the basis of race may receive a sentence no greater than 10 years' imprisonment.

The rule that JUSTICE THOMAS advocates in his concurring opinion embraces this precise distinction between a fact that increases punishment and a fact that decreases punishment. See *ante*, at 3 ("[A] 'crime' includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment)"). The historical evidence on which JUSTICE THOMAS relies, however, demonstrates both the difficulty and the pure formalism of making a constitutional "elements" rule turn on such a difference. For example, the Wisconsin statute considered in *Lacy* v. *State*, 15 Wis. *13 (1862), could plausibly qualify as either increasing or mitigating punishment on the basis of the same specified fact. There, Wisconsin provided that the willful and malicious burning of a dwelling house in which "the life of no person shall have been destroyed" was punishable by 7 to 14 years in prison, but that the same burning at a time in which "there was no person lawfully in the dwelling house" was punishable by only 3 to 10 years in prison. Wis. Rev. Stat., ch. 165, § 1 (1858). Although the statute appeared to make the *absence* of persons from the affected dwelling house a fact that mitigated punishment, the Wisconsin Supreme Court found that the *presence* of a person in the affected house constituted an aggravating circumstance. *Lacy*, *supra*, at *15-*16. As both this example and the above hypothetical redrafted New Jersey statute demonstrate, see *supra*, at 20, whether a fact is responsible for an **[*543]** increase or a decrease in punishment rests in the eye of the beholder. Again, it is difficult to understand, and neither the Court nor JUSTICE THOMAS explains, why the Constitution would require a state legislature to follow such a meaningless and formalistic difference in drafting its criminal statutes.

If either of the above readings is all that the Court's decision means, "the Court's principle amounts to nothing more than chastising [the New Jersey Legislature] for failing to use the approved phrasing in expressing its intent as to how [unlawful weapons possession] should be punished." *Jones, 526 U.S. at 267* (KENNEDY, J., dissenting). If New Jersey can,

consistent with the Constitution, make precisely the same differences in punishment turn on precisely the same **[**2391]** facts, and can remove the assessment of those facts from the jury and subject them to a standard of proof below "beyond a reasonable doubt," it is impossible to say that the Fifth, Sixth, and Fourteenth Amendments require the Court's rule. For the same reason, the "structural democratic constraints" that might discourage a legislature from enacting either of the above hypothetical statutes would be no more significant than those that would discourage the enactment of New Jersey's present sentence-enhancement statute. See *ante*, at 24, n. 16 (majority **[***488]** opinion). In all three cases, the legislature is able to calibrate punishment perfectly, and subject to a maximum penalty only those defendants whose cases satisfy the sentence-enhancement criterion. As JUSTICE KENNEDY explained in *Jones*, "no constitutional values are served by so formalistic an approach, while its constitutional costs in statutes struck down . . . are real." *526 U.S. at 267.*

Given the pure formalism of the above readings of the Court's opinion, one suspects that the constitutional principle underlying its decision is more far reaching. The actual principle underlying the Court's decision may be that any fact (other than prior conviction) that has the effect, *in real terms*, of increasing the maximum punishment beyond an **[*544]** otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt. See, *e.g.*, *ante*, at 28 ("The relevant inquiry is one not of form, but of effect -- does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"). The principle thus would apply not only to schemes like New Jersey's, under which a factual determination exposes the defendant to a sentence beyond the prescribed statutory maximum, but also to all determinate-sentencing schemes in which the length of a defendant's sentence within the statutory range turns on specific factual determinations (*e.g.*, the federal Sentencing Guidelines). JUSTICE THOMAS essentially concedes that the rule outlined in his concurring opinion would require the invalidation of the Sentencing Guidelines. See *ante*, at 27, n. 11.

I would reject any such principle. As explained above, it is inconsistent with our precedent and would require the Court to overrule, at a minimum, decisions like *Patterson* and *Walton*. More importantly, given our approval of -- and the significant history in this country of -- discretionary sentencing by judges, it is difficult to understand how the Fifth, Sixth, and Fourteenth Amendments could possibly require the Court's or JUSTICE THOMAS' rule. Finally, in light of the adoption of determinate-sentencing schemes by many States and the Federal Government, the consequences of the Court's and JUSTICE THOMAS' rules in terms of sentencing schemes invalidated by today's decision will likely be severe.

As the Court acknowledges, we have never doubted that the Constitution permits Congress and the state legislatures to define criminal offenses, to prescribe broad ranges of punishment for those offenses, and to give judges discretion to decide where within those ranges a particular defendant's punishment should be set. See *ante*, at 14-15. That view accords with historical practice under the Constitution. "From the beginning of the Republic, federal judges were entrusted with wide sentencing discretion. The great **[*545]** majority of federal criminal statutes have stated only a maximum term of years and a maximum monetary fine, permitting the sentencing judge to impose any term of imprisonment and any fine up to the statutory maximum." K. Stith & J. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 9 (1998) (footnote omitted). Under discretionary-sentencing schemes, a judge bases the defendant's sentence on any number of facts neither presented at trial nor found by a jury beyond a reasonable doubt. As one commentator has explained: **[**2392]** **[***489]**

"During the age of broad judicial sentencing discretion, judges frequently made sentencing decisions on the basis of facts that they determined for themselves, on less than proof beyond a reasonable doubt, without eliciting very much concern from civil libertarians. . . . The sentence in any number of traditional discretionary situations depended quite directly on judicial findings of specific contested facts. . . . Whether because such facts were directly relevant to the judge's retributionist assessment of how serious the particular offense was (within the spectrum of conduct covered by the statute of conviction), or because they bore on a determination of how much rehabilitation the offender's character was likely to need, the sentence would be higher or lower, in some specific degree determined by the judge, based on the judge's factual conclusions." Lynch, Towards A Model Penal Code, Second (Federal?), *2 Buffalo Crim. L. Rev. 297, 320 (1998)* (footnote omitted).

Accordingly, under the discretionary-sentencing schemes, a factual determination made by a judge on a standard of proof below "beyond a reasonable doubt" often made the difference between a lesser and a greater punishment.

For example, in *Williams* v. *New York*, a jury found the defendant guilty of first-degree murder and recommended life imprisonment. The judge, however, rejected the jury's **[*546]** recommendation and sentenced Williams to death on the basis of additional

facts that he learned through a pre-sentence investigation report and that had neither been charged in an indictment nor presented to the jury. *337 U.S. at 242-245.* In rejecting Williams' due process challenge to his death sentence, we explained that there was a long history of sentencing judges exercising "wide discretion in the sources and types of evidence used to assist [them] in determining the kind and extent of punishment to be imposed within limits fixed by law." *337 U.S. at 246.* Specifically, we held that the Constitution does not restrict a judge's sentencing decision to information that is charged in an indictment and subject to cross-examination in open court. "The due process clause should not be treated as a device for freezing the evidential procedure of sentencing in the mold of trial procedure." *337 U.S. at 251.*

Under our precedent, then, a State may leave the determination of a defendant's sentence to a judge's discretionary decision within a prescribed range of penalties. When a judge, pursuant to that sentencing scheme, decides to increase a defendant's sentence on the basis of certain contested facts, those facts need not be proved to a jury beyond a reasonable doubt. The judge's findings, whether by proof beyond a reasonable doubt or less, suffice for purposes of the Constitution. Under the Court's decision today, however, it appears that once a legislature constrains judges' sentencing discretion by prescribing certain sentences that may only be imposed (or must be imposed) in connection with the same determinations of the same contested facts, the Constitution requires that the facts instead be proved to a jury beyond a reasonable doubt. I see no reason to treat the two schemes differently. See, *e.g., McMillan, 477 U.S. at 92* ("We have some difficulty fathoming **[***490]** why the due process calculus would change simply because the legislature has seen fit to provide sentencing courts with additional guidance"). In this respect, I agree with the Solicitor General that "[a] sentence **[*547]** that is constitutionally permissible when selected by a court on the basis of whatever factors it deems appropriate does not become impermissible simply because the court is permitted to select that sentence only after making a finding prescribed by the legislature." Brief for United States as *Amicus Curiae* 7. Although the Court acknowledges the legitimacy of discretionary sentencing by judges, see *ante*, at 14-15, it never **[**2393]** provides a sound reason for treating judicial factfinding under determinate-sentencing schemes differently under the Constitution.

JUSTICE THOMAS' attempt to explain this distinction is similarly unsatisfying. His explanation consists primarily of a quotation, in turn, of a 19th-century treatise writer, who contended that the aggravation of punishment within a statutory range on the basis of facts found by a judge "'is an entirely different thing from punishing one for what is not alleged against him.'" *Ante*, at 22 (quoting 1 J. Bishop, Commentaries on Law of Criminal Procedure § 85, p. 54 (rev. 2d ed. 1872)). As our decision in *Williams v. New York* demonstrates, however, that statement does not accurately describe the reality of discretionary sentencing conducted by judges. A defendant's actual punishment can be affected in a very real way by facts never alleged in an indictment, never presented to a jury, and never proved beyond a reasonable doubt. In Williams' case, facts presented for the first time to the judge, for purposes of sentencing alone, made the difference between life imprisonment and a death sentence.

Consideration of the purposes underlying the Sixth Amendment's jury trial guarantee further demonstrates why our acceptance of judge-made findings in the context of discretionary sentencing suggests the approval of the same judge-made findings in the context of determinate sentencing as well. One important purpose of the Sixth Amendment's jury trial guarantee is to protect the criminal defendant against potentially arbitrary judges. It effectuates this promise by preserving, as a constitutional matter, certain **[*548]** fundamental decisions for a jury of one's peers, as opposed to a judge. For example, the Court has recognized that the Sixth Amendment's guarantee was motivated by the English experience of "competition . . . between judge and jury over the real significance of their respective roles," *Jones, 526 U.S. at 245*, and "measures [that were taken] to diminish the juries' power," *ibid.* We have also explained that the jury trial guarantee was understood to provide "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it." *Duncan v. Louisiana, 391 U.S. 145, 156, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968).* Blackstone explained that the right to trial by jury was critically important in criminal cases because of "the violence and partiality of judges appointed by the crown, . . . who might then, as in France or Turkey, imprison, dispatch, or exile any man that was obnoxious to the **[***491]** government, by an instant declaration, that such is their will and pleasure." 4 Blackstone, Commentaries, at 343. Clearly, the concerns animating the Sixth Amendment's jury trial guarantee, if they were to extend to the sentencing context at all, would apply with greater strength to a discretionary-sentencing scheme than to determinate sentencing. In the former scheme, the potential for mischief by an arbitrary judge is much greater, given that the judge's decision of where to set the defendant's sentence within the prescribed

statutory range is left almost entirely to discretion. In contrast, under a determinate-sentencing system, the discretion the judge yields within the statutory range is tightly constrained. Accordingly, our approval of discretionary-sentencing schemes, in which a defendant is not entitled to have a jury make factual findings relevant to sentencing despite the effect those findings have on the severity of the defendant's sentence, demonstrates that the defendant should have no right to demand that a jury make **[*549]** the equivalent factual determinations under a determinate-sentencing scheme.

The Court appears to hold today, however, that a defendant is entitled to have a jury decide, by proof beyond a reasonable **[**2394]** doubt, every fact relevant to the determination of sentence under a determinate-sentencing scheme. If this is an accurate description of the constitutional principle underlying the Court's opinion, its decision will have the effect of invalidating significant sentencing reform accomplished at the federal and state levels over the past three decades. JUSTICE THOMAS' rule, as he essentially concedes, see *ante*, at 27, n. 11, would have the same effect.

Prior to the most recent wave of sentencing reform, the Federal Government and the States employed indeterminate-sentencing schemes in which judges and executive branch officials (*e.g.*, parole board officials) had substantial discretion to determine the actual length of a defendant's sentence. See, *e.g.*, U.S. Dept. of Justice, S. Shane-DuBow, A. Brown, & E. Olsen, Sentencing Reform in the United States: History, Content, and Effect 6-7 (Aug. 1985) (hereinafter Shane-DuBow); Report of Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment 11-13 (1976) (hereinafter Task Force Report); A. Dershowitz, Criminal Sentencing in the United States: An Historical and Conceptual Overview, 423 Annals Am. Acad. Pol. & Soc. Sci. 117, 128-129 (1976). Studies of indeterminate-sentencing schemes found that similarly situated defendants often received widely disparate sentences. See, *e.g.*, Shane-Dubow 7; Task Force Report 14. Although indeterminate sentencing was intended to soften the harsh and uniform sentences formerly imposed under mandatory-sentencing systems, some studies revealed that indeterminate sentencing actually had the opposite effect. See, *e.g.*, A. Campbell, Law of Sentencing 13 (1978) ("Paradoxically the humanitarian impulse sparking the adoption of indeterminate sentencing systems in this country has resulted in **[*550]** an actual increase of the average criminal's incarceration term"); Task Force Report 13 ("The data seem to indicate that in those jurisdictions where the sentencing structure is more indeterminate, judicially imposed sentences tend to be longer").

In response, Congress and the state legislatures shifted to determinate-sentencing schemes that aimed to **[***492]** limit judges' sentencing discretion and, thereby, afford similarly situated offenders equivalent treatment. See, *e.g.*, *Cal. Penal Code Ann. § 1170* (West Supp. 2000). The most well known of these reforms was the federal Sentencing Reform Act of 1984, *18 U.S.C. § 3551 et seq.* In the Act, Congress created the United States Sentencing Commission, which in turn promulgated the Sentencing Guidelines that now govern sentencing by federal judges. See, *e.g.*, United Stammentators -- the apparent effect of the Court's opinion today is to halt the current debate on sentencing reform in its tracks and to invalidate with the stroke of a pen three decades' worth of nationwide reform, all in the name of a principle with a questionable constitutional pedigree. Indeed, it is ironic that the Court, in the name of constitutional rights meant to protect criminal defendants from the potentially arbitrary exercise of power by prosecutors and judges, appears to rest its decision on a principle that would render unconstitutional efforts by Congress and the state legislatures to place constraints on that very power in the sentencing context.

Finally, perhaps the most significant impact of the Court's decision will be a practical one -- its unsettling effect on sentencing conducted under current federal and state determinate-sentencing schemes. As I have explained, the Court does not say whether these schemes are constitutional, **[*551]** but its reasoning strongly suggests that they are not. Thus, with respect to past sentences handed down by judges under determinate-sentencing schemes, the Court's decision threatens to unleash a **[**2395]** flood of petitions by convicted defendants seeking to invalidate their sentences in whole or in part on the authority of the Court's decision today. Statistics compiled by the United States Sentencing Commission reveal that almost a half-million cases have been sentenced under the Sentencing Guidelines since 1989. See Memorandum from U.S. Sentencing Commission to Supreme Court Library, dated June 8, 2000 (total number of cases sentenced under federal Sentencing Guidelines since 1989) (available in Clerk of Court's case file). Federal cases constitute only the tip of the iceberg. In 1998, for example, federal criminal prosecutions represented only about 0.4% of the total number of criminal prosecutions in federal and state courts. See National Center for State Courts, A National Perspective: Court Statistics Project (federal and state court filings, 1998), http://www.ncsc.dni.us/divisions/research/csp/csp98-fscf.html (showing that, in 1998, 57,691 criminal cases were filed in federal court compared to 14,623,330 in state courts). Because many States, like New Jersey, have determinate-sentencing

schemes, the number of individual sentences drawn into question by the Court's decision could be colossal.

The decision will likely have an even more damaging effect on sentencing conducted in the immediate future under current determinate-sentencing schemes. Because the Court fails to clarify the precise contours of the constitutional principle underlying its decision, federal and state judges are left in a state of limbo. Should they continue to assume the constitutionality of the **[***493]** determinate-sentencing schemes under which they have operated for so long, and proceed to sentence convicted defendants in accord with those governing statutes and guidelines? The Court provides no answer, **[*552]** yet its reasoning suggests that each new sentence will rest on shaky ground. The most unfortunate aspect of today's decision is that our precedents did not foreordain this disruption in the world of sentencing. Rather, our cases traditionally took a cautious approach to questions like the one presented in this case. The Court throws that caution to the wind and, in the process, threatens to cast sentencing in the United States into what will likely prove to be a lengthy period of considerable confusion.

III

Because I do not believe that the Court's "increase in the maximum penalty" rule is required by the Constitution, I would evaluate New Jersey's sentence-enhancement statute, *N. J. Stat. Ann. § 2C:44-3* (West Supp. 2000), by analyzing the factors we have examined in past cases. See, *e.g., Almendarez-Torres, 523 U.S. at 242-243; McMillan, 477 U.S. at 86-90.* First, the New Jersey statute does not shift the burden of proof on an essential ingredient of the offense by presuming that ingredient upon proof of other elements of the offense. See, *e.g., 477 U.S. at 86-87; Patterson, 432 U.S. at 215.* Second, the magnitude of the New Jersey sentence enhancement, as applied in petitioner's case, is constitutionally permissible. Under New Jersey law, the weapons possession offense to which petitioner pleaded guilty carries a sentence range of 5 to 10 years' imprisonment. *N. J. Stat. Ann. § § 2C:39-4(a)*, 2C:43-6(a)(2) (West 1995). The fact that petitioner, in committing that offense, acted with a purpose to intimidate because of race exposed him to a higher sentence range of 10 to 20 years' imprisonment. § 2C:43-7(a)(3). The 10-year increase in the maximum penalty to which petitioner was exposed falls well within the range we have found permissible. See *Almendarez-Torres, 523 U.S. at 226, 242-243* (approving 18-year enhancement). Third, the New Jersey statute gives no impression of having been **[*553]** enacted to evade the constitutional requirements that attach when a State makes a fact an element of the charged offense. For example, New Jersey did not take what had **[**2396]** previously been an element of the weapons possession offense and transform it into a sentencing factor. See *McMillan, 477 U.S. at 89.*

In sum, New Jersey "simply took one factor that has always been considered by sentencing courts to bear on punishment" -- a defendant's motive for committing the criminal offense -- "and dictated the precise weight to be given that factor" when the motive is to intimidate a person because of race. *477 U.S. at 89-90.* The Court claims that a purpose to intimidate on account of race is a traditional *mens rea* element, and not a motive. See *ante*, at 26-27. To make this claim, the Court finds it necessary once again to ignore our settled precedent. In *Wisconsin v. Mitchell, 508 U.S. 476, 124 L. Ed. 2d 436, 113 S. Ct. 2194 (1993)*, we considered a statute similar to the one at issue here. The Wisconsin statute provided for an **[***494]** increase in a convicted defendant's punishment if the defendant intentionally selected the victim of the crime because of that victim's race. *508 U.S. at 480.* In a unanimous decision upholding the statute, we specifically characterized it as providing a sentence enhancement based on the "motive" of the defendant. See *508 U.S. at 485* (distinguishing between punishment of defendant's "criminal conduct" and penalty enhancement "for conduct *motivated* by a discriminatory point of view" (emphasis added)); *508 U.S. at 484-485* ("Under the Wisconsin statute the same criminal conduct may be more heavily punished if the victim is selected because of his race . . . than if no such *motive* obtained" (emphasis added)). That same characterization applies in the case of the New Jersey statute. As we also explained in *Mitchell*, the motive for committing an offense has traditionally been an important factor in determining a defendant's sentence. *508 U.S. at 485.* New Jersey, therefore, has done no more than what we held permissible **[*554]** in *McMillan;* it has taken a traditional sentencing factor and dictated the precise weight judges should attach to that factor when the specific motive is to intimidate on the basis of race.

The New Jersey statute resembles the Pennsylvania statute we upheld in *McMillan* in every respect but one. That difference -- that the New Jersey statute increases the maximum punishment to which petitioner was exposed -- does not persuade me that New Jersey "sought to evade the constitutional requirements associated with the characterization of a fact as an offense element." *Supra*, at 2. There is no question that New Jersey could prescribe a range of 5 to 20 years' imprisonment as punishment for its weapons possession offense. Thus, as explained above, the specific means by which the State chooses to control judges' discretion within that permissible range is of no moment. Cf. *Patterson, 432 U.S. at 207-208* ("The Due Process Clause, as we see it, does not put New York to the choice

of abandoning [the affirmative defense] or undertaking to disprove [its] existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment"). The New Jersey statute also resembles in virtually every respect the federal statute we considered in *Almendarez-Torres*. That the New Jersey statute provides an enhancement based on the defendant's motive while the statute in *Almendarez-Torres* provided an enhancement based on the defendant's commission of a prior felony is a difference without constitutional importance. Both factors are traditional bases for increasing an offender's sentence and, therefore, may serve as the grounds for a sentence enhancement.

On the basis of our prior precedent, then, I would hold that the New Jersey sentence-enhancement statute is constitutional, and affirm the judgment of the Supreme Court of New Jersey. **[*555]**

JUSTICE BREYER, with whom CHIEF JUSTICE REHNQUIST joins, dissenting.

The majority holds that the Constitution contains the following requirement: "any **[**2397]** fact [other than recidivism] that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted **[***495]** to a jury, and proved beyond a reasonable doubt." *Ante*, at 24. This rule would seem to promote a procedural ideal -- that of juries, not judges, determining the existence of those facts upon which increased punishment turns. But the real world of criminal justice cannot hope to meet any such ideal. It can function only with the help of procedural compromises, particularly in respect to sentencing. And those compromises, which are themselves necessary for the fair functioning of the criminal justice system, preclude implementation of the procedural model that today's decision reflects. At the very least, the impractical nature of the requirement that the majority now recognizes supports the proposition that the Constitution was not intended to embody it.

I

In modern times the law has left it to the sentencing judge to find those facts which (within broad sentencing limits set by the legislature) determine the sentence of a convicted offender. The judge's factfinding role is not inevitable. One could imagine, for example, a pure "charge offense" sentencing system in which the degree of punishment depended only upon the crime charged (*e.g.*, eight mandatory years for robbery, six for arson, three for assault). But such a system would ignore many harms and risks of harm that the offender caused or created, and it would ignore many relevant offender characteristics. See United States Sentencing Commission, Sentencing Guidelines and Policy Statements, Part A, at 1.5 (1987) (hereinafter Sentencing Guidelines or Guidelines) (pointing out that a "charge offense" **[*556]** system by definition would ignore any fact "that did not constitute [a] statutory element of the offense of which the defendant was convicted"). Hence, that imaginary "charge offense" system would not be a fair system, for it would lack proportionality, *i.e.*, it would treat different offenders similarly despite major differences in the manner in which each committed the same crime.

There are many such manner-related differences in respect to criminal behavior. Empirical data collected by the Sentencing Commission makes clear that, before the Guidelines, judges who exercised discretion within broad legislatively determined sentencing limits (say, a range of 0 to 20 years) would impose very different sentences upon offenders engaged in the same basic criminal conduct, depending, for example, upon the amount of drugs distributed (in respect to drug crimes), the amount of money taken (in respect to robbery, theft, or fraud), the presence or use of a weapon, injury to a victim, the vulnerability of a victim, the offender's role in the offense, recidivism, and many other offense-related or offender-related factors. See United States Sentencing Commission, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements 35-39 (1987) (table listing data representing more than 20 such factors) (hereinafter Supplementary Report); see generally Department of Justice, W. Rhodes & C. Conly, Analysis of Federal Sentencing (May 1981). The majority does not deny that judges have exercised, and, constitutionally speaking, *may* exercise sentencing discretion in this way.

Nonetheless, it is important for present purposes to understand why *judges*, rather than *juries*, traditionally **[***496]** have determined the presence or absence of such sentence-affecting facts in any given case. And it is important to realize that the reason is not a theoretical one, but a practical one. It does not reflect (JUSTICE SCALIA's opinion to the contrary notwithstanding) an ideal of procedural "fairness," *ante*, at 1 (concurring opinion), but rather an administrative need **[*557]** for procedural *compromise*. There are, to put it simply, far too many potentially relevant sentencing factors to permit submission of all (or even **[**2398]** many) of them to a jury. As the Sentencing Guidelines state the matter,

"[a] bank robber with (or without) a gun, which the robber kept hidden (or brandished), might have frightened (or merely warned), injured seriously (or less seriously), tied up (or simply pushed) a guard, a teller or a customer, at night (or at noon), for a bad (or arguably less bad) motive, in an effort to obtain money for other crimes (or for other purposes), in the company of a few (or many) other robbers, for the first (or fourth) time that

day, while sober (or under the influence of drugs or alcohol), and so forth." Sentencing Guidelines, Part A, at 1.2.

The Guidelines note that "a sentencing system tailored to fit every conceivable wrinkle of each case can become unworkable and seriously compromise the certainty of punishment and its deterrent effect." *Ibid.* To ask a jury to consider all, or many, such matters would do the same.

At the same time, to require jury consideration of all such factors -- say, during trial where the issue is guilt or innocence -- could easily place the defendant in the awkward (and conceivably unfair) position of having to deny he committed the crime yet offer proof about how he committed it, *e.g.*, "I did not sell drugs, but I sold no more than 500 grams." And while special postverdict sentencing juries could cure this problem, they have seemed (but for capital cases) not worth their administrative costs. Hence, before the Guidelines, federal sentencing judges typically would obtain relevant factual sentencing information from probation officers' presentence reports, while permitting a convicted offender to challenge the information's accuracy at a hearing before the judge without benefit of trial-type evidentiary rules. See *Williams v. New York, 337 U.S. 241, 249-251, 93 L. Ed. 1337, 69 S. Ct. 1079* **[*558]** *(1949)* (describing the modern "practice of individualizing punishments" under which judges often consider otherwise inadmissible information gleaned from probation reports); see also Kadish, Legal Norm And Discretion In The Police And Sentencing Processes, *75 Harv. L. Rev. 904, 915-917 (1962).*

It is also important to understand how a judge traditionally determined which factors should be taken into account for sentencing purposes. In principle, the number of potentially relevant behavioral characteristics is endless. A judge might ask, for example, whether an unlawfully possessed knife was "a switchblade, drawn or concealed, opened or closed, large or small, used in connection with a car theft (where victim confrontation is rare), a burglary (where confrontation is unintended) or a robbery (where confrontation is intentional)." United States Sentencing Commission, Preliminary Observations of the Commission on Commissioner Robinson's Disse[illegible] 3, n. 3 (May 1, 1987). Again, the method reflects practical, rather than theoretical, **[***497]** considerations. Prior to the Sentencing Guidelines, federal law left the individual sentencing judge free to determine which factors were relevant. That freedom meant that each judge, in an effort to tailor punishment to the individual offense and offender, was guided primarily by experience, relevance, and a sense of proportional fairness. Cf. Supplementary Report, at 16-17 (noting that the goal of the Sentencing Guidelines was to create greater sentencing uniformity among judges, but in doing so the Guidelines themselves had to rely primarily upon empirical studies that showed which factors had proved important to federal judges in the past).

Finally, it is important to understand how a legislature decides which factual circumstances among all those potentially related to generally harmful behavior it should transform into elements of a statutorily defined crime (where they would become relevant to the guilt or innocence of an accused), and which factual circumstances it should leave to **[*559]** the sentencing process (where, as sentencing factors, they **[**2399]** would help to determine the sentence imposed upon one who has been found guilty). Again, theory does not provide an answer. Legislatures, in defining crimes in terms of elements, have looked for guidance to common-law tradition, to history, and to current social need. And, traditionally, the Court has left legislatures considerable freedom to make the element determination. See *Almendarez-Torres v. United States, 523 U.S. 224, 228, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998); McMillan v. Pennsylvania, 477 U.S. 79, 85, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986).*

By placing today's constitutional question in a broader context, this brief survey may help to clarify the nature of today's decision. It also may explain why, in respect to sentencing systems, proportionality, uniformity, and administrability are all aspects of that basic "fairness" that the Constitution demands. And it suggests my basic problem with the Court's rule: A sentencing system in which judges have discretion to find sentencing-related factors is a workable system and one that has long been thought consistent with the Constitution; why, then, would the Constitution treat sentencing *statutes* any differently?

II

As JUSTICE THOMAS suggests, until fairly recent times many legislatures rarely focused upon sentencing factors. Rather, it appears they simply identified typical forms of antisocial conduct, defined basic "crimes," and attached a broad sentencing range to each definition -- leaving judges free to decide how to sentence within those ranges in light of such factors as they found relevant. *Ante*, at 12-15, 21 (concurring opinion). But the Constitution does not freeze 19th-century sentencing practices into permanent law. And dissatisfaction with the traditional sentencing system (reflecting its tendency to treat similar cases differently) has led modern legislatures to write new laws that refer specifically to sentencing factors. See Supplementary Report, at 1 **[*560]** (explaining that "a growing recognition of the need to bring greater rationality and consistency to penal

statutes and to sentences imposed under those statutes" led to reform efforts such as the Federal Sentencing Guidelines).

Legislatures have tended to address **[***498]** the problem of too much judicial sentencing discretion in two ways. First, legislatures sometimes have created sentencing commissions armed with delegated authority to make more uniform judicial exercise of that discretion. Congress, for example, has created a federal Sentencing Commission, giving it the power to create Guidelines that (within the sentencing range set by individual statutes) reflect the host of factors that might be used to determine the actual sentence imposed for each individual crime. See *28 U.S.C. § 994*(a); see also United States Sentencing Commission, Guidelines Manual (Nov. 1999). Federal judges must apply those Guidelines in typical cases (those that lie in the "heartland" of the crime as the statute defines it) while retaining freedom to depart in atypical cases. *Id.* ch. 1, pt. A, 4(b).

Second, legislatures sometimes have directly limited the use (by judges or by a commission) of particular factors in sentencing, either by specifying statutorily how a particular factor will affect the sentence imposed or by specifying how a commission should use a particular factor when writing a guideline. Such a statute might state explicitly, for example, that a particular factor, say, use of a weapon, recidivism, injury to a victim, or bad motive, "shall" increase, or "may" increase, a particular sentence in a particular way. See, *e.g.*, *McMillan, supra, at 83* (Pennsylvania statute expressly treated "visible possession of a firearm" as a sentencing consideration that subjected a defendant to a mandatory 5-year term of imprisonment).

The issue the Court decides today involves this second kind of legislation. The **[**2400]** Court holds that a legislature cannot enact such legislation (where an increase in the maximum is involved) unless the factor at issue has been charged, **[*561]** tried to a jury, and found to exist beyond a reasonable doubt. My question in respect to this holding is, simply, "*why* would the Constitution contain such a requirement"?

III

In light of the sentencing background described in Parts I and II, I do not see how the majority can find in the Constitution a requirement that "any fact" (other than recidivism) that increases the maximum penalty for a crime "must be submitted to a jury." *Ante*, at 24. As JUSTICE O'CONNOR demonstrates, this Court has previously failed to view the Constitution as embodying any such principle, while sometimes finding to the contrary. See *Almendarez-Torres, 523 U.S. at 239-247; McMillan, 477 U.S. at 84-91*. The majority raises no objection to traditional pre-Guidelines sentencing procedures under which judges, not juries, made the factual findings that would lead to an increase in an individual offender's sentence. How does a legislative determination differ in any significant way? For example, if a judge may on his or her own decide that victim injury or bad motive should increase a bank robber's sentence from 5 years to 10, why does it matter that a legislature instead enacts a statute that increases a bank robber's sentence from 5 years to 10 based on this same judicial finding?

With the possible exception of the last line of JUSTICE SCALIA's concurring **[***499]** opinion, the majority also makes no constitutional objection to a legislative delegation to a commission of the authority to create guidelines that determine how a judge is to exercise sentencing discretion. See also *ante*, at 27, n. 11 (THOMAS, J., concurring) (reserving the question). But if the Constitution permits Guidelines, why does it not permit Congress similarly to guide the exercise of a judge's sentencing discretion? That is, if the Constitution permits a delegatee (the commission) to exercise sentencing-related rulemaking power, how can it deny the **[*562]** delegator (the legislature) what is, in effect, the same rulemaking power?

The majority appears to offer two responses. First, it argues for a limiting principle that would prevent a legislature with broad authority from transforming (jury-determined) facts that constitute elements of a crime into (judge-determined) sentencing factors, thereby removing procedural protections that the Constitution would otherwise require. See *ante*, at 19 ("constitutional limits" prevent states from "defining away facts necessary to constitute a criminal offense"). The majority's cure, however, is not aimed at the disease.

The same "transformational" problem exists under traditional sentencing law, wheive sentences because the embezzler murdered his employer. And, as part of the traditional sentencing discretion that the majority concedes judges retain, the judge, not a jury, would determine the last-mentioned relevant fact, *i.e.*, that the murder actually occurred.

This egregious example shows the problem's complexity. The source of the problem lies not in a legislature's power to enact sentencing factors, but in the traditional legislative power to select elements defining a crime, the traditional legislative power to set broad sentencing ranges, and **[**2401]** the traditional judicial power to choose a sentence within that range on the basis of relevant offender conduct. Conversely, the solution to the problem lies, not in prohibiting legislatures from enacting sentencing factors, but in sentencing rules that determine punishments on the basis of properly defined

[*563] relevant conduct, with sensitivity to the need for procedural protections where sentencing factors are determined by a judge (for example, use of a "reasonable doubt" standard), and invocation of the Due Process Clause where the history of the crime at issue, together with the nature of the facts to be proved, reveals unusual and serious procedural unfairness. Cf. *McMillan, 477 U.S. at 88* (upholding statute in part because it "gives no impression of having been tailored to permit the [sentencing factor] to be a tail which wags the dog of the substantive offense").

Second, the majority, in support of its constitutional rule, emphasizes the concept of a statutory "maximum." **[***500]** The Court points out that a sentencing judge (or a commission) traditionally has determined, and now still determines, sentences *within* a legislated range capped by a maximum (a range that the legislature itself sets). See *ante*, at 14-15. I concede the truth of the majority's statement, but I do not understand its relevance.

From a defendant's perspective, the legislature's decision to cap the possible range of punishment at a statutorily prescribed "maximum" would affect the actual sentence imposed no differently than a sentencing commission's (or a sentencing judge's) similar determination. Indeed, as a practical matter, a legislated mandatory "minimum" is far more important to an actual defendant. A judge and a commission, after all, are legally free to select any sentence below a statute's maximum, but they are not free to subvert a statutory minimum. And, as JUSTICE THOMAS indicates, all the considerations of fairness that might support submission to a jury of a factual matter that increases a statutory maximum, apply *a fortiori* to any matter that would increase a statutory minimum. See *ante*, at 25-26 (concurring opinion). To repeat, I do not understand why, when a legislature *authorizes* a judge to impose a higher penalty for bank robbery (based, say, on the court's finding that a victim was injured or the defendant's motive was bad), a new crime is born; but **[*564]** where a legislature *requires* a judge to impose a higher penalty than he otherwise would (within a pre-existing statutory range) based on similar criteria, it is not. Cf. *Almendarez-Torres, 523 U.S. at 246.*

IV

I certainly do not believe that the present sentencing system is one of "perfect equity," *ante*, at 2 (SCALIA, J., concurring), and I am willing, consequently, to assume that the majority's rule would provide a degree of increased procedural protection in respect to those particular sentencing factors currently embodied in statutes. I nonetheless believe that any such increased protection provides little practical help and comes at too high a price. For one thing, by leaving mandatory minimum sentences untouched, the majority's rule simply encourages any legislature interested in asserting control over the sentencing process to do so by creating those minimums. That result would mean significantly less procedural fairness, not more.

For another thing, this Court's case law, prior to *Jones v. United States, 526 U.S. 227, 243, n. 6, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999)*, led legislatures to believe that they were permitted to increase a statutory maximum sentence on the basis of a sentencing factor. See *ante*, at 7-17 (O'CONNOR, J., dissenting); see also, *e.g., McMillan, 477 U.S. at 84-91* (indicating that a legislature could impose mandatory sentences on the basis of sentencing factors, thereby suggesting it could impose more flexible statutory maximums **[**2402]** on same basis). And legislatures may well have relied upon that belief. See, *e.g., 21 U.S.C. § 841*(b) (1994 ed. and Supp. III) (providing penalties for, among other things, possessing a "controlled substance" with intent to distribute it, which sentences vary dramatically depending upon the **[***501]** amount of the drug possessed, without requiring jury determination of the amount); *N. J. Stat. Ann. § § 2C:43-6*, 2C:43-7, 2C:44-1a-f, 2C:44-3 (West 1995 and Supp. 1999-2000) (setting sentencing ranges for crimes, while providing for lesser or greater punishments **[*565]** depending upon judicial findings regarding certain "aggravating" or "mitigating" factors); *Cal. Penal Code Ann. § 1170* (West Supp. 2000) (similar); see also Cal. Court Rule 420(b) (1996) (providing that "circumstances in aggravation and mitigation" are to be established by the sentencing judge based on "the case record, the probation officer's report, [and] other reports and statements properly received").

As JUSTICE O'CONNOR points out, the majority's rule creates serious uncertainty about the constitutionality of such statutes and about the constitutionality of the confinement of those punished under them. See *ante*, at 27- 30 (dissenting opinion). The few *amicus* briefs that the Court received in this case do not discuss the impact of the Court's new rule on, for example, drug crime statutes or state criminal justice systems. This fact, I concede, may suggest that my concerns about disruption are overstated; yet it may also suggest that (despite *Jones* and given *Almendarez-Torres*) so absolute a constitutional prohibition is unexpected. Moreover, the rationale that underlies the Court's rule suggests a principle -- jury determination of all sentencing-related facts -- that, unless restricted, threatens the workability of every criminal justice system (if applied to judges) or threatens efforts to make those systems more uniform, hence more fair (if applied to commissions).

Finally, the Court's new rule will likely impede legislative attempts to provide authoritative guidance as to how courts should respond to the presence of traditional sentencing factors. The factor at issue here -- motive -- is such a factor. Whether a robber takes money to finance other crimes or to feed a starving family can matter, and long has mattered, when the length of a sentence is at issue. The State of New Jersey has determined that one motive -- racial hatred -- is particularly bad and ought to make a difference in respect to punishment for a crime. That determination is reasonable. The procedures mandated are consistent with traditional sentencing practice. Though additional procedural **[*566]** protections might well be desirable, for the reasons JUSTICE O'CONNOR discusses and those I have discussed, I do not believe the Constitution requires them where ordinary sentencing factors are at issue. Consequently, in my view, New Jersey's statute is constitutional.

I respectfully dissent.

REFERENCES: Return To Full Text Opinion

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21A Am Jur 2d, Criminal Law 792, 942

USCS, Constitution, Amendment 14

L Ed Digest, Constitutional Law 840.3, 841, 848

L Ed Index, Hate Crimes; Sentence or Punishment

Annotation References:

Limitations, under Federal Constitution's guaranty of due process of law, as to consideration of personal information about accused in imposition of initial sentence in criminal offense. *63 L Ed 2d 872.*

Race discrimination-- *Supreme Court cases. 94 L Ed 1121, 96 L Ed 1121, 98 L Ed 882, 100 L Ed 488, 3 L Ed 2d 1556, 6 L Ed 2d 1302, 10 L Ed 2d 1105, 15 L Ed 2d 990, 21 L Ed 2d 915.*

Due process requirements of presentence procedure following conviction. *3 L Ed 2d 1808.*

Validity, construction, and effect of "hate crime" statutes, "ethnic intimidation" statutes, or the like. *22 ALR 5th 261.*

1 of 1 DOCUMENT

STEVEN D. REICHEL, Appellant, v. STATE OF ALASKA, Appellee.

Court of Appeals No. A-8555, No. 1955

COURT OF APPEALS OF ALASKA

101 P.3d 197; 2004 Alas. App. LEXIS 209

November 12, 2004, Decided

PRIOR HISTORY: [**1] Appeal from the Superior Court, Third Judicial District, Homer, Jonathan H. Link, Judge. Trial Court No. 3HO-02-060 Cr.

DISPOSITION: Reversed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant challenged a decision from the Superior Court, Third Judicial District, Homer (Alaska), which denied his motion to suppress and convicted him of fourth-degree controlled substances misconduct.

OVERVIEW: Police observed defendant, a parolee, in a bar. Officers stopped defendant as he was about to leave. Defendant was arrested for a parole violation, and, during a search incident to arrest, drugs were found on his person. A later motion to suppress the evidence was denied, and defendant was convicted of fourth-degree controlled substances misconduct. In reversing, the court determined that, under Alaska law, officers were permitted to conduct an investigatory stop only if they had reasonable suspicion that imminent public danger existed or that serious harm to persons or property had recently occurred. The investigatory stop was not justified by a reasonable suspicion that defendant was about to drive a car. There was no imminent danger because defendant was about to take a cab. The officers could not base their reasonable suspicion on the fact that defendant might have driven a car later. The court declined to determine whether or not the stop was justified based on a reasonable suspicion that a parole violation had occurred since there was no imminent danger shown. Finally, the conditions of parole requiring a breath test or search by any police officer were unconstitutional.

OUTCOME: The decision of the superior court was reversed.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigatory Stops

[HN1] Under Alaska law, police officers' authority to conduct investigative stops is more restricted than under federal law. The Alaska Supreme Court has held that police officers can conduct an investigative stop only if they have reasonable suspicion that imminent public danger exists or that serious harm to persons or property has recently occurred.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigatory Stops

[HN2] Alaska law recognizes the difference between investigative stops (which constitute "seizures" for constitutional purposes) and police-citizen contacts in which the police are merely seeking information without engaging in a show of authority. Whether the police engaged in an "investigative stop" or merely a "contact" hinges on the facts of each particular case.

Criminal Law & Procedure > Appeals > Standards of Review > Standards Generally

[HN3] An appellate court is authorized to affirm a lower court's decision on any legal ground revealed by the record.

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Investigatory Stops

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

[HN4] An investigative stop cannot be grounded on a police officer's lack of knowledge as to whether a person might commit an offense, or an officer's speculation about a person's proclivity to commit a future offense. Rather, it is the State's burden to show that the officers who performed the stop had affirmative reasons to believe that an offense had just been committed or was about to be committed.

Constitutional Law > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Postconviction Proceedings > Parole

[HN5] As a matter of Alaska constitutional law, prisoners released on parole have the same protections against government searches and seizures as other citizens, except when reasonably conducted searches and seizures are required by the legitimate demands of correctional authorities, and when the authority to conduct such searches and seizures is expressly set forth in the parolee's conditions of parole by the Alaska Parole Board.

Constitutional Law > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Postconviction Proceedings > Parole

[HN6] *Alaska Stat. § 33.16.150* governs the Alaska Parole Board's authority to impose conditions of release on prisoners who are paroled. Section 33.16.150(a) lists twelve conditions of release that must be imposed on all parolees. Section 33.16.150(b) then lists an additional eleven conditions of release that the Parole Board may, in its discretion, impose on a particular parolee. Under § 33.16.150(b)(3), the Board may require a parolee to submit to reasonable searches and seizures by a parole officer, or by a peace officer acting under the direction of a parole officer.

COUNSEL: Brant G. McGee, Assistant Public Defender, and Barbara K. Brink, Public Defender, Anchorage, for the Appellant.

Timothy W. Terrell, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Gregg D. Renkes, Attorney General, Juneau, for the Appellee.

JUDGES: Before: Coats, Chief Judge, and Mannheimer and Stewart, Judges.

OPINIONBY: MANNHEIMER

OPINION:

[*198] MANNHEIMER, Judge.

In this appeal, we are asked to decide whether the police can conduct an investigative stop if they have a reasonable suspicion that a person is violating the conditions of their parole. The defendant asserts that Alaska law does not permit such an investigative stop unless the police are acting at the direction of a parole officer. The State asserts that Alaska law permits a stop to investigate a potential parole violation if the conduct involved in the parole violation meets the *Coleman-Ebona* **[**2]** test governing other investigative stops -- that is, if the conduct involved in the parole violation creates an imminent public danger, or if it involves recent serious harm to persons or property. We conclude that we need not resolve this legal dispute because, even under the State's interpretation of the law, the facts of this case did not justify the investigative stop.

Underlying facts

On the evening of October 28, 2001, Steven D. Reichel was socializing at Alice's Champagne Palace, a bar and restaurant in Homer. Reichel was on parole from a felony DWI conviction, and Reichel's conditions of parole forbade him from consuming alcohol and from being on premises where alcoholic beverages are sold.

Homer Police Sergeant William Hutt was among a group of police officers who went to Alice's that evening to perform a "bar check". Hutt was personally acquainted with Reichel from previous contacts and arrests, including two or three arrests for earlier probation violations. Shortly after Hutt spotted Reichel, Reichel got up and left the bar.

Hutt suspected that Reichel was still on probation, and that Reichel was therefore forbidden from going to bars, so Hutt and his fellow officers **[**3]** followed Reichel outside. At the same time, Hutt called his dispatcher to request a records check on Reichel. The police dispatcher confirmed that Reichel was not supposed to consume alcohol or be on premises where alcohol is served.

(Hutt's suspicions were essentially correct, with the exception that Reichel was no longer on probation; rather, he was on parole. It was true, however, that Reichel's parole conditions forbade him from going to bars.)

Hutt and his fellow officers stopped Reichel outside the bar, and the officers held Reichel while they attempted to contact his parole officer to ask what to do. Within twenty minutes, the officers succeeded in speaking with Reichel's parole officer; the parole officer directed the officers to arrest Reichel for the parole

violation. During a search of Reichel's person incident to this arrest, the police discovered cocaine in his pocket. This discovery ultimately led to Reichel's conviction for fourth-degree controlled substances misconduct. n1

n1 *AS 11.71.040(a)(3)(A).*

[4]**

In this appeal, Reichel contends that the police acted unlawfully when they stopped him and held him outside the bar. Reichel concedes that he violated the conditions of his parole by going into the bar, but Reichel argues that this violation of parole was not a sufficient justification for an investigative stop.

Reichel's main arguments

Reichel argues that the investigative stop in his case was illegal for two reasons.

First, based on the Alaska Supreme Court's decision in *Roman v. State*, n2 Reichel argues that police officers have no authority to conduct a stop to investigate a potential parole violation unless the officers are acting at the direction of a parole officer.

n2 *570 P.2d 1235 (Alaska 1977).*

Second, Reichel argues in the alternative that, even if police officers have independent authority to conduct an investigative stop **[*199]** when they have a reasonable suspicion that a parolee has violated the conditions of parole, the investigative stop must still conform to the **[**5]** *Coleman-Ebona* rule.

[HN1] Under Alaska law, police officers' authority to conduct investigative stops is more restricted than under federal law. In *Coleman v. State* n3 and *Ebona v. State*, n4 our supreme court held that police officers can conduct an investigative stop only if they have "reasonable suspicion that imminent public danger exists or [that] serious harm to persons or property has recently occurred". n5

n3 *553 P.2d 40, 46 (Alaska 1976).*

n4 *577 P.2d 698, 700 (Alaska 1978).*

n5 *Coleman, 553 P.2d at 46.*

Reichel argues that even if the police reasonably suspected that Reichel had violated his conditions of parole by going to a bar and by drinking alcoholic beverages, the police had no basis for concluding that Reichel's unlawful conduct had harmed any person or property, nor any basis for concluding that Reichel's conduct created an imminent public danger. Thus, Reichel contends, the officers exceeded their authority under *Coleman* and **[**6]** *Ebona* when they stopped him outside the bar.

The State's argument that there was no investigative stop

The State's first response to Reichel's argument is that no investigative stop occurred -- that the police merely approached Reichel outside the bar and asked if they could speak to him. The State argues that this was merely a "generalized request for information" rather than an investigative stop.

[HN2] Alaska law recognizes the difference between investigative stops (which constitute "seizures" for constitutional purposes) and police-citizen contacts in which the police are merely seeking information without engaging in a show of authority. n6 Whether the police engaged in an "investigative stop" or merely a "contact" hinges on the facts of each particular case. n7

n6 *See Howard v. State, 664 P.2d 603, 608 (Alaska App. 1983).*

n7 *See Martin v. State, 797 P.2d 1209, 1214 (Alaska App. 1990).*

In Reichel's case, the superior court clearly viewed the encounter **[**7]** between Reichel and the police officers as an investigative stop -- a stop that ripened into an arrest after the officers spoke with Reichel's parole officer. Even if the facts of that encounter might reasonably be construed to support the State's contention that no stop occurred, the superior court did not view the facts that way.

Of course, we are not bound by the superior court's *legal* conclusion. If the facts of this case -- even when viewed in the light most favorable to Reichel -- showed that no investigative stop occurred, we would have the authority to affirm the superior court's decision on this alternative ground. n8 But here, based on the testimony presented at the evidentiary hearing, the superior court could reasonably conclude that an investigative stop occurred. We therefore have no authority to re-evaluate that testimony and reach our own independent decision on this issue.

n8 [HN3] An appellate court is authorized to affirm a lower court's decision on any legal ground revealed by the record. *See Rutherford v.*

State, 605 P.2d 16, 21 n. 12 (Alaska 1979); Ransom v. Haner, 362 P.2d 282, 285 (Alaska 1961); Millman v. State, 841 P.2d 190, 195 (Alaska App. 1992).

[8]**

The State's argument that the investigative stop was justified by a reasonable suspicion that Reichel was about to drive while intoxicated

The State next argues that the investigative stop was justified under the *Coleman-Ebona* rule. The State points out that Reichel was on parole from a conviction for felony driving while intoxicated. The State argues that, because of Reichel's criminal history, and because the police found Reichel in a bar (and observed Reichel leave the bar soon after Sergeant Hutt spotted him), the officers had a reasonable suspicion that Reichel **[*200]** had been drinking and that he therefore posed an imminent danger to the public safety.

(This was not the legal theory advanced by Sergeant Hutt when he explained his reason for stopping Reichel, nor is it the legal theory that the superior court adopted when it upheld the investigative stop. However, as explained above, we are authorized to affirm the superior court's decision on any basis revealed by the record.)

In support of this argument, the State relies on our decision in *Smith v. State, 756 P.2d 913 (Alaska App. 1988)*. In *Smith*, a police officer observed the defendant driving **[**9]** a motor vehicle; a "locate" bulletin had been issued for this vehicle because the registered owner of the vehicle had had their driver's license suspended. n9 The officer stopped the vehicle to find out if the person he observed driving the vehicle was indeed the registered owner whose license had been suspended. n10 It turned out that Smith was not the registered owner -- but, by coincidence, Smith's driver's license was also suspended, so the officer arrested her. n11

n9 *Smith, 756 P.2d at 914.*

n10 *Id. at 914-15.*

n11 *Id. at 915.*

On appeal, Smith argued that the officer violated the *Coleman-Ebona* rule when he stopped the vehicle. Smith contended that even if the officer had reasonable suspicion to believe that she was driving with a suspended license, this offense did not pose the "imminent public danger" required by *Coleman* and *Ebona*. n12 We rejected this argument:

> Driver's licenses may be suspended for a variety of reasons that **[**10]** are generally related to public safety. ... It may well be correct, as Smith argues, that in many situations licenses are suspended for reasons having to do with a driver's inability to establish financial responsibility. [And we agree that] there is little reason to suppose that a driver whose license has been suspended for failing to provide proof of insurance poses any imminent public danger.
>
> Yet in many other situations, licenses are suspended precisely because a driver has, through past driving conduct or offenses, demonstrated an actual inability to drive safely. When a driver in this category is behind the wheel, there is a legitimate basis for concluding that there may be imminent danger to other motorists. In most situations that -- as in the present case -- an officer who has a reasonable suspicion that a motorist is committing the offense of [driving with a suspended license] will not know the underlying basis for the license suspension. We believe that the level of danger in such instances is sufficiently high to permit a traffic stop.

Smith, 756 P.2d at 915-16.

n12 *Id.*

[11]**

The State argues that Reichel's case is analogous to the *Smith* case because the officers reasonably suspected Reichel of drinking in the bar, and because Reichel had a history of engaging in dangerous conduct (*i.e.*, intoxicated driving) when he consumed alcoholic beverages. But one aspect of Reichel's case differs from the facts of *Smith*: the testimony presented at the evidentiary hearing gives no indication that Reichel had driven to the bar or that Reichel intended to drive when he left the bar.

Because the State did not rely on this "impending DWI" theory when Reichel's case was litigated below, the superior court made no finding on the issue of whether the police had any indication that Reichel was about to drive when he left the bar. However, the testimony presented to the superior court strongly suggests that Reichel did not intend to drive. Reichel took the stand and testified that he called a taxicab before

he left the bar, and that when he walked out of the bar he intended to depart in this cab. Reichel stated that he was about ten feet from the cab when the officers stopped him. Sergeant Hutt testified that he "believed there was a cab there" when the officers **[**12]** stopped Reichel, although Hutt disclaimed knowledge of Reichel's precise intentions with respect to this cab.

[*201] The State argues that an investigative stop was justified even if there was no affirmative indication that Reichel intended to drive. The State suggests that even if Reichel intended to leave in a taxicab, "the officers [who] followed Reichel out of the bar ... had no way of knowing that he would ... take a cab". The State further suggests that even if Reichel had taken a cab, "it is still possible that he would have driven [another vehicle] once he reached a location ... safely away from the officers".

But [HN4] an investigative stop can not be grounded on a police officer's lack of knowledge as to whether a person might commit an offense, or an officer's speculation about a person's proclivity to commit a future offense. Rather, it is the State's burden to show that the officers who performed the stop had *affirmative reasons* to believe that an offense had just been committed or was about to be committed.

In Reichel's case, before the officers could stop Reichel on suspicion that he was about to drive while intoxicated, the officers had to have some affirmative reason **[**13]** to believe (1) that Reichel was indeed intoxicated (as opposed to having simply consumed an alcoholic beverage), and (2) that Reichel was about to drive. The record is silent on the issue of whether Reichel gave the officers any reason to believe that he was intoxicated, and the record supports Reichel's assertion that he did not intend to drive.

The State argues that, even without affirmative evidence that Reichel was intoxicated or that he intended to drive, the police were entitled to stop Reichel simply because they had reason to believe that he had been drinking and because they knew that he had previously been convicted for driving while intoxicated. The State contends that, under these facts, the police could reasonably fear that Reichel might drive while intoxicated in the near future.

But under the State's theory, the police would have the authority to conduct an investigative stop of any person with a prior conviction for driving while intoxicated based merely upon a reasonable suspicion that the person had consumed some amount of alcohol at a social gathering. Moreover, applying the State's theory to the situation presented in *Smith* (*i.e.*, situations in which **[**14]** the police have reason to believe that a person's driver's license has been suspended), the police would have the authority to conduct an investigative stop of anyone whose driver's license was suspended if the police saw that person walking through or toward the parking lot of a shopping mall. This would be an unwarranted -- and unconstitutional -- expansion of police authority to conduct investigative stops.

For these reasons, we conclude that the investigative stop in this case was not supported by a reasonable suspicion that Reichel was about to drive while intoxicated.

The State's argument that the investigative stop was justified because the officers had a reasonable suspicion that Reichel had just violated the conditions of his parole

This brings us to the State's third argument: the argument that the investigative stop was justified because the officers had a reasonable suspicion that Reichel had just violated the conditions of his release (by going into the bar). This is one of the theories adopted by the superior court when the court denied Reichel's motion to suppress.

Under its "violation of parole" theory for upholding the stop, the State argues that the **[**15]** *Coleman-Ebona* rule should be construed to allow the police to conduct investigative stops, not only when the officers reasonably suspect recent or impending criminal conduct, but also when they reasonably suspect a recent or impending violation of probation or parole, so long as this violation "involves conduct serious enough to satisfy the *Coleman* standard" -- *i.e.*, so long as the conduct creates an "imminent public danger" or it involves "[recent] serious harm to persons or property".

Reichel contends that the State's argument is foreclosed by the Alaska Supreme Court's decision in *Roman v. State, 570 P.2d 1235 (Alaska 1977)*. In *Roman*, the supreme court held [HN5] (as a matter of Alaska constitutional law) that prisoners released on parole have the same protections against government searches and seizures as other citizens, **[*202]** "except [when] reasonably conducted searches and seizures are required by the legitimate demands of correctional authorities", and when the authority to conduct such searches and seizures "[is expressly] set forth [in the parolee's] conditions of parole by the Parole Board". n13

n13 *Roman, 570 P.2d at 1237.*

[16]**

The defendant in *Roman* had been granted parole release from his sentence for possession of heroin. n14 Roman later violated his conditions of release, but (following a hearing) the Parole Board decided not to

revoke his parole. Instead, Roman's parole officer drafted a series of supplemental conditions of parole to govern Roman's conduct in the future. n15 One of these conditions required Roman to "submit [his] person, vehicle and dwelling to search for contraband on demand by any parole officer or peace officer". n16

n14 *Id.*

n15 *Id.*

n16 *Id.*

The supreme court held that this parole condition was unconstitutional to the extent that it purported to grant police officers independent authority to require Roman to submit to a search:

> The right to perform such searches is limited to parole officers and peace officers acting under their direction. ... The authorization for searches [in Roman's case] was too broad [because it subjected] Roman to searches other than by or at **[**17]** the direction of parole officers.

Roman, 570 P.2d at 1243 & n. 26. The supreme court added that, "in the future, we believe that [any] conditions of parole authorizing searches should be specified by the Parole Board and [should] not [be] left to the discretion of individual parole officers." n17

n17 *Id. at 1243-44.*

These two aspects of the *Roman* decision are now codified in *AS 33.16.150.* [HN6] This statute governs the Parole Board's authority to impose conditions of release on prisoners who are paroled. *Subsection (a)* of the statute lists twelve conditions of release that must be imposed on all parolees. *Subsection (b)* of the statute then lists an additional eleven conditions of release that the Parole Board may, in its discretion, impose on a particular parolee. Under *subsection (b)(3)*, the Parole Board may require a parolee to

> submit to reasonable searches and seizures by a parole officer, or [by] a peace officer acting **[**18]** under the direction of a parole officer[.]

Thus, subsection *(b)(3)* echoes the holding in *Roman* -- the constitutional ruling that, except when acting at the direction of a parole officer, police officers may not subject parolees to searches or seizures that would be unconstitutional if performed on the person or property of other citizens.

Based on *Roman*, Reichel argues that police officers can not detain a parolee to investigate a suspected parole violation unless either (1) the suspected parole violation involves conduct that would constitute an independent crime, or (2) the officers are acting at the direction of a parole officer. Thus, Reichel reasons, the investigative stop in his case was unconstitutional.

We conclude that we need not resolve these issues concerning the interplay between the *Roman* decision and the *Coleman-Ebona* rule. As explained above, the State does not argue that police officers are authorized to conduct an investigative stop whenever they have a reasonable suspicion that a parole violation is occurring or has just occurred. Rather, the State takes the position that police officers are entitled to conduct an investigative stop if **[**19]** they have a reasonable suspicion (1) that a parole violation is occurring or has just occurred, *and* (2) that the conduct involved in this violation of parole meets the *Coleman-Ebona* test -- *i.e.*, that the parole violation creates an "imminent public danger" or it involves "[recent] serious harm to persons or property".

As we explained earlier in this opinion (when we rejected the State's argument that the police had a reasonable suspicion that Reichel was about to drive while intoxicated), the facts known to the police when they stopped Reichel did not provide reason to believe that an imminent public danger existed **[*203]** or that serious harm to persons or property had just occurred. The officers knew that Reichel had just been inside the bar. They might reasonably have suspected that Reichel had consumed alcoholic beverages while in the bar. And they reasonably suspected that Reichel's conditions of release forbade him from engaging in these activities. But these facts, even in combination, do not amount to a reasonable suspicion that Reichel posed an imminent danger to the public.

Thus, even under the State's interpretation of the law -- that is, even assuming that the **[**20]** *Coleman-Ebona* rule allows the police to conduct investigative stops based on reasonable suspicion of a serious parole violation -- the facts of Reichel's case would not support the investigative stop. For this reason, we conclude that the parties' various arguments concerning the proper interpretation of *Roman* and the *Coleman-Ebona* rule are moot.

The superior court's alternative rationale for upholding the investigative stop

In addition to the theories that we have already discussed, the superior court ruled that the investigative stop was justified because Reichel's conditions of parole required him to submit to a breath test or to a search for controlled substances at the request or direction of any police officer. On appeal, the State does not defend this rationale for the investigative stop. As we explained in the preceding section of this opinion, the Alaska Supreme Court's decision in *Roman v. State* holds that these conditions of Reichel's parole are unconstitutional.

Conclusion

Reichel's suppression motion should have been granted. Accordingly, the judgement of the superior court is REVERSED.

LEXSEE 477 P.2D 441

STATE of Alaska, Appellant, v. Donald Scott CHANEY, Appellee

No. 1249

Supreme Court of Alaska

477 P.2d 441; 1970 Alas. LEXIS 170

December 7, 1970

CASE SUMMARY:

PROCEDURAL POSTURE: The State of Alaska appealed a decision of the trial court (Alaska), which sentenced defendant to concurrent one-year terms of imprisonment after his conviction for two counts of forcible rape and one count of robbery.

OVERVIEW: Defendant was found guilty after a jury trial of two counts of forcible rape and one count of robbery. The trial court imposed concurrent one-year terms of imprisonment and provided for parole in the discretion of the parole board. The State appealed the judgment and sentence entered by the trial court. The State claimed that the one-year concurrent sentences were too lenient in view of the severity of the crimes of forcible rape and robbery. It argued that there was a need to deter others from such brutal behavior, and that the presentence recommendations called for significantly greater sentences than those imposed by the trial court. On appeal, the court held that the sentence imposed was too lenient considering the circumstances surrounding the commission of the crimes. The trial court accorded little or no weight to several significant goals of the system of penal justice.

OUTCOME: The court reversed the judgment of the trial court and remanded the cause for resentencing.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Sentencing > Appeals

[HN1] *Alaska Stat. § 12.55.120* states in part that: (a) A sentence of imprisonment lawfully imposed by the superior court for a term or for aggregate terms exceeding one year may be appealed to the supreme court by the defendant on the ground that the sentence is excessive. By appealing a sentence under the section, the defendant waives the right to plead that by a revision of the sentence resulting from the appeal he has been twice placed in jeopardy for the same offense. (b) A sentence of imprisonment lawfully imposed by the superior court may be appealed to the supreme court by the State on the ground that the sentence is too lenient; however, when a sentence is appealed by the State and the defendant has not appealed the sentence, the court is not authorized to increase the sentence but may express its approval or disapproval of the sentence and its reasons in a written opinion.

Criminal Law & Procedure > Sentencing > Appeals

[HN2] The Supreme court of the State of Alaska has jurisdiction to hear appeals of sentences of imprisonment lawfully imposed by the superior courts on the grounds that the sentence is excessive or too lenient and, in the exercise of this jurisdiction, may modify the sentence as provided by law and by the constitution of the State of Alaska. For the purpose of considering appeals of sentences on those grounds, the supreme court may sit in divisions. *Alaska Stat. § 22.05.010(b).*

Criminal Law & Procedure > Sentencing > Appeals

[HN3] Alaska Supreme Ct. R. 6 was amended to read in part as follows: except that the State shall have a right to appeal in criminal cases on the ground that the sentence is too lenient.

Criminal Law & Procedure > Sentencing > Imposition > Factors

[HN4] Alaska Const., art. I, § 12.provides: Penal administration shall be based on the principle of reformation and upon the need for protecting the public.

Criminal Law & Procedure > Sentencing > Appeals
[HN5] Sentencing is a discretionary judicial function. When a sentence is appealed, the court will make our own examination of the record and will modify the sentence if it is convinced that the sentencing court was clearly mistaken in imposing the sanction it did.

Criminal Law & Procedure > Sentencing > Imposition > Factors
[HN6] Under Alaska's Constitution, the principles of reformation and necessity of protecting the public constitute the touchstones of penal administration. Multiple goals are encompassed within these broad constitutional standards. Within the ambit of this constitutional phraseology are found the objectives of rehabilitation of the offender into a noncriminal member of society, isolation of the offender from society to prevent criminal conduct during the period of confinement, deterrence of the offender himself after his release from confinement or other penological treatment, as well as deterrence of other members of the community who might possess tendencies toward criminal conduct similar to that of the offender, and community condemnation of the individual offender, or in other words, reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves.

Criminal Law & Procedure > Sentencing > Imposition > Procedures
[HN7] Alaska Supreme Ct. R. 21(f) requires that at the time of imposition of sentence the judge shall make a statement on the record explaining his reasons for imposition of the sentence.

COUNSEL: [1]**

G. Kent Edwards, Atty. Gen., Juneau, Harold W. Tobey, Dist. Atty., Robert L. Eastaugh, Asst. Dist. Atty., Anchorage, for Appellant.

Herbert D. Soll, Asst. Public Defender, Anchorage, for Appellee.

JUDGES:

Boney, C.J., and Dimond, Rabinowitz, Connor and Erwin, JJ.

OPINIONBY:

RABINOWITZ

OPINION:

[*441] Appellee Donald Scott Chaney was indicted on two counts of forcible rape and one count of robbery. After trial by jury, appellee was found guilty on all three counts. The superior court imposed concurrent one-year terms of imprisonment and provided for parole in the discretion of the parole board. The State of Alaska has appealed from the judgment and commitment which was entered by the trial court.

First impression issues concerning Alaska's recently enacted legislation establishing appellate review of criminal sentences are presented in this appeal. In Bear v. State, n1 this court concluded that it lacked "jurisdiction to review and remand or to review and revise a criminal sentence for abuse of discretion." n2 *Bear* was subsequently **[*442]** followed in Faulkner v. State n3 and Thessen v. State. n4 In 1969, the Alaska legislature enacted legislation providing for appellate review **[**2]** of criminal sentences. n5 The 1969 act, codified as *AS 12.55.120*, states in part that:

> [HN1] (a) A sentence of imprisonment lawfully imposed by the superior court for a term or for aggregate terms exceeding one year may be appealed to the supreme court by the defendant on the ground that the sentence is excessive. By appealing a sentence under this section, the defendant waives the right to plead that by a revision of the sentence resulting from the appeal he has been twice placed in jeopardy for the same offense.
>
> (b) A sentence of imprisonment lawfully imposed by the superior court may be appealed to the supreme court by the state on the ground that the sentence is too lenient; however, when a sentence is appealed by the state and the defendant has not appealed the sentence, the court is not authorized to increase the sentence but may express its approval or disapproval of the sentence and its reasons in a written opinion. n6

n1 *439 P.2d 432 (Alaska 1968).*

n2 *Id. at 435.* In *Bear*, a majority of the court concluded that:

> It is the view of this court that review of legal criminal sentences should be provided for by statute only after a careful study of the

> efficacy of reviewing techniques now in force in other jurisdictions has been made, and the need for the procedure determined. Reviewing authority should perhaps include the power to modify a sentence upward as well as downward in order to achieve the full advantage of the procedure and decrease or eliminate disparity in sentences.

Id. at 437. **[**3]**

n3 *445 P.2d 815 (Alaska 1968).* In *Faulkner,* Justice Dimond thought the sentence violated both the federal and Alaskan constitutional protections against cruel and unusual punishment. Justice Rabinowitz took the view that the court had jurisdiction to review the sentence and that the sentence was excessive. Chief Justice Nesbett was of the opinion that the court lacked jurisdiction to review the sentence for excessiveness, and further that the sentence did not contravene constitutional protections against cruel and unusual punishment.

n4 *454 P.2d 341, 354 (Alaska 1969).* In *Berfield v. State, 458 P.2d 1008, 1011 (Alaska 1969),* we said:

> A majority of the court as now constituted has not had occasion to express itself on the question presented in *Bear* of whether this court has jurisdiction to review criminal sentences for abuse of discretion.

n5 SLA 1969, ch. 117. A comprehensive study conducted by the Judicial Council played a significant role in the shaping and enactment of this legislation.

n6 Subsection (c) of *AS 12.55.120* treats the subject of bail in regard to sentence appeals. Sections 1 and 2 of chapter 117, SLA 1969 amended the statutes which delineate the jurisdiction of both the Supreme and Superior Courts of the State of Alaska. In regard to this court's jurisdiction, it was provided that:

> [HN2] The supreme court has jurisdiction to hear appeals of sentences of imprisonment lawfully imposed by the superior courts on the grounds that the sentence is excessive or too lenient and, in the exercise of this jurisdiction, may modify the sentence as provided by law and by the constitution of this state. For the purpose of considering appeals of sentences on these grounds, the supreme court may sit in divisions. (SLA 1969, ch. 117, § 1, codified as *AS 22.05.010(b)*).

In order to conform with the changes instituted by chapter 117, SLA 1969, Supreme Ct. R. 6 was amended to read in part as follows:

> * * * * [HN3] except that the state shall have a right to appeal in criminal cases * * * * on the ground that the sentence is too lenient.

[4]**

In the case at bar, the state has appealed from the sentence imposed. In such circumstances, the provisions of subsection (b) of *AS 12.55.120* prohibit any increase in the sentence which was passed by the trial court although this court may express its approval or disapproval of the sentence in a written opinion.

This appeal is the first by the state under the 1969 act. Since this legislation is of great significance to the administration of criminal justice in the State of Alaska, we deem it important to express our approval or disapproval of sentences within this **[*443]** category of sentence appeal. n7 For in our view, the 1969 sentence appeal statute manifests the legislature's awareness of existing deficiencies in sentencing practices throughout Alaska's entire court system and the compelling necessity of developing appropriate sentencing criteria. The primary goal of such legislation is an attempt to implement Alaska's constitutional mandate that " [HN4] Penal administration shall be based on the principle of reformation and upon the need for protecting the public." n8

n7 The lack of sentence review precedent requires that this court's discretion be exercised in favor of expression of our views in an attempt to articulate and develop sentencing standards. The decision to express our views in appeals by the state on grounds of excessive leniency reflects our awareness of the possibility that distorted

criteria could result if review were limited exclusively to claims of excessive harshness. [**5]

n8 Alaska Const., art. I, § 12.

In the case at bar, appellant, the State of Alaska, claims that the one-year concurrent sentences were too lenient in view of the severity of the crimes of forcible rape and robbery, the need to deter others from such brutal behavior, and in view of the presentence recommendations, all of which called for significantly greater sentences than those which were imposed by the superior court.

At the threshold, we are confronted with the problem of determining the scope of our review of criminal sentences under the 1969 act. As we interpret this legislative enactment, it is our duty to examine the proceedings below to review for excessiveness or leniency the sentence imposed by the trial court, in light of the nature of the crime, the defendant's character, and the need for protecting the public. We are also obliged to consider the manner in which the sentence was imposed, including the sufficiency and accuracy of the information upon which it was based. n9 Sentence review by this court must be carried out with a view to effectuate the purposes of the 1969 act, [**6] as well as the goals of sentence review in general. The objectives of sentence review have been said to be:

> (i) to correct the sentence which is excessive in length, having regard to the nature of the offense, the character of the offender, and the protection of the public interest;
>
> (ii) to facilitate the rehabilitation of the offender by affording him an opportunity to assert grievances he may have regarding his sentence;
>
> (iii) to promote respect for law by correcting abuses of the sentencing power and by increasing the fairness of the sentencing process; and
>
> (iv) to promote the development and application of criteria for sentencing which are both rational and just. n10

We think this a fair statement of some of the general objectives of sentencing review.

n9 ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences, Standard 3.2 (Approved Draft, 1968).

n10 ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences, Standard 1.2 (Approved Draft, 1968). Under the 1969 act, codified as *AS 12.55.120(b)*, the state was given the right of appeal on the ground that the sentence imposed was too lenient. Thus, one of the objectives of sentence review under our statute is to express our disapproval of the sentence which is too lenient, having regard to the nature of the offense, the character of the offender, protection of the public. *See also* the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 25-26 (1967).

[**7]

[HN5] Sentencing is a discretionary judicial function. n11 When a sentence is appealed, [*444] we will make our own examination of the record and will modify the sentence if we are convinced that the sentencing court was clearly mistaken in imposing the sanction it did. n12 [HN6] Under Alaska's Constitution, the principles of reformation and necessity of protecting the public constitute the touchstones of penal administration. n13 Multiple goals are encompassed within these broad constitutional standards. Within the ambit of this constitutional phraseology are found the objectives of rehabilitation of the offender into a noncriminal member of society, isolation of the offender from society to prevent criminal conduct during the period of confinement, deterrence of the offender himself after his release from confinement or other penological treatment, as well as deterrence of other members of the community who might possess tendencies toward criminal conduct similar to that of the offender, and community condemnation of the individual offender, or in other words, reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves. n14

> In Faulkner v. State, [**8] n15 it was said, determination of an appropriate sentence involves the judicious balancing of many and ofttimes competing factors * * * * [of which] primacy cannot be ascribed to any particular factor. n16

n11 G. Mueller, Penology on Appeal: Appellate Review of Legal but Excessive Sentences, *15 Vand.L.Rev. 671, 684 (1962)*, says regarding the discretionary aspects of sentencing in criminal law,

> sentencing is a judicial problem, and as long as the judiciary is vested with a discretionary range of sentences, there must be some guard against a possible abuse of such discretion, just as there is appellate supervision over every other exercise of judicial discretion.

See, State v. Pete, 420 P.2d 338 (Alaska 1966); Battese v. State, 425 P.2d 606 (Alaska 1967); Egelak v. State, 438 P.2d 712 (Alaska 1968).

n12 In the ABA's Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences, Standard 3.1, 49-50 (Approved Draft, 1968), while clear recognition is accorded the difficulty of articulating precisely the proper role of reviewing courts in sentencing appeals, it is suggested that

> respect for the discretion of the trial judge should not prevent the reviewing court from making its own inquiry into the justice of the sentence before it. Having made that inquiry, the reviewing court, to be sure, should not 'tinker' with the sentence. Still, the point remains that an independent examination of the justice of the particular sentence is necessary in order for the review process to properly function.

See also President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 26 (1967); President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 357-58 (Avon 1968). **[**9]**

n13 Alaska Const., art. I, § 12.

n14 Appellate Review of Primary Sentencin Decisions: A Connecticut Case Study, *69 Ya L.J. 1454 (1960).*

n15 *445 P.2d 815, 823 (Alaska 1968).*

n16 In *Bear v. State, 439 P.2d 432, 43 (Alaska 1968)*, we said:

> The determination of the exact period of time that a convicted defendant should serve is basically a sociological problem to be resolved by a careful weighing of the principle of reformation and the need for protecting the public.

In Appellate Review of Primary Sentencin Decisions: A Connecticut Case Study, *69 Yal L.J. 1454 (1960)*, it is stated in part:

> To determine the appropriate type and degree of sanction to be applied, the sentencing authority must decide which aim is primarily to be implemented and the relative weight to be assigned to secondary aims.

We now turn to the facts of the case at bar. At the time appellee committed the crimes of forcible rape and robbery, he was an unmarried member of the United States Armed Forces tioned at Fort Richardson, near Anchorage, Alaska. n17 Appellee was born in 1948, **[**10]** the youngest of eight children. His youth was spent on the family's dairy farm in Washington County, Maryland. He played basketball on the Boonsboro High School team, was a member of Future Farmers of America and the Boy Scouts. Appellee did not complete high school, having dropped out one month prior to graduation. n18 After a series of **[*445]** varying types of employment, appellee was drafted into the United States Army in 1968. At sentencing, it was disclosed that appellee did not have any prior criminal record, was not a user of drugs, and was only a social drinker.

n17 Appellee's commanding officer stated, prior to sentencing, that appellee was an excellent soldier, takes orders well, and was on the promotion list before his crimes.

n18 Appellee asserts he was forced to take this action because his father needed his help on the family dairy farm.

From the record that has been furnished, it appears that appellee and a companion picked up the prosecutrix at a downtown location in Anchorage. After [**11] driving the victim around in their car, appellee and his companion beat her and forcibly raped her four times. n19 During this same period of time, the victim's money was removed from her purse. Upon completion of these events, the prosecutrix was permitted to leave the vehicle to the accompaniment of dire threats of reprisals if she attempted to report the incident to the police.

n19 The prosecutrix was also forced to perform an act of fellatio with appellee's companion.

The presentence report which was furnished to the trial court prior to sentencing contains appellee's version of the rapes. According to appellee, he felt "that it wasn't rape as forcible and against her will on my part." As to his conviction of robbery, appellee states: "I found the money on the floor of the car afterwards and was planning on giving it back, but didn't get to see the girl." At the time of sentencing, appellee told the court that he "didn't direct any violence against the girl."

The Division of Corrections, in its presentence [**12] report, recommended appellee be incarcerated and parole be denied. The assistant district attorney who appeared for the state at the time of sentencing recommended that appellee receive concurrent seven-year sentences with two years suspended on the two rape convictions, and that the appellee be sentenced to a consecutive five-year term of imprisonment on the robbery conviction, and that this sentence be suspended and appellee be placed on probation during this period of time. n20 At the time of sentencing, a representative of the Division of Corrections recommended that appellee serve two years on each of the rape convictions and that appellee be sentenced to two years suspended with probation as to the robbery conviction. In his opinion, there was "an excellent possibility of * * * * early parole." Counsel for appellee concurred in the Division of Corrections' recommendation. As was indicated at the outset, the trial court imposed concurrent one-year terms of imprisonment and provided for parole at the discretion of the parole board. n21 The trial judge further recommended that appellee be placed in a minimum security facility.

n20 After the state made its recommendation, the following transpired:

THE COURT: I wish Mr. Tobey were - were here. I would like to find out * * * * why he makes that particular recommendation and I presume you don't know?

MR. FELTON: No, Your Honor, this is what I tried to explain to the Court earlier, why the - defense counsel may specifically request Mr. Tobey's presence rather than my own.

MR. KERNAN [trial counsel for appellee]: I was not aware, Your Honor, that Mr. Tobey would be unavailable and * * * * since this is - I believe the sentence that's been recommended * * * * it is a very vindictive sentence. * * * * Under the circumstances of this case, I would like to have Mr. Tobey here to explain his reasoning.

. . .

THE COURT: * * * * I suppose everybody else being here, we might as well go ahead and pass the sentence. * * * *

. . .

MR. FELTON: I think, Your Honor, that primarily the State was concerned - or appalled by the - the apparent violence involved in this thing. I think this is probably the major reason that Mr. Tobey recommended these things that he's indicated to me. Your Honor.

[**13]

n21 These were minimum sentences under the applicable statutes. Rape carries a potential range of imprisonment from 1 to 20 years while a conviction of robbery can result in imprisonment from 1 to 15 years.

In imposing this sentence, the trial judge remarked that he was "sorry that the [military] [*446] regulations would not permit keeping [appellee] * * * * in the service if he wanted to stay because it seems to me that is * * * * a better setup for everybody concerned than

putting him in the penitentiary." n22 At a later point in his remarks, the trial judge said:

> Now as a matter of fact, I have sentenced you to a minimum on all 3 counts here but there will be no problem as far as I'm concerned for you to be paroled at the first day, the Parole Board says that you're eligible for parole. * * * * [If] the Parole Board should decide 10 days from now that you're eligible for parole and parole you, it's entirely satisfactory with the court. n23

n22 Collateral consequences flowing from an accused's conviction may be considered by the trial judge in arriving at an appropriate sentence. In addition to giving weight to the fact that military regulations prohibited appellee's retention in the service, the record further indicates that the trial judge also took into consideration the fact that appellee's conviction would result in his receiving an undesirable discharge from the military service. **[**14]**

n23 Supreme Ct. R. 21(f) requires that:

> [HN7] At the time of imposition of sentence the judge shall make a statement on the record explaining his reasons for imposition of the sentence.

The ABA recommends that when sentence is imposed the court

> normally should state for the record in the presence of the defendant the reasons for selecting the particular sentence to be imposed. In the exceptional cases where the court deems it in the best interests of the defendant not to state fully in his presence the reasons for the sentence, the court should prepare such a statement for inclusion in the record. * * * *

The basic reasons for this requirement are that a statement of the reasons by the sentencing judge should greatly increase the rationality of sentences, such a statement can be of therapeutic value to the defendant, and the statement can be of significance to an appellate court faced with the prospect of reviewing the sentence.

> ABA Project on Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures, Standard 5.6(ii) 269, 270-7 (Approved Draft, 1968).

[15]**

Exercising the appellate jurisdiction vested in this court by virtue of the provisions of *AS 12.55.120(b)*, we express our disapproval of the sentence which was imposed by the trial court in the case at bar. In our opinion, the sentence was too lenient considering the circumstances surrounding the commission of these crimes. It further appears that several significant goals of our system of penal justice were accorded little or no weight by the sentencing court.

Forcible rape and robbery rank among the most serious crimes. In the case at bar, the record reflects that the trial judge explicitly stated, on several occasions, that he disbelieved appellee and believed the prosecutrix's version of what happened after she entered the vehicle which was occupied by appellee and his companion. Considering both the jury's and the trial judge's resolution of this issue of credibility, and the violent circumstances surrounding the commission of these dangerous crimes, we have difficulty in understanding why one-year concurrent sentences were thought appropriate.

Review of the sentencing proceedings leads to the impression that the trial judge was apologetic in regard to his decision to impose **[**16]** a sanction of incarceration. Much was made of appellee's fine military record and his potential eligibility for early parole. n24 On the one hand, the record is devoid of any trace of remorse on appellee's part. Seemingly all but forgotten in the sentencing proceedings is the victim of appellee's rapes and robbery. On the other hand, the record discloses that the trial judge properly considered the mitigating circumstance that the prosecutrix, who at **[*447]** the time did not know either appellee or his companion, voluntarily entered appellee's car. But the crux of our disapproval of the sentence stems from what we consider to be the trial judge's de-emphasis of several important goals of criminal justice.

n24 A military spokesman represented to the sentencing court that:

> An occurrence such as the one concerned is very common and

happens many times each night in Anchorage. Needless to say, Donald Chaney was the unlucky 'G.I.' that picked a young lady who told.

In view of the circumstances of [**17] this record, we think the sentence imposed is not well calculated to achieve the objective of reformation of the accused. Considering the apologetic tone of the sentencing proceedings, the court's endorsement of an extremely early parole, and the concurrent minimum sentences which were imposed for these three serious felonies, we fail to discern how the objective of reformation was effectuated. At most, appellee was told that he was only technically guilty and minimally blameworthy, all of which minimized the possibility of appellee's comprehending the wrongfulness of his conduct.

We also think that the sentence imposed falls short of effectuating the goal of community condemnation, or the reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves. In short, knowledge of the calculated circumstances involved in the commission of these felonies and the sentence imposed could lead to the conclusion that forcible rape and robbery are not reflective of serious antisocial conduct. Thus, respect for society's condemnation of forcible rape and robbery is eroded and reaffirmation of these societal norms negated. n25

n25 We also doubt whether the sentence in the case at bar mitigates the persistent problem of disparity in sentences. What is sought is reasonable differentiation among sentences.

[**18]

We believe that a concurrent sentence calling for a substantially longer period of incarceration on each count was appropriate in light of the particular facts of this record and the goals of penal administration. A sentence of imprisonment for a substantially longer period of imprisonment than the one-year sentence which was imposed would unequivocally bring home to appellee the seriousness of his dangerously unlawful conduct, would reaffirm society's condemnation of forcible rape and robbery, and would provide the Division of Corrections of the State of Alaska with the opportunity of determining whether appellee required any special treatment prior to his return to society. n26

n26 Operation of our system of penal administration in Alaska is dependent upon a properly staffed and functioning Division of Corrections which has, in addition to probation and parole functions, the responsibility for treatment, rehabilitation, and custody of incarcerated offenders.

LEXSEE 46 P.3D 949

STATE OF ALASKA, Petitioner, v. MAUREEN ALICE MALLOY, Respondent.

Supreme Court No. S-9754, No. 5560

SUPREME COURT OF ALASKA

46 P.3d 949; 2002 Alas. LEXIS 56

May 3, 2002, Decided

PRIOR HISTORY: [**1] Petition for Hearing from the Court of Appeals of the State of Alaska, on Appeal from the Superior Court. Third Judicial District, Anchorage, Elaine M. Andrews, Judge. Court of Appeals No. A-6873. Superior Court No. 3AN-95-9983 CR.

Malloy v. State, 2000 Alas. App. LEXIS 91 (Alaska Ct. App. June 16, 2000)

DISPOSITION: Vacated.

CASE SUMMARY:

PROCEDURAL POSTURE: The defendant was convicted for first-degree murder, kidnapping, and tampering with evidence, and was sentenced to 99 years imprisonment without eligibility for parole on the murder charge under *Alaska Stat. § 12.55.125(a)(3)*. On appeal by the defendant, the Alaska Court of Appeals found the sentencing statute unconstitutional and vacated the murder sentence. The State appealed.

OVERVIEW: The court of appeals held that the defendant's sentence was procedurally flawed, as *Alaska Stat. § 12.55.125(a)* represented a new, harsher penalty than the usual maximum penalty for first-degree murder. On appeal, the State argued that, even without relying on the aggravating circumstances spelled out in the mandatory sentencing provision, the sentencing court could have sentenced the defendant to exactly the same term that she received under the statute. Because the sentencing judge had discretion to impose the same sentence, the statute could not plausibly be construed to mandate any increase in the potential maximum sentence. The appellate court agreed with the State. The mandatory sentencing provisions of § 12.55.125(a) did not subject the defendant to a greater maximum penalty than was otherwise authorized. The statute did not eliminate all sentencing discretion, as the sentencing court had the power to impose the sentence independent of the mandatory provision. Additionally, the sentencing judge made it clear that she would have imposed the same sentence, even if the statute had not made it mandatory.

OUTCOME: The court of appeal's order remanding the case for resentencing was vacated, and the sentence, as originally imposed by the trial court, was affirmed.

LexisNexis(R) Headnotes

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder
Criminal Law & Procedure > Sentencing > Imposition > Factors
[HN1] Under *Alaska Stat. § 12.55.125(a)(3)*, a defendant convicted of first-degree murder must receive an unsuspended term of 99 years without eligibility for parole if the sentencing court finds by clear and convincing evidence that the defendant subjected the murder victim to substantial physical torture.

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder
Criminal Law & Procedure > Sentencing > Imposition > Factors
[HN2] Because the statute's mandatory sentence falls within the range otherwise authorized for first-degree murder, *Alaska Stat. § 12.55.125(a)(3)* does not define a new, aggravated class of first-degree murder, but simply imposes a permissible limit on the court's usual sentencing discretion.

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review
[HN3] Constitutional issues present questions of law, which appellate courts review de novo. In ruling on questions of law appellate courts adopt the rule that is most persuasive in light of precedent, reason, and policy.

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder
Criminal Law & Procedure > Sentencing > Imposition > Factors
[HN4] *Alaska Stat. § 12.55.125(a)(1)*-(3) lists three aggravating circumstances that trigger a mandatory maximum sentence for first-degree murder.

Criminal Law & Procedure > Sentencing > Imposition > Factors
Criminal Law & Procedure > Postconviction Proceedings > Parole
[HN5] See *Alaska Stat. § 33.16.090(b)*.

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder
Criminal Law & Procedure > Sentencing > Imposition > Factors
[HN6] See *Alaska Stat. § 12.55.125(a)(1)*-(3).

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder
Criminal Law & Procedure > Sentencing > Imposition > Factors
[HN7] Under *Alaska Stat. § 12.55.115*, a sentencing court sentencing a defendant for first-degree murder generally has authority to deny eligibility for discretionary parole, regardless of whether the court finds one of the aggravating circumstances that trigger a mandatory maximum term under *Alaska Stat. § 12.55.125(a)(1)*-(3).

Criminal Law & Procedure > Sentencing > Imposition > Factors
Criminal Law & Procedure > Postconviction Proceedings > Parole
[HN8] See *Alaska Stat. § 12.55.115*.

Criminal Law & Procedure > Sentencing > Imposition > Factors
[HN9] Where a criminal statute provides for graded or enhanced ranges of punishments for aggravated instances of the proscribed offense, an indictment charging the offense must specify the aggravating facts before the defendant can be exposed to an increased range of punishment.

Criminal Law & Procedure > Sentencing > Imposition > Factors
[HN10] When a statute provides a greater maximum penalty for a crime based on specified aggravating factors, Alaska's guarantees of due process, Alaska Const. art. I, § 7, and of trial by jury, Alaska Const. art. I, § 11, and also, when a felony is charged, Alaska's guarantee of grand jury indictment, Alaska Const. art. I, § 8, require us to treat the statute as creating separate offenses, and to treat the aggravating factors as elements of the aggravated form of the offense. The defendant will not be subject to the greater maximum penalty unless the charging document specifies the pertinent aggravating factors and the State proves these aggravating factors beyond a reasonable doubt at the defendant's trial.

Criminal Law & Procedure > Sentencing > Imposition > Factors
[HN11] 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 the jury, and proved beyond a reasonable doubt.

Criminal Law & Procedure > Sentencing > Imposition > Factors
[HN12] Where a statute proscribes a single offense and commits a single range of sentences to the discretion of the sentencing court, aggravating facts warranting sentences in the upper spectrum of the range need not be set forth in the complaint or indictment.

Criminal Law & Procedure > Sentencing > Cruel & Unusual Punishment
[HN13] See Alaska Const. art. I, § 12.

Criminal Law & Procedure > Sentencing > Imposition > Factors
[HN14] A mere possibility of constitutional friction in occasional, extraordinary cases does not justify declaring a sentencing statute entirely invalid.

Criminal Law & Procedure > Sentencing > Imposition > Factors
Criminal Law & Procedure > Postconviction Proceedings > Parole
[HN15] Parole eligibility should be considered irrelevant for purposes of the rule requiring a sentencing judge to make an express "worst-offender" finding before imposing a maximum sentence.

Criminal Law & Procedure > Sentencing > Imposition > Factors
[HN16] For constitutional purposes, there is no distinction between extended and mandatory minimum enhanced sentencing. Both constrain the discretion of the

sentencing judge and fix the term of incarceration imposed as a result of the conviction.

Criminal Law & Procedure > Sentencing > Imposition > Factors

[HN17] When imposing judgment within the sentencing range prescribed by statute, sentencing courts may consider sentencing factors relating both to the offense and the offender.

COUNSEL: Appearances:

Nancy R. Simel, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Petitioner.

Dan S. Bair, Anchorage, for Respondent.

JUDGES: Before: Fabe, Chief Justice, Matthews, Eastaugh, Bryner, and Carpeneti, Justices.

OPINIONBY: BRYNER

OPINION: **[*950]**

BRYNER, Justice.

I. INTRODUCTION

[HN1] Under *AS 12.55.125(a)(3)*, a defendant convicted of first-degree murder must receive an unsuspended term of ninety-nine years without eligibility for parole if the sentencing court "finds by clear and convincing evidence that the defendant subjected the murder victim to substantial physical torture." Does this statute impermissibly subject the defendant to increased punishment for **[**2]** an aggravated class of first-degree murder that has not been proved beyond a reasonable doubt to the jury? [HN2] Because the statute's mandatory sentence falls within the range otherwise authorized for first-degree murder, we hold that *AS 12.55.125(a)(3)* does not define a new, aggravated class of first-degree murder, but simply imposes a permissible limit on the court's usual sentencing discretion.

II. FACTS AND PROCEEDINGS

A jury convicted Maureen Alice Malloy of first-degree murder, kidnapping, and tampering with evidence. **n1** Before sentencing, the state gave notice that it would seek a sentence under *AS 12.55.125(a)(3)*; this statute requires the court to impose a maximum, unsuspended term of ninety-nine years when it finds by clear and convincing evidence that a defendant convicted of first-degree murder subjected the victim to substantial physical torture.

n1 The underlying facts of Malloy's offenses are exceptionally brutal but are not relevant here; they are summarized in *Malloy v. State, 1 P. 3d 1266, 1269 (Alaska App. 2000).*

[3]**

In response to the state's notice, Malloy challenged the statute as unconstitutional because it did not require the state to charge the statutorily specified aggravating circumstance - substantial physical torture - as an element of the offense or to prove it beyond a reasonable doubt to the jury.

Superior Court Judge Elaine M. Andrews rejected Malloy's constitutional challenge and, after finding by clear and convincing evidence that Malloy had subjected her victim to substantial physical torture, imposed the mandatory sentence under *AS 12.55.125(a)(3)*: a term of ninety-nine years' imprisonment without eligibility for discretionary parole. **n2** Despite the mandatory nature of the sentence, Judge Andrews noted that she would have sentenced Malloy to the maximum term for murder even if subparagraph .125(a)(3) had not made it mandatory; Judge Andrews further emphasized that, in her view, Malloy deserved a life sentence without possibility of parole.

n2 Judge Andrews also sentenced Malloy to a term of ninety-nine years for kidnapping, made sixty years of that term consecutive to the term for murder, and imposed a concurrent five-year sentence for tampering with evidence. Malloy's composite term thus totaled 159 years' imprisonment.

[4]**

Malloy appealed, and the court of appeals affirmed her convictions and sentences except for the sentencing provision that made Malloy ineligible for discretionary parole until she completed serving her term for first-degree **[*951]** murder. **n3** The court vacated this parole restriction because it was imposed under *AS 12.55.125(a)*, and the court found that this statute is unconstitutional. **n4**

n3 *Malloy, 1 P. 3d at 1290.*

n4 *Id. at 1288, 1290.*

The state petitioned for hearing, challenging the court of appeals's decision declaring *AS 12.55.125(a)* unconstitutional. We granted the petition to address that issue. **n5**

n5 *Malloy v. State, 1 P. 3d 1266 (Alaska App. 2000), pet. for hrg. granted,* File No. S-9754 (Alaska, October 3, 2000). Malloy also petitioned for hearing, challenging the court of appeals's decision to affirm her conviction and total term of imprisonment. We denied Malloy's petition for hearing.

[5]**

III. DISCUSSION

A. Standard of Review

[HN3] Constitutional issues present questions of law, which we review de novo. **n6** In ruling on questions of law we "adopt the rule that is most persuasive in light of precedent, reason, and policy." **n7**

n6 *Keane v. Local Boundary Comm'n, 893 P. 2d 1239, 1241 (Alaska 1995); Langdon v. Champion, 752 P. 2d 999, 1001 (Alaska 1988).*

n7 *Guin v. Ha, 591 P. 2d 1281, 1284 n. 6 (Alaska 1979).*

B. Statutory Background

[HN4] *Alaska Statutes 12.55.125(a)(1)*-(3) lists three aggravating circumstances that trigger a mandatory maximum sentence for first-degree murder. **n8** In imposing Malloy's first-degree murder sentence, the superior court found by clear and convincing evidence that Malloy had subjected **[**6]** her murder victim to substantial physical torture, the aggravating circumstance listed in *AS 12.55.125(a)(3)*, which attaches when the sentencing court "finds by clear and convincing evidence that the defendant subjected the murder victim to substantial physical torture." Given this finding, Judge Andrews sentenced Malloy to a ninety-nine-year term of imprisonment for murder, as required under *AS 12.55.125(a)(3)*; under a separate statutory provision - *AS 33.16.090(b)* - this mandatory sentence barred Malloy from being eligible for discretionary parole: [HN5] "A prisoner sentenced to a mandatory 99-year term under *AS 12.55.125(a)* ...is not eligible for discretionary parole during the entire term." **n9**

n8 [HN6] *AS 12.55.125(a)(1)*-(3) provides: (a) A defendant convicted of murder in the first degree shall be sentenced to a definite term of imprisonment of at least 20 years but not more than 99 years. A defendant convicted of murder in the first degree shall be sentenced to a mandatory term of imprisonment of 99 years when (1) the defendant is convicted of the murder of a uniformed or otherwise clearly identified peace officer, fire fighter, or correctional employee who was engaged in the performance of official duties at the time of the murder; [or] (2) the defendant has been previously convicted of (A) murder in the first degree under *AS 11.41.100* or former *AS 11.15.010* or 11.15.020; (B) murder in the second degree under *AS 11.41.110* or former AS 11.15.030; or (C) homicide under the laws of another jurisdiction when the offense of which the defendant was convicted contains elements similar to first degree murder under *AS 11.41.100* or second degree murder under *AS 11.41.110*; [or] (3) the court finds by clear and convincing evidence that the defendant subjected the murder victim to substantial physical torture[.]

[7]**

n9 *See Malloy, 1 P. 3d at 1281* (quoting *AS 33.16.090(b)*).

Like the mandatory sentence specified by *AS 12.55.125(a)(1)*-(3), the maximum discretionary sentence for first-degree murder - also set out in *AS 12.55.125(a)* - is ninety-nine years; **n10** and [HN7] under *AS 12.55.115*, a court sentencing a defendant for first-degree murder generally has authority to deny eligibility for discretionary parole, regardless of whether the court finds one of the aggravating circumstances that trigger a mandatory maximum term under *AS 12.55.125(a)(1)*-(3). **n11**

n10 *See* above, footnote 8.

n11 [HN8] *AS 12.55.115* provides: "The court may, as part of a sentence of imprisonment, further restrict the eligibility of a prisoner for discretionary parole for a term greater than that required under *AS 33.16.090* and 33.16.100."

[8]**

C. The Court of Appeals's Decision

Upon considering the present case in light of these statutory provisions, the court of **[*952]** appeals found that Malloy's sentence was procedurally flawed because *AS 12.55.125(a)* improperly allowed the sentencing court to find the existence of the aggravating circumstances that subjected Malloy to an increased mandatory maximum sentence. **n12** In context, the court ruled, the factors listed in *AS 12.55.125(a)(1)*-(3) amounted to elements of a separate, more serious class of first-degree murder, and so should have been formally charged and proved beyond a reasonable doubt to the jury. **n13**

n12 *Malloy, 1 P. 3d at 1285, 1288-89.*

n13 *Id. at 1288-89.*

In reaching this ruling, the court of appeals relied **[**9]** primarily on *Donlun v. State*, **n14** a case decided by the Alaska Supreme Court in 1974. **n15** *Donlun* involved an offender convicted under Alaska's former burglary statute, which authorized three different maximum burglary sentences: ten years for an ordinary burglary, fifteen years for a burglary committed at night, and twenty years for a burglary in an occupied dwelling. **n16** Although Donlun's indictment failed to allege either of the statutorily specified aggravating circumstances, the evidence at trial indicated that he had committed his offense in an occupied dwelling at night. The trial court thus explicitly based Donlun's sentence on the premise that he was subject to a maximum term of twenty years. **n17**

n14 *527 P. 2d 472 (Alaska 1974).*

n15 *Malloy, 1 P. 3d at 1285, 1288-89.*

[10]**

n16 *Donlun, 527 P. 2d at 473-74* (describing former *AS 11.20.080*).

n17 *Id. at 473.*

Donlun appealed, challenging the superior court's sentencing premise. This court reversed, holding "that [HN9] where a criminal statute provides for graded or enhanced ranges of punishments for aggravated instances of the proscribed offense, an indictment charging the offense must specify the aggravating facts before the defendant can be exposed to an increased range of punishment." **n18** We grounded this conclusion on general principles of fairness and notice, without saying whether it was constitutionally based: "We believe that if a defendant is to be afforded a fair opportunity to defend against a burglary charge involving aggravated circumstances, such circumstances must be set forth **[**11]** in the indictment ...and proven at trial." **n19**

n18 *Id.*

n19 *Id. at 474.*

In considering Malloy's appeal, the court of appeals read *Donlun* as stating a rule of law based on the Alaska Constitution. **n20** The court construed *Donlun* to mean

> that [HN10] when a statute provides a greater maximum penalty for a crime based on specified aggravating factors, Alaska's guarantees of due process (Article I, Section 7) and of trial by jury (Article I, Section 11) [and also, when a felony is charged, Alaska's guarantee of grand jury indictment (Article I, Section 8)] require us to treat the statute as creating separate offenses, and to treat the aggravating factors as elements of the aggravated form of the offense. The defendant will not be subject to the greater maximum penalty unless the charging document **[**12]** specifies the pertinent aggravating factors and the State proves these aggravating factors beyond a

reasonable doubt at the defendant's trial.**n21**

n20 *Malloy, 1 P. 3d at 1287-89.*

n21 *Id. at 1288.*

Applying this interpretation of *Donlun* to the case at hand, the court of appeals concluded that Malloy's parole restriction was invalid because Malloy had not been specifically charged and convicted for inflicting substantial physical torture on her murder victim. The court expressly recognized that Alaska law ordinarily empowers sentencing courts "to restrict a defendant's normal eligibility for parole - or deny it altogether." **n22** But it nonetheless reasoned that a mandatory parole restriction imposed under *AS 12.55.125(a)(1)*-(3) "represents a new, harsher **[**13]** penalty" **n23** than the usual "maximum penalty" **[*953]** for first-degree murder, since the court's earlier case law had defined "maximum penalty" to mean "the [ninety-nine-year] maximum term of imprisonment, whether or not the sentencing judge restricts or denies parole eligibility." **n24**

n22 *Id. at 1285* (citing *AS 12.55.115*).

n23 *Id. at 1285.*

n24 *Id. 1 P. 3d 1266* (footnote omitted) (citing *Capwell v. State, 823 P. 2d 1250, 1256 (Alaska App. 1991)).*

After emphasizing that *AS 12.55.125(a)* "not only requires sentencing judges to impose the maximum term **[**14]** of imprisonment that might have been imposed under prior law, but ...also effectively requires sentencing judges to exercise their utmost power ...to restrict the defendant's parole," the court of appeals found that the challenged statute "establishes a separate maximum penalty for certain offenders convicted of first-degree murder, a penalty that is harsher than the maximum penalty specified for other offenders convicted of this crime." **n25** Viewing this finding in light of *Donlun*, the court declared that *AS 12.55.125(a)* violated Malloy's constitutional rights to an indictment, a jury trial, and a finding of guilt beyond a reasonable doubt on the issue of substantial physical torture. **n26** The court thus vacated Malloy's mandatory parole restriction and remanded the case for resentencing. **n27**

n25 *Id. at 1285.*

n26 *Id. at 1288, 1290.*

[15]**

n27 The court of appeals initially ordered the superior court to enter an amended judgment with the parole restriction deleted. *Malloy, 1 P. 3d at 1290.* But after the state filed a petition for rehearing pointing out that the sentencing judge had strongly suggested that she would have imposed the same parole restriction as a matter of discretion under *AS 12.55.115* even if *AS 12.55.125(a)(3)* had not applied, the court amended its mandate to allow the superior court to exercise its discretion on remand with respect to Malloy's eligibility for parole. *Malloy v. State, No. A-6873 2000 Alas. App. LEXIS 91* (Alaska App., June 16, 2000) (order on rehearing).

D. Analysis

When the court of appeals heard Malloy's case and reached its decision, federal constitutional case law on point was unsettled and offered no clear resolution as to whether Malloy had a right to be formally charged with and convicted of aggravating circumstances such as those specified **[**16]** in *AS 12.55.125(a)(3)* before being exposed to mandatory maximum term for first-degree murder. **n28** Because of this uncertainty, the court of appeals chose to view *Donlun* as a decision grounded on the Alaska Constitution; the court thus extended to Malloy the state constitutional protections that it found implicit in *Donlun*. **n29**

n28 *Malloy, 1 P. 3d at 1285-86* (discussing the United States Supreme Court's then two most recent decisions on the issue, *Almendarez-Torres*

v. United States, 523 U.S. 224, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998), and *Jones v. United States, 526 U.S. 227, 143 L. Ed. 2d 311, 119 S. Ct. 1215 (1999)*).

n29 *See id.* at *1 P. 2d 1287-89.*

Less than two months after the court of appeals decided *Malloy*, the United States **[**17]** Supreme Court ended the federal law's lingering uncertainty by deciding *Apprendi v. New Jersey*, **n30** a landmark case interpreting the Fourteenth Amendment's Due Process Clause to incorporate procedural protections that closely mirror the protections that *Malloy* found embedded in the Alaska Constitution.

n30 *530 U.S. 466 (2000).*

Specifically, *Apprendi* holds that, " [HN11] 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 the jury, and proved beyond a reasonable doubt." **n31** Conversely put, *Apprendi* forbids treating as a mere sentencing factor any aggravating circumstance (apart from a prior conviction) that "must exist in order to subject the defendant to a legally prescribed punishment" **n32** - or in other words, "any fact which is essential to the punishment to be inflicted." **n33**

n31 *Id. at 490.*

[18]**

n32 *Id. at 499* (Scalia, Justice, concurring).

n33 *Id. at 511* (Thomas, Justice, concurring) (quoting 1 J. Bishop, *Commentaries on Criminal Law* § 961, pp. 564-65 (5th ed. 1872)).

[*954] This holding, directly binding on states under the Fourteenth Amendment, lays to rest any controversy over the accuracy of the court of appeals's view that *Donlun* is grounded on constitutional principles. The court of appeals's explanation of *Donlun's* state constitutional roots accords with *Apprendi*. And as the state now recognizes,*Donlun* accurately presaged *Apprendi's* holding that aggravating facts must be charged and proved beyond a reasonable doubt to the jury when their existence would allow or require the court to impose a sentence exceeding the maximum otherwise authorized.

But *Apprendi* **[**19]** does not lay to rest the narrower controversy presented here: whether the court of appeals correctly applied *Donlun* to Malloy's situation - that is, whether the court of appeals properly concluded that Malloy's murder sentence - a mandatory maximum sentence imposed under *AS 12.55.125(a)(3)* - actually exceeds the maximum otherwise authorized.

The state correctly points out that, even without relying on the aggravating circumstances spelled out in the mandatory sentencing provision, Judge Andrews could have sentenced Malloy to exactly the same term that she received under AS 12. 55.125(a)(3) - ninety-nine years without possibility of parole. Because Judge Andrews had discretion to impose the same sentence in any event, the state asserts that *AS 12.55.125(a)(1)*-(3) cannot plausibly be construed to mandate any increase in the potential maximum sentence that might otherwise be authorized. Therefore, the state reasons, neither *Donlun* nor *Apprendi* precludes treating the aggravating circumstances listed in paragraphs .125(a)(1)-(3) as ordinary sentencing factors - and similarly, neither case justifies characterizing the **[**20]** mandatory sentencing statute as a substantive law defining a new crime: aggravated first-degree murder. We agree.

As the court of appeals expressly recognized, the usual maximum sentence for first-degree murder is ninety-nine years in prison, and in all such cases "sentencing judges have the authority under *AS 12.55.115* to restrict a defendant's normal eligibility for parole"; the court nonetheless ruled that " *AS 12.55.125(a)* establishes a separate maximum penalty ...that is harsher than the maximum penalty specified for other offenders convicted of [first-degree murder]." **n34** The court gave two reasons for holding that *AS 12.55.125(a)(3)* exposed Malloy to a harsher maximum penalty even though Judge Andrews could have imposed the same sentence without invoking the mandatory sentencing provision: first, *AS 12.55.125(a)* not only limits the court's discretion but completely "abolishes the range of sentences in favor of a fixed 99-year sentence"; **n35** second, the mandatory parole restriction that attaches to a mandatory term imposed under *AS 12.55.125(a)* **[**21]** results in a sentence exceeding the

definition that the court of appeals usually applies to the term "maximum sentence." In the court's words:

> True, sentencing judges have the authority under *AS 12.55.115* to restrict a defendant's normal eligibility for parole - or deny it altogether. But we have previously held that a defendant receives a "maximum sentence" if he or she is sentenced to the maximum term of imprisonment, whether or not the sentencing judge restricts or denies parole eligibility. That is, the mandatory sentencing provision in the first-degree murder statute not only requires sentencing judges to impose the maximum term of imprisonment that might have been imposed under prior law, but it also effectively requires sentencing judges to exercise their utmost power under *AS 12.55.115* to restrict the defendant's parole.**n36**

But neither of these reasons supports the conclusion that *AS 12.55.125(a)* increases the usual maximum sentence for first-degree murder in the manner contemplated by *Donlun* and *Apprendi* - that is, by empowering the court to impose a sentence **[**22]** harsher than the harshest sentence otherwise authorized.

n34 *Malloy, 1 P. 3d at 1285.*

n35 *Id. 1 P. 3d 1266*

n36 *Id. 1 P. 3d 1266* (footnote omitted) (citing *Capwell v. State, 823 P. 2d 1250, 1256 (Alaska App. 1991)).*

[*955] The court's first reason - that *AS 12.55.125(a)* eliminates all sentencing discretion and requires the maximum available sentence - bears no relation to the core concern underlying *Donlun* and *Apprendi*: protecting a defendant from a higher sentencing range than otherwise possible. In addressing this concern *Donlun* and *Apprendi* recognize that an increased sentence resulting from a **[**23]** finding of statutory aggravating circumstances is not a harsher maximum sentence than otherwise authorized unless it falls outside the outer limits of the range of sentences that the court could otherwise impose. **n37**

n37 *See Apprendi, 530 U.S. at 482; Donlun, 527 P. 2d at 474.*

To be sure, any mandatory sentence that entirely eliminates a judge's sentencing discretion may result in occasional cases where extraordinary circumstances might appear to preclude imposing the mandated sentence without jeopardizing the court's ability to promote Alaska's constitutional sentencing goal of reforming the offender in the particular case at hand. **n38** But because this kind of constitutional friction implicates concerns relating to the substantive fairness of a mandatory sentence in particular factual settings, it has little to do with the concerns at issue here, which more narrowly relate to the procedural fairness of "exposing the defendant to a greater punishment than that **[**24]** authorized by the jury's guilty verdict." **n39** And as *Donlun* emphasized, " [HN12] where a statute proscribes a single offense and commits a single range of sentences to the discretion of the sentencing court, aggravating facts warranting sentences in the upper spectrum of the range need not be set forth in the complaint or indictment." **n40**

n38 [HN13] *See* Alaska Const. art. I, § 12: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation. *Cf. Dancer v. State, 715 P. 2d 1174, 1177-79 (Alaska App. 1986)* (discussing the three-judge sentencing panel's safety-valve function in the context of a due process challenge to Alaska's presumptive sentencing system).

n39 *Apprendi, 530 U.S. at 494.*

[25]**

n40 *Donlun, 527 P. 2d at 474; cf. McMillan v. Pennsylvania, 477 U.S. 79, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986)* (upholding Pennsylvania's Mandatory Minimum Sentencing Act).

Furthermore, [HN14] a mere possibility of constitutional friction in occasional, extraordinary cases does not justify declaring a statute entirely invalid. And in any event, no realistic danger of any such friction exists in the present case, for Judge Andrews's sentencing comments make it abundantly clear that she firmly believed Malloy's mandatory sentence to be justified and likely would have imposed exactly the same sentence even if *AS 12.55.125(a)(3)* had not made it mandatory. Hence, the fact that *AS 12.55.125(a)* left Judge Andrews no choice but to impose the maximum sentence lends no support to the court of appeals's conclusion that the statute exposed Malloy to a sentence "harsher than the maximum penalty specified for other offenders convicted **[**26]** of this crime." **n41**

n41 *Malloy, 1 P. 3d at 1285.*

The court of appeals's second reason for concluding that *AS 12.55.125(a)* exposed Malloy to an increased maximum sentence was that the court had "previously held that a defendant receives a 'maximum sentence' if he or she is sentenced to the maximum term of imprisonment, whether or not the sentencing court judge restricts or denies parole eligibility." **n42** But the previous holding referred to in this passage - *Capwell v. State* - stands for the narrow proposition that [HN15] parole eligibility should be considered irrelevant for purposes of the rule requiring a sentencing judge to make an express "worst-offender" finding before imposing a maximum sentence. **n43** Nothing in *Capwell* suggests that the rule in *Donlun* should require courts to deem a non-parole-restricted maximum term of imprisonment to be the "maximum sentence" normally authorized for first-degree murder. Moreover, if *Capwell* **[**27]** did suggest **[*956]** this conclusion, then logically *Capwell's* definition of "maximum sentence" would apply to both parts of the *Donlun* analysis: For if parole is transparent when we decide what "maximum sentence" attaches for murder without *AS 12.55.125(a)(1)*-(3), why is it not just as transparent when we decide if a mandatory "maximum sentence" under that statute is harsher? **n44**

n42 *Id.* (footnote omitted).

n43 *823 P. 2d 1250, 1256 (Alaska App. 1991), cited in Malloy, 1 P. 3d at 1285 n. 47.*

n44 Alternatively stated, if *AS 12.55.115*'s general conferral of power to deny parole eligibility in all first-degree murder cases does not authorize a "maximum sentence" exceeding a non-parole-restricted term of ninety-nine years, then, similarly, *AS 33.16.090(b)*'s specific directive to restrict parole for sentences imposed under *AS 12.55.125(a)* seemingly would not cause those mandatory sentences to exceed the otherwise authorized "maximum sentence."

[28]**

In reality, of course, a parole-restricted term of ninety-nine years is undeniably harsher than a ninety-nine-year term that does not restrict a defendant's eligibility for discretionary parole. To apply *Capwell's* narrow definition of "maximum sentence" in the *Donlun* context would thus place form over substance. Both *Donlun* and *Apprendi* preclude this result: they require us to compare the harshest sentence actually available before a finding of aggravating circumstances under *AS 12.55.125(a)* with the actual harshness of the sentence that is mandated by such a finding: "The relevant inquiry is one not of form, but of effect - does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" **n45**

n45 *Apprendi, 530 U.S. at 494.*

Because the actual effect of a mandatory parole restriction imposed under *AS 33.16.090(b)* is identical to that of a parole restriction **[**29]** imposed at the sentencing court's option under *AS 12.55.115*, and because the optional restriction is independently authorized, it is immaterial that *Capwell* would call a ninety-nine-year non-parole-restricted murder sentence a "maximum sentence" in a different sentencing context.

We hold, then, that the court of appeals incorrectly applied *Donlun* to Malloy's situation. The mandatory sentencing provisions of *AS 12.55.125(a)(1)*-(3) did not subject Malloy to a greater maximum penalty than was otherwise authorized.

Malloy nonetheless urges us to expand *Donlun* beyond its literal terms and beyond its meaning as interpreted by the court of appeals. Citing Oregon and Hawaii case law, **n46** Malloy advocates a state constitutional rule that would require the prosecution to charge and submit to the jury any aggravating factor that is "intrinsic" to the commission of the charged offense

and has the effect of narrowing the sentencing court's range of discretion in any way that disfavors the defendant. Under this approach, for example, Oregon has construed its state constitution to prohibit a mandatory minimum sentence [**30] triggered by intrinsic circumstances not specifically charged and addressed by the jury. **n47**

n46 *See State v. Janto, 92 Haw. 19, 986 P. 2d 306, 320 (Haw. 1999); State v. Tafoya, 91 Haw. 261, 982 P. 2d 890 (Haw. 1999); State v. Wedge, 293 Ore. 598, 652 P. 2d 773 (Or. 1982).*

n47 *Wedge, 652 P. 2d at 775, 778; cf. Tafoya, 982 P. 2d at 902* (stating that [HN16] "for constitutional purposes, there is no distinction between extended and mandatory minimum enhanced sentencing. Both constrain the discretion of the sentencing judge and fix the term of incarceration imposed ...as a result of the conviction.").

But this approach has been considered by the United States Supreme Court and rejected under the federal constitution. **n48** It also conflicts with Alaska [**31] cases that deal with minimum and presumptive sentencing. **n49** [*957] The approach finds no support in the text or history of the Alaska Constitution. And it is inconsistent with *Donlun's* statement reaffirming "that where a statute proscribes a single offense and commits a single range of sentences to the discretion of the sentencing court, aggravating facts warranting sentences in the upper spectrum of the range need not be set forth in the complaint or indictment." **n50** For all these reasons, we decline to expand the *Donlun* rule under the Alaska Constitution to prohibit presumptive or mandatory sentencing factors as long as those factors simply guide or limit a sentencing court's discretion within the existing statutory sentencing range for the offense at issue.

n48 *Apprendi, 530 U.S. at 482* ([HN17] when imposing judgment within the sentencing range prescribed by statute, courts may consider sentencing factors relating both to the offense and the offender); *see also McMillan v. Pennsylvania, 477 U.S. 79, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986)* (approving mandatory minimum sentencing law).

[**32]

n49 Notably, the court of appeals has consistently upheld both presumptive sentencing and mandatory sentencing statutes as constitutionally valid. *See, e. g., Abdulbaqui v. State, 728 P. 2d 1211 (Alaska App. 1986)* (affirming enhanced presumptive sentence as constitutional); *Dancer v. State, 715 P. 2d 1174, 1177-79 (Alaska App. 1986)* (upholding Alaska's presumptive sentencing statutes against a due process challenge); and *Huf v. State, 675 P. 2d 268, 273 (Alaska App. 1984)* (holding that a six-year mandatory minimum sentence merely limited the judge's discretion within the penalty range of up to twenty years, when the trial court found that the defendant possessed or used a firearm during the commission of a felony). More notably still, in *Abdulbaqui* the court disapprovingly commented on the approach adopted in *Wedge*, observing that the Oregon decision conflicted with the court of appeals's ruling in *Huf v. State. See Abdulbaqui, 728 P. 2d at 1220.*

[**33]

n50 *Donlun, 527 P. 2d at 474.*

IV. CONCLUSION

Because *AS 12.55.125(a)* does not violate *Donlun* or *Apprendi*, we VACATE the court of appeals's order remanding this case to the superior court for resentencing and AFFIRM the superior court's sentence as originally imposed.

Not Reported in P.3d
2004 WL 1166366 (Alaska App.)
(Cite as: 2004 WL 1166366 (Alaska App.))

Court of Appeals of Alaska.

Kenneth A. HUSKEY Jr., Appellant,
v.
STATE of Alaska, Appellee.

No. A-8667.

May 26, 2004.

Appeal from the Superior Court, Third Judicial District, Anchorage, Michael L. Wolverton, Judge.

Douglas O. Moody, Assistant Public Defender, and Barbara K. Brink, Public Defender, Anchorage, for Appellant.

Taylor E. Winston, Assistant District Attorney, Anchorage, and Gregg D. Renkes, Attorney General, Juneau, for Appellee.

Before: COATS, Chief Judge, and MANNHEIMER and STEWART, Judges.

MEMORANDUM OPINION AND JUDGMENT

STEWART, Judge.

*1 Kenneth A. Huskey Jr. pleaded no contest to one count of second-degree sexual abuse of a minor and one count of violation of a condition of release. [FN1] Superior Court Judge Michael L. Wolverton imposed a 6-year term with 3 1/2 years suspended on the sexual abuse charge and 90 days for violating a condition of release. Huskey appeals the imposition of two conditions of probation.

FN1. AS 11.41.436(a)(2) and AS 11.56.757(b)(2), respectively.

The State appears to claim that Huskey cannot appeal because his objections should be raised with Judge Wolverton, not this court. A defendant, such as Huskey, can challenge a probation condition on the grounds that it is not reasonably related to the protection of the public or the rehabilitation of the offender. [FN2] A defendant can also challenge a probation condition on the ground that the sentencing court impermissibly delegated its authority, as Huskey does with the second condition he challenges. [FN3] Therefore, to the extent the State argues that we cannot consider Huskey's appeal, we reject the argument.

FN2. *Roman v. State*, 570 P.2d 1235, 1240 (Alaska 1977).

FN3. *Williams v. State*, 924 P.2d 104, 107-08 (Alaska App.1996); *Hester v. State*, 777 P.2d 217, 219 (Alaska App.1989); *Brezenoff v. State*, 658 P.2d 1359, 1363-64 (Alaska App.1983).

We agree with Huskey that the record before us does not support the probation condition requiring him to submit to searches for alcohol and drugs. The State appears to concede that the other challenged condition should be stricken. Therefore, we will remand the case and direct Judge Wolverton to reconsider the probation conditions.

Background facts and proceedings

On November 30, 2002, Huskey, who had recently turned eighteen years old, took twelve-year-old B.J. into a bathroom. Huskey placed B.J. on the floor,

removed his own pants and her pants, and penetrated B.J.'s vagina with his fingers and penis. This misconduct led to Huskey's sexual abuse conviction. Huskey also violated a condition of release.

The probation condition requiring Huskey to submit to a search

At sentencing, Huskey objected to any proposed condition of probation that addressed alcohol or illegal drug use because he said he had no demonstrated problem with alcohol or drugs. Judge Wolverton found that there was no showing of a nexus between Huskey's crimes and a drug or alcohol problem.

Special condition of probation no. 7 requires Huskey to submit to a search by his probation officer, including a search for alcohol and controlled substances. [FN4] Huskey argues that we must vacate that entire condition because Judge Wolverton did not find a nexus between Huskey's crimes and an alcohol or drug problem. [FN5]

> FN4. The probation condition provides: The defendant shall submit to a search of his person, personal property, residence, vehicle or any vehicle under which he has control, for the presence of stolen property/weapons/alcohol/ narcotic, hallucinogenic, stimulant, depressant, amphetamine, barbiturate or other drugs or drug paraphernalia.

> FN5. *Sprague v. State*, 590 P.2d 410, 417-18 (Alaska 1979).

For its part, the State claims that the superior court may have relied on other considerations not specifically related to alcohol or drugs when it imposed the condition because the condition permits a search for more than alcohol or drugs. We agree with this part of the State's argument.

Special condition no. 7 requires Huskey to submit to searches for weapons and stolen property. As shown in the presentence report, Huskey's history of contacts with the juvenile justice system showed more than five theft-related contacts and a charge for attempted robbery. This history provided a reasonable basis for Judge Wolverton to impose a condition that Huskey submit to searches for stolen property and weapons. However, Judge Wolverton found that there was no nexus between Huskey's crimes and a potential alcohol or substance abuse problem. Because the record does not demonstrate that a search for alcohol or controlled substances would be related to protection of the public or Huskey's rehabilitation, that portion of this challenged probation condition is not supported.

*2 Therefore, we direct Judge Wolverton to delete the provisions of special condition no. 7 that authorize searches for alcohol and controlled substances.

The probation condition delegating authority to the probation officer

Huskey argues that general condition of probation no. 12 illegally delegates the court's authority to impose additional conditions of probation to the probation officer. [FN6] The State does not oppose striking this entire probation condition.

> FN6. The probation condition provides: Abide by any special instructions given by the court or any of its duly authorized officers, including probation officers of the Department of Corrections.

We have recognized that there are limitations on a probation officer's authority. For example, in *Brezenoff v. State* [FN7] we ruled that a sentencing court could not empower a probation officer to set the amount or terms of restitution because that is an impermissible delegation of the court's sentencing authority. [FN8] And in *Hester v. State* [FN9] we ruled that a sentencing court could not delegate authority to order a probationer to complete a particular rehabilitation program. [FN10] We reasoned that the probation condition constituted an illegal delegation of the court's sentencing authority. [FN11]

> FN7. 658 P.2d 1359.

> FN8. *Id.* at 1363-64.

> FN9. 777 P.2d 217.

FN10. *Id.* at 218-19.

FN11. *Id.* at 219.

Later, in *Williams v. State* [FN12] we upheld the probation officer's authority to require Williams to reside in a local residential center. We distinguished *Williams* from *Hester* because a statute (AS 12.55.100(a)(5)) authorized the delegation of this responsibility to the probation officer. [FN13]

FN12. 924 P.2d 104.

FN13. *Id.* at 107-08.

It is important to distinguish the sentencing court's power to impose conditions of probation from the probation officer's authority to supervise and implement conditions of probation. In the day-to-day management of probationers, a probation officer can implement the conditions by instructing a probationer in many ways, such as ordering a probationer to go to certain places at certain times to fulfill a condition imposed by the court. Moreover, in this case, the condition requires Huskey to comply with instructions not just from the probation officer but from the court, a condition that Judge Wolverton may have considered important.

The State's memorandum has not addressed the extent of a probation officer's authority, whether derived from common law or granted by statute. Our supreme court has recognized that probation officers have common law authority, [FN14] and decisions from other jurisdictions recognize that a probation officer has inherent discretion as long as the exercise of that discretion does not impinge on a judicial responsibility--that is, as long as the court has not improperly delegated its authority to the probation officer. [FN15]

FN14. *See Soroka v. State,* 598 P.2d 69, 71 (Alaska 1979).

FN15. *See Greenwood v. State,* 754 So.2d 158, 160 (Fla.App.2000); *McArthur v. State,* 1 S.W.3d 323, 334 (Tex.App.1999).

Even so, the State does not oppose striking this condition. Because we are already remanding the case to Judge Wolverton to reconsider special condition no. 7, we direct him to reconsider general condition no. 12 as well.

Conclusion

We REMAND this case and direct the superior court to RECONSIDER special condition no. 7 and general condition no. 12. On reconsideration, the superior court shall enter findings justifying each condition as entered. The superior court shall transmit its findings to this court within 75 days. When those findings are received in this court, each party shall have 30 days to submit simultaneous memoranda addressing the findings. We retain jurisdiction.

2004 WL 1166366 (Alaska App.)

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924 P.2d 104
924 P.2d 104
(Cite as: 924 P.2d 104)

H

Court of Appeals of Alaska.

Charles W. WILLIAMS, Appellant,
v.
STATE of Alaska, Appellee.

No. A-5857.

Sept. 13, 1996.

Defendant convicted of sexual assault filed application for postconviction relief, challenging certain conditions of his sentence. The Superior Court, First Judicial District, Juneau, Larry R. Weeks, J., denied application, and defendant appealed. The Court of Appeals, Bryner, C.J., held that: (1) condition requiring defendant to "complete" program of sex offender treatment did not exceed authority granted under statute authorizing court to require defendants to "comply with" their treatment plans; (2) statute was not unconstitutionally vague; and (3) condition requiring defendant to reside in community residential center for not more than one year was valid.

Affirmed.

See also, 859 P.2d 720.

West Headnotes

[1] Mental Health ⇐465(1)
257Ak465(1) Most Cited Cases
(Formerly 257Ak447)
Sentencing order requiring defendant to "complete" program of sex offender treatment did not exceed authority granted under statute authorizing court to require defendants to "comply with" their treatment plans, as "complete" and "comply with" had to be construed as synonymous terms. AS 12.55.015(a)(10).

[2] Constitutional Law ⇐270(1)
92k270(1) Most Cited Cases

[2] Sentencing and Punishment ⇐8
350Hk8 Most Cited Cases
(Formerly 110k1206.1(1))
Use of words "participate in or comply with" in statute authorizing sentencing judges to order defendants to "participate in or comply with" treatment plans did not render statute unconstitutionally vague; statutory requirement was readily comprehensible. AS 12.55.015.

[3] Criminal Law ⇐13.1(1)
110k13.1(1) Most Cited Cases
Statute fails to provide adequate notice only when it is so imprecise that ordinary persons of common intelligence are left to guess at its meaning and are apt to differ as to its scope.

[4] Criminal Law ⇐13.1(1)
110k13.1(1) Most Cited Cases
Mathematical precision is unnecessary to satisfy requirement that statutes provide fair notice, as some imprecision in definitions is unavoidable.

[5] Criminal Law ⇐13.1(1)
110k13.1(1) Most Cited Cases
Lack of bright-line test will not render statute unconstitutionally vague if, although difficult to define concretely, statutory requirement is readily comprehensible.

[6] Sentencing and Punishment ⇐1971(2)
350Hk1971(2) Most Cited Cases
(Formerly 110k982.5(2))
Sentencing condition requiring defendant, upon his eventual release on probation and if requested by his probation officer, to reside in community residential center for not more than one year did not exceed trial judge's statutory sentencing authority. AS 12.55.100(a)(5).

[7] Constitutional Law ⇐75
92k75 Most Cited Cases

[7] Sentencing and Punishment ⇐1971(2)
350Hk1971(2) Most Cited Cases
(Formerly 110k982.5(2))
Sentencing condition requiring defendant, upon his eventual release on probation and if requested by his probation officer, to reside in community residential center for not more than one year did not impermissibly delegate trial court's sentencing authority to his probation officer or constitute

impermissible increase in his originally imposed sentence, and thus was not illegal on its face; statute expressly authorizes such delegation. AS 12.55.100(a)(5).

***105** Charles W. Williams, Palmer, pro se.

John A. Scukanec, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage, and Bruce M. Botelho, Attorney General, Juneau, for Appellee.

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

OPINION

BRYNER, Chief Judge.

Charles W. Williams was convicted in 1992 of one count of sexual assault in the first degree. Superior Court Judge Larry R. Weeks sentenced Williams to a term of twenty years with twelve years suspended. Williams appealed his sentence to this court, claiming that it was excessive, and we affirmed. *Williams v. State,* 859 P.2d 720 (Alaska App.1993).

In 1995, Williams filed an application for post-conviction relief in the superior court, challenging as illegal a provision of his judgment of conviction that required Williams to "participate in and complete any sex offender treatment program offered in prison." Williams later supplemented his application, challenging as unconstitutionally vague the statute under which this requirement was imposed; he also challenged the validity of a condition of probation requiring him, upon ***106** request of his probation officer, to "reside in a Community Residential Center approved by the Department of Corrections for a period of time not to exceed one year."

Judge Weeks denied Williams' application. Williams appeals, renewing here the claims he asserted below. We affirm.

[1] In ordering Williams to "participate in and complete any sex offender treatment program offered in prison," Judge Weeks relied on AS 12.55.015(a)(10), which authorizes sentencing judges to "order the defendant, while incarcerated, to participate in or comply with the treatment plan of a rehabilitation program that is related to the defendant's offense or the defendant's rehabilitation if the program is made available to the defendant by the Department of Corrections [DOC]." Williams points out that the wording used by Judge Weeks, which requires Williams to participate in and "complete" a treatment program, differs from the wording of the statute, which only empowers the court to order an offender to participate in and "comply with" a treatment program. Williams maintains that, in requiring him to "complete" treatment, Judge Weeks exceeded the authority conferred to sentencing courts by AS 12.55.015(a)(10).

As a practical matter, we see little difference between the wording of AS 12.55.015(a)(10) and the wording used by Judge Weeks in Williams' judgment. [FN1] Nevertheless, in the interest of utmost clarity, and in order to avoid even a remote possibility of misunderstanding in the enforcement of Williams' judgment, we hold that the order requiring Williams to "complete" a program of treatment must be interpreted as being synonymous with the statutory wording authorizing the court to require Williams to "comply with" his treatment plan. So construed, the wording of the judgment is not at odds with AS 12.55.015(a)(10).

> FN1. The problem posed by the different wording seems more semantic than real. To the extent that any treatment plan offered Williams by DOC contemplated his eventual completion of a rehabilitation program, completion of the program would be subsumed within the requirement of compliance. And if a treatment plan called for Williams' participation in an ongoing program that had no mandatory goals to be completed or that allowed Williams to obtain approval to terminate treatment at some point short of the ultimate treatment goal, Williams' compliance with the requirements of the plan--that is, his continued participation while the program remained available and until termination of treatment was approved--would be tantamount to completion, thereby satisfying the requirement that Williams "complete" a program of treatment.

[2] Williams separately contends, however, that AS 12.55.015 is itself unconstitutionally vague; he professes to be uncertain as to the meaning of the words "participate in or comply with." Williams complains that

> the term *participate in* gives no notice or information as to what constitutes participation i.e.; one day, one week, 2 hours daily or what? The same lack of definiteness and notice applies to the ambiguous term *or comply with* [;] what constitutes compliance? Ambiguously if a defendant does not *participate in* then he/she can obey with a second choice of *or comply with*.

Williams' complaint is groundless. In authorizing orders requiring incarcerated defendants "to participate in or comply with" the treatment plans of DOC rehabilitation programs, AS 12.55.015(a)(10) plainly empowers courts to order participation, compliance, or both; Williams' judgment expressly requires both. Williams cannot plausibly claim confusion as to whether he has a choice between participation or compliance.

[3][4][5] Nor can Williams plausibly claim confusion as to the meanings of the statutory words "participate in" and "comply with." A statute fails to provide adequate notice only "when it is so imprecise that ordinary persons of common intelligence are left to guess at its meaning and are apt to differ as to its scope." *Konrad v. State*, 763 P.2d 1369, 1379 (Alaska App.1988). Mathematical precision is unnecessary to satisfy the requirement of fair notice; some imprecision in definitions is unavoidable. *Panther v. State*, 780 P.2d 386, 390 (Alaska App.1989). The lack of a bright-line test will not render a statute unconstitutionally vague if, "[a]lthough difficult to define ***107** concretely, the statutory requirement ... is readily comprehensible." *Id.* at 391. [FN2]

> FN2. As this court noted in *De Nardo v. State*, 819 P.2d 903, 908 (Alaska App.1991):
> [t]he fact that people can, in good faith, litigate the meaning of a statute does not necessarily (or even usually) mean that the statute is so indefinite as to be unconstitutional. The question is whether the statute's meaning is unresolvably confused or ambiguous *after* it has been subjected to legal analysis. If study of the statute's wording, examination of its legislative history, and reference to other relevant statutes and case law makes the statute's meaning clear, then the statute is constitutional.
> (emphasis in original).

In the present case, the statutory words "participate in" and "comply with" must be interpreted in light of AS 12.55.015(a)(10) as a whole. In our view, the statutory language as a whole reasonably fixes the parameters defining participation and compliance. Under AS 12.55.015(a)(10), the precise level of compliance and participation required in a given case must be determined by reference to the "treatment plan" adopted by the "rehabilitation program" to which the defendant is assigned: whatever the treatment plan requires, the defendant must do. As to duration, the defendant may be required to continue participating and complying "while incarcerated," that is, throughout the entire term of incarceration (provided, of course, that the treatment plan calls for continued participation). But the defendant is obligated to comply and participate only "if the program is made available" by DOC. And the program must be "related to the defendant's offense or to the defendant's rehabilitation."

Williams' participation and compliance must be measured by these parameters. At this juncture, we have been given no reason to believe that either DOC or the superior court would be inclined to apply a different standard. Since "the statutory requirement ... is readily comprehensible," *Panther*, 780 P.2d at 391, we find no vagueness problem.

[6] Williams lastly challenges a probation condition that will require him, upon his eventual release on probation and if requested by his probation officer, to "reside in a Community Residential Center approved by the Department of Corrections for a period of time not to exceed one year." Judge Weeks evidently imposed this condition under the authority stated in AS 12.55.100(a)(5), which states that, while on probation, a defendant may be required "to participate in or comply with the treatment plan of an inpatient or outpatient rehabilitation program specified by either the court or the defendant's

probation officer that is related to the defendant's offense or to the defendant's rehabilitation."

Williams cursorily asserts that one year's residency in a Community Residential Center [CRC] is unrelated to any inpatient or outpatient rehabilitation program, and so does not comply with the requirements of AS 12.55.100(a)(5). The record is devoid of any support for this contention. If Williams' eventual CRC placement is governed by a treatment plan related to his offense or rehabilitation--and Williams has failed to show that it will not be--we see no reason to conclude that the placement would fall outside the authority of AS 12.55.100(a)(5).

[7] Williams also maintains that the disputed probation condition impermissibly delegates the superior court's sentencing authority to his probation officer and constitutes an impermissible increase in his originally imposed sentence. Williams relies principally on ***Hester v. State,*** **777 P.2d 217, 219 (Alaska App.1989).**

But Williams' case differs markedly from Hester's. In ***Hester,*** the sentencing statute at issue--former AS 28.35.030(c)--permitted the sentencing court to order a defendant's participation in treatment, but only in a program selected by the court, and for a term fixed by the court. The sentencing court failed to designate a specific program for Hester or to fix a term of treatment; instead, it simply ordered Hester to "enroll in and satisfactorily complete a program to be designated by the Kodiak Alcohol Safety Action Program." Hester was eventually directed to enroll in a thirty-day residential treatment program that was the functional equivalent of incarceration.

108** We concluded in ***Hester that the disputed treatment order amounted to an unauthorized delegation of the court's sentencing powers. In addition, because Hester's original sentencing order did not specifically require him to spend any time in residential treatment, we concluded that the subsequent directive requiring him to undergo thirty days of residential treatment resulted in an impermissible increase in the originally imposed sentence. ***Hester,*** **777 P.2d at 218-19.**

By contrast, the sentencing statute at issue in Williams' case--AS 12.55.100(a)(5)--expressly authorizes the sentencing court to delegate to the defendant's probation officer the responsibility of specifying a treatment program. Hence, no impermissible delegation occurred here. Moreover, the disputed condition, requiring Williams to spend up to one year in a CRC placement upon request of his probation officer, was specifically imposed by Judge Weeks as part of the original sentencing order. Should Williams eventually be directed to spend a year in CRC placement, the directive will neither increase nor otherwise alter his originally imposed sentence. Hence, the disputed condition of probation is not, on its face, illegal.

For the foregoing reasons, the order denying Williams' application for post-conviction relief is AFFIRMED.

924 P.2d 104

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777 P.2d 217
777 P.2d 217
(Cite as: 777 P.2d 217)

Court of Appeals of Alaska.

Joseph HESTER, Appellant,
v.
STATE of Alaska, Appellee.

No. A-2843.

July 28, 1989.

Following defendant's no contest plea to driving while intoxicated, the District Court, Third Judicial District, Kodiak, Anna M. Moran, Magistrate, sentenced defendant to 60 days with 40 days suspended and placed defendant on two-year probation, imposing condition that defendant satisfactorily complete program to be designated by alcoholism organization. Following organization's recommendation that defendant serve 30 days in residential alcohol treatment center, defendant moved to modify sentence and court denied motion. Defendant appealed. The Court of Appeals, Coats, J., held that alcoholism organization's recommendation amounted to enhancement of defendant's original sentence in contravention of double jeopardy clause of State Constitution.

Remanded.

West Headnotes

Constitutional Law ⚖75
92k75 Most Cited Cases
Double Jeopardy ⚖**112.1**
135Hk112.1 Most Cited Cases
(Formerly 135Hk112, 110k163)

In conjunction with probation condition that defendant complete program designated by alcoholism organization, organization's recommendation that defendant serve 30 days in residential alcohol treatment center constituted enhancement of defendant's original sentence in contravention of double jeopardy clause of State Constitution; sentencing court was not authorized to delegate its authority to impose conditions of probation which were functional equivalent of incarceration. Const. Art. 1, § 9; AS 12.55.025(c), 28.35.030(c); AS 11.05.040(a) (Repealed).

***218** Kurt M. LeDoux, Kodiak, for appellant.

R. Bruce Roberts, Asst. Dist. Atty., Nathan A. Callahan, Dist. Atty., Kodiak, and Douglas B. Baily, Atty. Gen., Juneau, for appellee.

OPINION

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

COATS, Judge.

Joseph Hester pled no contest to driving while intoxicated, AS 28.35.030. Magistrate Anna M. Moran sentenced Hester to sixty days with forty days suspended and imposed a fine of $1,000 with $500 suspended. The court also revoked Hester's license for one year and placed Hester on probation for two years. As one of the conditions of probation, the court ordered that Hester "[c]omply with the recommendations of alcohol screening." In an "Order for Alcohol and Assignment" issued at the time of sentencing, the court more specifically directed that Hester "enroll in and satisfactorily complete a program to be designated by the Kodiak Alcohol Safety Action Program" (Kodiak ASAP). The Kodiak Council on Alcoholism (KCA), the overseer of the Kodiak ASAP, recommended that Hester serve thirty days in the Hope House residential alcohol treatment center. Hester moved to modify his sentence on the ground that the KCA's recommendation constituted an illegal sentence. The court denied Hester's motion and Hester appeals from this ruling. We reverse.

On appeal, Hester argues, as he did below, that the KCA's recommendation of thirty days to serve in the Hope House amounts to an enhancement of his original sentence in contravention of the double jeopardy clause of the Alaska Constitution. *See* Alaska Const. art. I, § 9. Hester relies on *Lock v*

State, 609 P.2d 539 (Alaska 1980), to support his argument. In *Lock*, the Alaska Supreme Court concluded that the defendant was entitled to receive credit against his overall sentence for the time he spent as a condition of probation in two residential rehabilitation programs, Family House and Akeela House. *Lock*, 609 P.2d at 545. In the court's view, because the defendant was subject to severe restraints on his freedom of movement while a resident in the two programs, he was "in custody" within the meaning of AS 11.05.040(a). [FN1] *Id.* at 546. In reaching its decision, the court noted:

> FN1. AS 11.05.040(a) provided as follows:
> *Computation of term of imprisonment and stay.* (a) When a person is sentenced to imprisonment, his term of confinement begins from the day of his sentence. A person who is sentenced shall receive credit toward service of his sentence for time spent in custody pending trial or sentencing, or appeal, if that detention was in connection with the offense for which sentence was imposed. The time during which the person is voluntarily absent from the penitentiary, reformatory, jail, or from the custody of an officer after his sentence, shall not be estimated or counted as a part of the term for which he was sentenced. This statute has been renumbered and amended, but remains substantially the same. *See* AS 12.55.025(c).

> We think that under certain circumstances the restraints imposed as conditions of probation may be so substantial that the defendant is, in legal effect, "in custody" although on probation. Confinement need not be penal in nature to be custodial. Nor need the defendant be confined to a prison or jail in order to be "in custody" within the meaning of AS 11.05.040. Custodial confinement takes many forms and has been interpreted to include time spent in a mental hospital, a juvenile detention center, a diagnostic center, a hospital, a halfway house, and a hotel room.

Id. at 543-44 (citation and footnotes omitted).

We agree with Hester that the *Lock* decision mandates that Hester's case be remanded for resentencing. Hester's original sentence of sixty days with forty days suspended requires that Hester serve twenty days in confinement. If the KCA's recommendation is followed, Hester's sentence will include twenty days of imprisonment and thirty additional days of custodial confinement at the Hope House, for a total of fifty days of confinement. We recognize*219 that a court may impose conditions of probation which are reasonably related to a person's rehabilitation. *Roman v. State*, 570 P.2d 1235, 1240 (Alaska 1977). However, where, as here, these conditions severely restrict a defendant's freedom of movement, they shall be regarded as the functional equivalent of imprisonment. *See Lock*, 609 P.2d at 546.

We have previously held that the court may not delegate its authority to sentence a defendant. *See Brezenoff v. State*, 658 P.2d 1359, 1363-64 (Alaska App.1983) (court may not delegate to probation officer authority to make decision regarding the total amount of restitution owed or the terms of payment). It follows that the sentencing court may not delegate its authority to impose conditions of probation which are the functional equivalent of incarceration. Such a holding is consistent with the language found in AS 28.35.030(c), which states:

> *Operating a vehicle, aircraft or watercraft while intoxicated.* (c) Upon conviction under this section ... the *court shall order*, and a person convicted under this section shall undertake, *for a term specified by the court*, that program of alcohol education or rehabilitation that *the court*, after consideration of any information compiled under (d) of this section, *finds appropriate*.

(Emphasis added). The statute specifically provides that the court shall determine both the program of rehabilitation to be completed by the defendant and the period of time the defendant must be enrolled in the program.

Accordingly, we conclude that the KCA's recommendation that Hester serve thirty days in the Hope House residential alcohol treatment center constitutes an illegal sentence. The recommendation resulted from an improper delegation of the court's sentencing authority and, in effect, amounts to an enhancement of Hester's

original sentence in contravention of the double jeopardy clause of the Alaska constitution.

The case is REMANDED for resentencing consistent with this decision. [FN2]

> FN2. The state contends this case is not ripe for review by this court because Hester failed to seek review of KCA's recommendation with the sentencing court. The state points out that the court's order, dated July 24, 1987, specifically states the following: "If you object to the recommendations of the alcohol treatment agency, you may request that this court review their recommendations." We reject the state's argument. Hester filed a motion to modify sentence in which he specifically requested the court to overturn KCA's recommendation of thirty days to serve in the Hope House.

777 P.2d 217

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West Reporter Image (PDF)

658 P.2d 1359

Partially overturned on unrelated issue

Court of Appeals of Alaska.
Eva B. BREZENOFF, Appellant,
v.
STATE of Alaska, Appellee.
No. 7117.
Feb. 25, 1983.

Defendant, convicted of theft in the first degree, was sentenced by the Superior Court, Fourth Judicial District, James R. Blair, J., to eight years' imprisonment with four years suspended, and ordered to make restitution. Defendant appealed. The Court of Appeals, Singleton, J., held that: (1) sentence was not excessive; (2) worst-offender classification could be predicated on specific offense under consideration, without regard to defendant's personal characteristics or prior criminal history; and (3) trial court did not err in determining total amount of theft victim's loss at time of sentencing hearing, but Court of Appeals would defer inquiry into defendant's ability to make restitution until such time as she was released from imprisonment.
Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] KeyCite Notes

350H Sentencing and Punishment
350HIX Probation and Related Dispositions
350HIX(F) Disposition of Offender
350Hk1942 Duration
350Hk1945 k. Relation to Potential or Actual Term of Confinement. Most Cited Cases
(Formerly 110k1208.1(2), 110k1208(1))

In evaluating sentences to determine whether they are excessive, suspended time cannot be considered nugatory or insignificant.

[2] KeyCite Notes

350H Sentencing and Punishment
350HI Punishment in General
350HI(E) Factors Related to Offender
350Hk93 Other Offenses, Charges, Misconduct
350Hk102 k. Lack of Significant Prior Record. Most Cited Cases
(Formerly 110k1263, 110k1208(1), 110k1208.1(3))

Where total sentence received by first offender exceeds presumptive sentence for second offender, but period of actual imprisonment is substantially less, Court of Appeals would conclude that total sentence met requirement that first offender receive substantially more favorable sentence than presumptive sentence for second offender; however, where actual period of imprisonment equals or exceeds presumptive term for second offender, court would require aggravating factors or extraordinary circumstances to justify additional time, even if it is suspended.

[3] KeyCite Notes

234 Larceny
234II Prosecution and Punishment
234II(D) Sentence and Punishment
234k87 Nature and Extent of Punishment
234k88 k. In General. Most Cited Cases

Sentence of eight years' imprisonment, with four years suspended, for first offender convicted of first-degree theft, was proper, notwithstanding that presumptive sentence for second offender was four years' imprisonment, in light of trial court's finding that defendant's conduct was among the most serious proscribed by statute, in that defendant stole $140,000 in 133 separate thefts over a period of nearly one year. AS 11.46.120, 11.81.250(a)(2), 12.55.155(c)(10); U.S.C.A. Const.Amend. 8.

[4] KeyCite Notes

350H Sentencing and Punishment
350HI Punishment in General
350HI(D) Factors Related to Offense
350Hk66 k. Nature, Degree or Seriousness of Offense. Most Cited Cases
(Formerly 110k986.2(4.1), 110k986.2(4))

Aggravating factor of worst-offender classification could be predicated on specific offense under consideration, without regard to defendant's personal characteristics or prior criminal history, and establishment of such factor could be based on comparison of conduct constituting crime in question with other conduct which would satisfy elements of the offense. AS 12.55.155(c)(10).

[5] KeyCite Notes

350H Sentencing and Punishment
350HI Punishment in General
350HI(E) Factors Related to Offender
350Hk90 k. In General. Most Cited Cases
(Formerly 110k986.2(1))

Aggravating factor of worst-offender classification warrants a sentence for first offender equal to or in excess of presumptive sentence for second offender. AS 12.55.155(c)(10).

[6] KeyCite Notes

350H Sentencing and Punishment
350HXI Restitution
350HXI(E) Amount
350Hk2160 k. In General. Most Cited Cases
(Formerly 110k986(1))

Where a person is given a suspended sentence and expected to begin making restitution immediately, trial judge must comply with statute at sentencing hearing and determine an appropriate amount of restitution. AS 12.55.045(a).

[7] KeyCite Notes

350H Sentencing and Punishment
350HXI Restitution
350HXI(C) Factors Related to Offender
350Hk213[illegible] Offender's Ability to Pay
350Hk2134 k. In General. Most Cited Cases
(Formerly 110k986.2(1))

350H Sentencing and Punishment
350HXI Restitution
350HXI(G) Payment
350Hk2206 k. Payment Plan or Schedule. Most Cited Cases
(Formerly 110k990.1, 110k990(1), 110k986.2(1), 110k991)

On inquiry at sentencing hearing into defendant's ability to make restitution, trial judge should consider defendant's circumstances and determine whether defendant has sufficient assets to pay restitution in one lump sum; where defendant's assets are insufficient, court should at that time establish schedule of payments. AS 12.55.045(a, c).

[8] KeyCite Notes

350H Sentencing and Punishment
350HII Sentencing Proceedings in General
350HII(E) Presentence Report
350Hk300 k. Use and Effect of Report. Most Cited Cases
(Formerly 110k986.4(1))

While probation officer preparing presentence report can substantially aid the court by interviewing witnesses and determining in advance of sentencing hearing amount of restitution owed, court may not delegate to probation officer authority to make decision regarding total amount of restitution to be paid or terms of payment. AS 12.55.045(a, c).

[9] KeyCite Notes

350H Sentencing and Punishment
350HXI Restitution
350HXI(F) Proceedings
350Hk2180 k. In General. Most Cited Cases
(Formerly 110k990.1, 110k990(1), 110k991)

Trial court must determine issue of restitution to extent possible at time of sentencing hearing: victims entitled to restitution must be identified and extent of their recoverable loss established; to extent that defendant retains proceeds of crime, court should make provisions for recoupment; defendant's assets should be inventoried and valued prior to any assignment to crime victim; receiver may be appointed by court in appropriate cases. AS 12.55.045(a).

[10] KeyCite Notes

350H Sentencing and Punishment
350HXI Restitution
350HXI(C) Factors Related to Offender
350Hk2133 Offender's Ability to Pay
350Hk2134 k. In General. Most Cited Cases

(Formerly 110k1208.4(2), 110k1208(4))

It is defendant's ability to pay restitution after she is released which is material to inquiry contemplated by statute relating to restitution. AS 12.55.045(a).

*1360 Dick L. Madson, Cowper & Madson, Fairbanks, for appellant.

James P. Doogan, Jr., Asst. Dist. Atty., Harry L. Davis, Dist. Atty., Fairbanks, and Wilson L. Condon, Atty. Gen., Juneau, for appellee.

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

OPINION

SINGLETON, Judge.

Eva Brezenoff was convicted of theft in the first degree. AS 11.46.120. Theft in the first degree is a class B felony. The maximum penalty is ten years' imprisonment. Presumptive terms are respectively four years' imprisonment for a second felony offender and six years for a third felony offender. AS 12.55.125(d). She was given a sentence of eight years with four years suspended and ordered to make restitution *1361 in the amount of $140,000. In sentencing Brezenoff, Judge Blair considered the sentence he imposed in *Karr v. State,* No. 4FA-S82-261-Cr. (a case with very similar facts where a slightly longer sentence was given). Brezenoff appeals contending that the sentence imposed was excessive and that the requirement that she make restitution was illegal because the court did not make the inquiry into her ability to pay, as required by AS 12.55.045(a), before determining the amount of restitution she would have to pay. We affirm the sentence but direct further proceedings regarding restitution.

Brezenoff was employed by WIC-CA as a part-time bookkeeper from May 1979 until December 1982. WIC-CA is a nonprofit corporation supported by federal grants which provides social services in the Fairbanks area. During her employment, Brezenoff discovered that WIC-CA was withholding federal taxes from its employees' paychecks as required by law but was not remitting the proceeds to the federal government. Consequently, her employer had built up a substantial fund that was not earmarked for current expenses. WIC-CA's bank accounts required two signatures to cash checks. Brezenoff was not authorized to sign these checks. However, her supervisors accomodated her by giving her a number of checks signed in blank and exercised no control over her subsequent use of those checks. Brezenoff noted that frequently she would receive multiple invoices from a single billing source. This practice facilitated Brezenoff's thefts. She would pay the bill with one WIC-CA check. She would in addition list a separate check for each additional invoice in the check register and make each additional check payable to herself. The typical amount of each check was $1,249.22, an amount equal to her monthly salary. Using this procedure, Brezenoff succeeded in embezzling $141,025 from WIC-CA during her employment there. When the police learned of the embezzlement and confronted Brezenoff, she confessed and turned over evidence of her crimes.

Brezenoff was thirty-one years old at the time of sentencing. She has no adult or juvenile criminal record so she was not subject to presumptive sentencing. She has been steadily employed and has no dependants. She explains her crime as necessary to supply her cocaine use which she alleges amounted to four to five grams per day and cost over $120,000 during the period in question. She testified that she was happy she was caught and suffered remorse. She indicated that she was addressing her drug dependency and had obtained counseling. The probation officer recommended a brief period of incarceration followed by a period of probation during which Brezenoff should attempt reasonable restitution.

The trial court carefully considered the sentencing standards set out in *State v. Chaney,* 477 P.2d 441 (Alaska 1970). He considered the chances of Brezenoff's rehabilitation fair to good. He felt isolation was necessary only to aid in her rehabilitation. He emphasized individual and general deterrence and affirmation of community norms. Finally, he concluded that Brezenoff was a professional criminal, *i.e.,* that she relied primarily on her thefts for her support during the almost one year she was stealing and that she was a worst offender based on the total amount taken. He stressed that Brezenoff had engaged in 133 separate acts of theft evidenced by the checks she had issued to herself without authorization. The sentence required Brezenoff to spend four years in prison and upon her release to make restitution in the amount of $140,000. The court also directed Brezenoff to transfer all of her assets to her victim.

Brezenoff argues that the sentence was excessive. She points to the Alaska Supreme Court decision

in *Leuch v. State*, 633 P.2d 1006 (Alaska 1981), where the court held that those convicted of nonviolent crimes should ordinarily receive sentences not requiring more than nominal incarceration (*i.e.*, sixty days or less to serve), in the absence of proof of past failures on probation ***1362** and that the total sentence including suspended time must be considered in reviewing a sentence for excessiveness. In addition, she argues that the supreme court has counseled lenience in past decisions dealing with embezzlement. She points to *Amidon v. State*, 565 P.2d 1248 (Alaska 1977), where the court reversed a sentence of three years to serve holding that an appropriate sentence for embezzlement should not exceed one year where two defendants stole $63,000 from one of the defendant's sixty-two-year-old disabled mother. Finally, she points to our decision in *Austin v. State*, 627 P.2d 657 (Alaska App.1981), where we held that normally a first offender should receive a substantially more favorable sentence then the presumptive sentence for a second offender.

[1] [2] This is Brezenoff's first felony offense. Her total sentence of eight years with four years suspended exceeds the presumptive term for a third felony offender (six years), and her period of actual imprisonment is equal to the presumptive term for a second felony offender (four years). While it is true that in evaluating sentences, suspended time cannot be considered "nugatory or insignificant," *Leuch v. State*, 633 P.2d 1006, 1010 (Alaska 1981), we recently held that, in applying *Austin* the primary focus will be on the period of actual imprisonment in determining whether a first offender received a more severe sentence than she would have received had she been a second or third offender subject to presumptive sentencing. *Tazruk v. State*, 655 P.2d 788 (Alaska App.1982). Where the total sentence received by a first offender exceeds the presumptive sentence for a second offender but the period of actual imprisonment is substantially less, we will conclude that the total sentence meets the *Austin* requirement of a substantially more favorable sentence for the first offender. *Connors v. State*, 652 P.2d 110 (Alaska App.1982) (sentence of three years with two years suspended was affirmed for first offender convicted of negligent homicide, a class C felony. The presumptive term was two years for a second felony offender; no aggravating factors were found. [FN1]) Where, however, the actual period of imprisonment equals or exceeds the presumptive term for a second offender, we will require aggravating factors or extraordinary circumstances to justify additional time even if it is suspended. *Sears v. State*, 653 P.2d 349, 350 n. 2 (Alaska App.1982) (sentence of five years with three years suspended reversed for first offender convicted of negligent homicide. The presumptive term was two years and no aggravating factors were found; held that the sentence could not exceed two years unless a portion of the two years was suspended).

> FN1. In such cases, while the *Austin* rule is inapplicable, we must nevertheless evaluate the total sentence including suspended time to determine if it is clearly mistaken. *Leuch*, 633 P.2d at 1010; *Andrews v. State*, 552 P.2d 150, 152 and 154 n. 11 (Alaska 1976).

Brezenoff received a period of actual imprisonment equal to the presumptive term for a second felony offender and in addition received suspended time. In order to affirm this sentence, our decisions require the presence of aggravating factors or extraordinary circumstances in the record in order to insure that Brezenoff received a more favorable sentence than she would have received as a second felony offender committing the same crime under the same circumstances.

[3] We are satisfied that the trial court's decision in this case is in accord with the authorities cited. While no violence was involved, the trial court properly found that Brezenoff's conduct was among the most serious conduct prescribed by the statute. AS 12.55.155(c)(10). Theft is a class B felony if the amount stolen exceeds $25,000. A class B offense characteristically involves an aggravated offense against property. AS 11.81.250(a)(2). The amount stolen ($140,000), the number of separate thefts constituting the offense (133) and the duration of the offense (almost one year) serve ***1363** to establish this case as among the most serious prescribed by AS 11.46.120 and therefore serve to distinguish it from prior cases in which substantial sentences for embezzlement were disapproved. *Cf. Huff v. State*, 598 P.2d 928 (Alaska 1979) (Huff embezzled $6,500 while acting as a fiduciary in the course of a business transaction. His offense would be a class C felony under current law. Three-year sentence affirmed but a concurrent five-year sentence for perjury reduced to three years); *Stone v. State*, 598 P.2d 72 (Alaska 1979) (four years to serve affirmed. Defendant

stole $7,000 while on probation for prior embezzlement in which she had stolen $78,000); *Andrews v. State*, 552 P.2d 150 (Alaska 1976) (young first offender stole $28,301.51 from her employer and received a sentence of ten years with five years suspended. The supreme court criticized the adequacy of the findings and remanded but did not approve or disapprove the sentence). With the exception of Andrews, whose theft would barely qualify as a class B felony under existing law, and Amidon, who committed one theft amounting to approximately three times the jurisdictional amount for a class B felony, Leuch and the other defendants mentioned all committed what would be class C felonies under existing law. Brezenoff committed an aggravated class B felony. Other things being equal, one who commits a class B felony should receive a more severe sentence than one who commits a class C felony.

[4] [5] Brezenoff argues that a worst offender classification cannot be predicated on the offense itself without regard to a defendant's prior history of criminal behavior, at least where the offense under consideration is a property crime rather than a crime of violence. *See, e.g., Chappell v. State*, 592 P.2d 1218, 1221 n. 5 (Alaska 1979) (violation in aggregate would warrant a finding that defendant's offenses were among the worst violations of statute but Mrs. Chappel's record as a devoted mother with no prior convictions prevents characterizing her as a worst offender subject to a maximum sentence). *State v. Wortham*, 537 P.2d 1117, 1120 (Alaska 1975) (discussing criteria for determining worst offenders under prior law). *Cf. Hoover v. State*, 641 P.2d 1263 (Alaska App.1982) (nature of offense standing alone may establish worst offender classification. Hoover was convicted of first degree murder). Brezenoff overlooks AS 12.55.155(c)(10). This statute became effective after *Chappell* and *Wortham* were decided. AS 12.55.155(c)(10) stresses the conduct involved in the specific offense under consideration rather than the personal characteristics of the offender and requires comparison of the conduct constituting the crime in question with other conduct which would satisfy the elements of the offense. This aggravating factor does not require a comparison of the defendant to other potential defendants committing the offense. If established, it warrants a sentence for a first offender equal to or in excess of a presumptive sentence for a second offender. A finding that Brezenoff's conduct satisfied the requirements of AS 12.55.155(c)(10) was not clearly mistaken.

[6] [7] Brezenoff's final argument is that the trial judge did not conduct an inquiry into her ability to make restitution before ordering her to pay restitution. AS 12.55.045(a). We agree with Brezenoff that where a person is given a suspended sentence and expected to begin making restitution immediately, the trial judge must comply with the statute at the sentencing hearing and determine an appropriate amount of restitution. He should consider the defendant's circumstances and determine whether the defendant has sufficient assets to pay the restitution in one lump sum. Where the defendant's assets are insufficient, the court should at that time establish a schedule of payments. AS 12.55.045(c).

[8] While the probation officer preparing the presentence report can substantially aid the court by interviewing witnesses and ***1364** determining in advance of the sentencing hearing the amount of restitution owed, the court may not delegate to the probation officer authority to make a decision regarding the total amount of restitution to be paid or the terms of payment.

[9] Finally, the trial court must determine the issue of restitution to the extent possible at the time of the sentencing hearing. Victims entitled to restitution must be identified and the extent of their recoverable loss established. To the extent that the defendant retains the proceeds of her crime, the court should make provisions for recoupment. The court should not enter a general order assigning all of the defendant's assets to her victim without inventorying those assets and valuing them. Of course the court has the authority to appoint a receiver in an appropriate case and may use the probation officer for this purpose if he or she agrees.

[10] In this case, Brezenoff was sentenced to a substantial period of imprisonment. She must win her freedom and establish herself in the community before she may realistically be expected to begin paying restitution. It is her ability to pay restitution after she is released which is material to the inquiry contemplated by AS 12.55.045(a). We therefore find no error in the trial judge's decision to determine the total amount of the loss caused to the victim by Brezenoff's conduct at this time but

defer the inquiry required by AS 12.55.045 until she is released. *Cf.* AS 12.55.051(c) (the court may order modification of the amount of restitution ordered or of the terms of payment at any time if the defendant's inability to pay is established).

We disapprove, however, the court's order assigning all Brezenoff's assets without first inventorying and valuing them. On remand, the court should hold the necessary hearings to put this aspect of its order into operation. If the parties agree on the assets to be assigned and the value to be deducted from the restitution owed, the matter may be handled by stipulation. If there is disagreement, a further hearing may be necessary.

The sentence of the superior court is AFFIRMED in part and REVERSED in part and the case REMANDED for further proceedings regarding the issue of restitution consistent with this decision.

Alaska App.,1983.

Brezenoff v. State

658 P.2d 1359

END OF DOCUMENT

West Reporter Image (PDF)

HB

81

HOUSE COMMITTEE REPORT

(7)

Date Referred to Committee: February 2, 2005 **FURTHER REFERRALS: Finance**

Date of Committee Action: February 9, 2005

The JUDICIARY Committee considered: **HB 81**

HOUSE BILL NO. 81 **CONTRACTOR LICENSE ENFORCEMENT**

"An Act establishing an administrative fine and procedure for construction contractors in certain circumstances; increasing the amount of a civil penalty for persons acting in the capacity of contractors or home inspectors; modifying the elements of a crime involving contractor registration and residential contractors; and exempting the administrative hearings for imposing an administrative fine on construction contractors from the hearings conducted by the office of administrative hearings in the Department of Administration."

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB 81 (L+C)

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

PREVIOUS **FISCAL NOTES**				
List by Dept(s):	FN#	Fiscal	Indet.	Zero
LWF	2			✓
CED	1			✓

Signing with recommendations	Printed Last Name	DP	DNP	NR	AM
	Gruenberg	–			
	Kott	–			
	ANDERSON	X			
	GDahlstrom			X	
	Coghill			X	
Chair:				✓	
Chair:					

b

HOUSE COMMITTEE REPORT

2.2.05

(7)

Date Referred to Committee: January 19, 2005 **FURTHER REFERRALS: Judiciary, Finance**

Date of Committee Action: JANUARY 26, 2005

The LABOR AND COMMERCE Committee considered: **HB 81**

HOUSE BILL NO. 81 **CONTRACTOR LICENSE ENFORCEMENT**

"An Act establishing an administrative fine and procedure for construction contractors in certain circumstances; increasing the amount of a civil penalty for persons acting in the capacity of contractors or home inspectors; modifying the elements of a crime involving contractor registration and residential contractors; and exempting the administrative hearings for imposing an administrative fine on construction contractors from the hearings conducted by the office of administrative hearings in the Department of Administration."

Recommends it be replaced with [ ] HCS *or* [X] CS *for* HB 81 (L3C)

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

[ ] [illegible] amendments

[ ] [illegible] 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
LWF	2			X
CED	1			X

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

Signing with recommendations	Printed Last Name	DP (5)	DNP	NR (1)	AM
	LYNN	X			
	KOTT	X			
	LeDOUX	X			
	GUTTENBERG	X			
	Rokeberg			✓	
Chair:	ANDERSON	X			
Chair:					

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM February 10, 2005

SUBJECT: Contractors (CSHB 81(L&C) (Work Order No.24-LS0144\I))

TO: Representative Lesil McGuire, Chair, House Judiciary Committee
Attn: Vanessa Tondini

FROM: Jean M. Mischel
Legislative Counsel

The House Judiciary Committee has requested an opinion regarding equal protection issues raised by CSHB 81(L&C), pertaining to construction contractors and home inspectors. The bill contains two provisions that raise the possibility of an equal protection challenge, but the likelihood of prevailing is probably low if the state can demonstrate a legitimate interest that is fairly and substantially related to the differential treatment.

The first provision of the bill that raises equal protection issues is at sec. 2, page 2, lines 28-30, that exempts contractors and home inspectors working in areas with populations of less than 1,000 and that are not connected to Anchorage or Fairbanks by rail or road from the imposition of an administrative fine for second and subsequent violations of the applicable licensing laws.

The second provision of the bill that raises equal protection issues (as well as other constitutional questions) is the authorization in bill section 2 generally of the imposition of an administrative fine for contractors and home inspectors in non-rural areas in addition to the current availability of citations and civil penalties for the same violation.

Alaska's equal protection clause is found in Article I, Section 1 of the Constitution of the State of Alaska: "all persons are equal and entitled to equal rights, opportunities, and protection under the law." Amendment XIV, Section 1 of the Constitution of the United States provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

The equal protection clause does not mean that the state has to treat everyone equally. It only requires that similarly situated people be treated equally. *Rutter v. State*, 963 P.2d 1007, 1013 (Alaska 1998); *Shepherd v. State, Dep't of Fish & Game*, 897 P.2d 33, 43, 44 (Alaska 1995). The threshold question in any equal protection analysis is whether similarly situated individuals are being treated differently. *Matanuska-Susitna Borough School District v. State*, 931 P.2d 391, 396 (Alaska 1997).

Assuming that a court found that the contractors working in rural and non-rural areas were similarly situated, it would apply the full sliding scale equal protection analysis. See *Matanuska-Susitna Borough School District v. State*, 931 P.2d 391, 396 (Alaska 1997). The contractors and home owners' interests impaired by CSHB 81(L&C) would likely be found to be economic interests. Under Alaska law, economic interests are entitled only to "minimum scrutiny." See *Underwood v. State*, 881 P.2d 322, 325 (Alaska 1994). At the minimum level of scrutiny, the state only needs to show that the challenged enactment "was designed to achieve a legitimate governmental objective, and that the means bear a 'fair and substantial' relationship to the accomplishment of that objective." Id. (citations omitted).

Since contractors and home inspectors working in rural areas may be construed by a court not to be similarly situated with non-rural contractors and home inspectors, the equal protection principles may be found to be inapplicable in both instances of differential treatment.

If a court does find them to be similarly situated, however, the court will look for a legitimate governmental objective that is fairly and substantially related to that objective. With regard to the imposition of administrative fines, two possible legitimate objectives are efficiency and cost. The procedures allowed for the imposition of an administrative fine would require enforcement personnel and hearings to be conducted in remote areas at great expense. The risks and fines associated with enforcement in those areas may be too small to justify that level of inefficiency and expense. This may be particularly persuasive in the context of the availability of two other penalty options in rural areas: citations and civil remedies.

With regard to the authorization of three different types of penalties for non-rural contractors and home inspectors, the legitimacy of the government objective will depend upon the standards used for selecting the penalty. As long as all non-rural contractors and home inspectors are treated the same (since they are clearly similarly situated) for each type of violation found to exist, the validity of the distinction for rural contractors and home inspectors will again turn on the court's perception of the legitimacy of the differential treatment for them.

If I may be of further assistance, please advise.

JMM:med
05-094.med

ALASKA STATE HOUSE OF REPRESENTATIVES

Labor & Commerce Committee, Chair
Administrative Regulation Review, Chair
Judiciary Committee, Vice-Chair
Health, Education and Social Services

State Capitol Suite 408
Juneau, AK 99508
Phone (907) 465-4939
Fax (907) 465-2418

Representative Tom Anderson

Email: Representative_Tom_Anderson@legis.state.ak.us

MEMORANDUM

Date: February 2, 2005

To: Representative Lesil McGuire, Chair
House Judiciary Committee

From: Representative Tom Anderson

Re: HB 81

I respectfully request scheduling of HB 81 for consideration by the House Judiciary Committee.

Enclosed are:

1. The most recent version of the bill
2. Current Sponsor Statement
3. Sectional Analysis
4. Fiscal Notes
5. Letters of support and other appropriate backup documentation

Thank you for your consideration of this request. Please contact Jon Bittner at 465-5031 in my office if you have any questions or concerns.

Alaska State Legislature
House of Representatives

Official Business

State Capitol
Juneau, AK 99801-1182

SPONSOR STATEMENT FOR HB 81
BY: Representative Tom Anderson

TITLE: "An Act establishing an administrative fine and procedure for construction contractors in certain circumstances; increasing the amount of a civil penalty for persons acting in the capacity of contractors or home inspectors; modifying the elements of a crime involving contractor registration and residential contractors; and exempting the administrative hearings for imposing an administrative fine on construction contractors from the hearings conducted by the office of administrative hearings in the Department of Administration."

Under current law, the State of Alaska investigates and enforces violations of construction contractor laws. Both the Departments of Labor and Commerce, Community & Economic Development have authority to pursue violations of work performed by unregistered construction contractors. For the most part, they rely upon the public complaints, and follow up with investigations (depending on the availability of resources). Under current laws, these agencies enforce violation by issuing citations. After a citation is issued, the impetus falls to the Department of Law as to whether or not to prosecute the matter in Court.

With over 1,600 unregistered contractors operating under this exemption, numerous reports have been made about these unregistered businesses offering construction services in violation of the laws. Enforcement efforts have proven to be difficult and many consumers are unaware their contractor may not be qualified to provide construction services, and even worse, have little or no insurance and warranty protections.

HB 81 would amend the law to allow DCCED of DOL to issue civil penalties for violations. Instead of going through the Dept. of Law, a violator would either pay a fine (proposed at $1,000 for the first violation and $1,500 for subsequent violations) or appeal to an administrative hearing officer. This system would be much more effective toward penalizing first-time violations quickly and effectively. The Departments would retain the option of going through the current criminal violation process if the fines did not deter a violator.

A loophole in the contractor exemption statutes that allowed small contracting companies to operate without a license has also been closed. Previously an individual could file for an exemption and build a residential or commercial property every year. Under HB 81 the time limit between buildings is raised to 2 years of occupancy. Individuals who need to can file for a hardship waiver in order to build another property before the two year minimum.

I urge your support for this legislation.

Alaska State Legislature
House of Representatives

Official Business

State Capitol
Juneau, AK 99801-1182

Sectional Analysis for HB 81
BY: Representative Tom Anderson

Section 1. Amends AS 08.18.117. Adds: **Except as provided for in AS 08.18.125 either** removes [Either]. This change allows the Departments to also issue administrative fines as well as citations.

Section 2. Adds a new section to AS 08.18

AS 08.18.125

(a) Allows the Department to impose a $1000 fine for a first offense and a $1500 fine for all subsequent offenses against a person who violates AS 08.18.011 or 08.18.025

(b) The Department must issue a written notice of the fine as well as the reason, a copy of the applicable procedures and notice for an opportunity to request a hearing. The hearing must be made within 10 days after the notice on the fine

(c) If the Department receives a hearing request within 10 days of the fine being noticed a hearing must be scheduled no earlier than 10 days after the request is made

(d) The decisions of the hearing officer is final subject to review by a superior court

(e) A fine may not be imposed on a contractor or home inspector operating in an area with a population of less than 1000 people that is not connected to Anchorage or Fairbanks by rail or road

Section 3. Amends AS 08.18.131. Adds: **$1,000** and removes [$250]
This change increases the amount a superior court may fine a person from $250 to $1000.

Section 4. Adds language to the previous statute to include contractors who have been previously convicted of violations or who have been fined. Also makes all other violations of this chapter punishable under chapter 12

Section 5. AS 44.64.030 (a) is amended Adds**: AS 08.18.125**
Places the Administrative Hearings created in Section 2 of the bill under the jurisdiction of the Office of Administrative Hearings

Section 6. Adds to the uncodified law of the State of Alaska. Violations discussed in Sections 2-4 of this bill apply after the effective date of this Act. Section 4 is retroactive.

Section 7. Revisor's note. The changes made in Section 5 of this bill must be rectified with Secs. 82 and 96 ch. 163 SLA 2004 so that both are given effect

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: **HB081-DOLWD-MI-1-20-05**
() Publish Date:

Revision Date/Time (Note if correction):
Title: **Contractor License Enforcement**

Department: **Labor and Workforce Development**
RDU: **Labor Standards and Safety**
Component: **Mechanical Inspection**

Sponsor: **Representative Anderson**
Requester: **House Labor and Commerce**

Component Number: **346**

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 (Worker Safety Account)						
Other (Worker Safety Account)						
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

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						
Temporary						

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

This bill proposes to establish a civil administrative fine to allow for an alternative to the current criminal penalty for contractor licensing violations. Criminal penalties are difficult to pursue for contractor licensing violations. The standard of proof and the formality required in the investigation process are much higher in a criminal case and the District Attorney must agree to pursue the case to achieve a penalty. When weighed against other criminal violations competing for the District Attorney's time, licensing violations are generally a low priority and may not be prosecuted. The administrative civil fine is expected to provide a more efficient means of enforcement. The fiscal impacts of the administrative fine and hearing process are not expected to be significant and will be absorbed at current funding levels. The administrative fines are expected to produce unrestricted General Fund revenues. The specific amount of revenue cannot be accurately estimated.

Prepared by: **Grey Mitchell, Director** Phone: **(907) 465-4855**
Division: **Labor Standards and Safety** Date/Time: **1/20/05 1:23 PM**

Approved by: **Greg O'Claray, Commissioner** Date: **1/20/2005**
Agency: **Department of Labor and Workforce Development**

FISCAL NOTE

STATE OF ALASKA
2005 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: HB 81
() Publish Date:

Revision Date/Time (Note if correction):
Dept. Affected: Commerce
Title: Contractor License Enforcement
RDU: Occupational Licensing (117)
Component: Occupational Licensing
Sponsor: Anderson
Requester: House Labor and Commerce
Component No.: 2360

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 ( )	0.0	0.0	0.0	0.0	0.0	0.0

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)*

HB 81 establishes an administrative fine and procedure for construction contractors in certain circumstances. New funds are not required to implement this bill.

Prepared by: Jennifer Strickler, Administrative Manager
Phone (907) 465-2144
Division: Occupational Licensing
Date/Time 1/21/05 2:31 PM
Approved by: Edgar Blatchford, Commissioner
Date 1/21/2005
Agency: Commerce, Community & Economic Development

(Revised 9/23/2004 OMB)

LEGAL SERVICES

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MEMORANDUM January 25, 2005

SUBJECT: Construction Contractors - CSHB 81(L&C)
(Work Order No. 24-LS0144\F)

TO: Representative Tom Anderson,
Chair of House Labor and Commerce Committee
Attn: Jon Bittner

FROM: Jean M. Mischel
Legislative Counsel

Enclosed is a draft CS for HB 81(L & C) incorporating a conceptual amendment to sec. 2 of the bill at sec. 08.18.125(c). I have not incorporated a second conceptual amendment involving sec. 3 that was described as a substitution of the term "specialty contractor" for "home inspector" as that term is used in AS 08.18.131 relating to civil penalties. It is my understanding that, in proposing this second amendment, the committee was operating under the misunderstanding that those terms were substituted for each other by the 23rd Legislature. They were not. In separate bills, the term "specialty contractor" was clarified by adding AS 08.18.024(b) (sec. 1, ch. 144 SLA 2004) and related changes, and the concept of "home inspector" was added as a regulated entity throughout AS 08.18, including a list of prohibited acts and exemptions related to home inspectors under AS 08.18.152 and 08.18.156 (sec. 31, ch. 134 SLA 2003), for which the civil penalty applies.

A substitution of those terms, in this bill, for purposes of imposing a civil penalty would create confusion in the entire chapter and result in a redundancy in the civil penalty section itself. The confusion would come from the deletion of "home inspectors" in a section that specifically cross-references "home inspection activities" while retaining the term "home inspectors" in all other sections of AS 08.18. Substituting the term "specialty contractors" in the civil penalty section would cause a specialty contractor to become subject to a civil penalty for violations of provisions that currently apply to a home inspector. In addition, a redundancy would result since two civil penalty provisions would apply to both "contractors", as used in the general sense to include specialty contractors, and to "specialty contractors", as used in a more narrow sense (for violations of home inspection activities).

For these reasons I advise that the second conceptual amendment to substitute the term "specialty contractor" for "home inspector" in section 3 of the bill be reconsidered and, on reconsideration, withdrawn.

Home Builders Protect Consumers From Illegal Contractors

Prepared by John Bitney, ASHBA lobbyist
April 13, 2004

During a meeting of the Board of Directors, the Alaska State Home Building Association (ASHBA) voted in early March to pursue solutions to the growing issue of unregistered contractors providing construction services illegally under the guise of a "handyman license".

Background

A handyman is a person providing construction services without a state registration as a contractor or subcontractor. Instead of meeting qualification standards and insurance requirements, the Division of Occupational Licensing currently has sold 1,678 business licenses in Alaska for "Construction-related EXEMPT from contractor registration" (code 2360).

Under current state law (AS.08.18) there are minimum requirements for persons who represent themselves as either contractors or specialty contractors. For example, contractors and specialty contractor must have a bond, general liability insurance, education/qualifications standards, and may not offer more than three trade services.

There is also an exemption from registering for work on a project where labor and materials and all other items is less than $10,000. This exemption does not apply when the work is divided into contracts of amounts less than $10,000 for the purpose of evasion of the law, but enforcement can sometimes be difficult. For work priced at $2,500 or more, some public liability and property damage insurance is required.

These exemption areas in state law have allowed the establishment and growth of over 1,600 unregistered contractor businesses in Alaska. Numerous reports have been made about these unregistered businesses offering construction services in violation of these laws, but enforcement efforts have proven to be difficult. The problem is that many consumers are unaware that their contractor may not be qualified to provide construction services, and even worse, have little or no insurance and warranty protections.

New Handyman Legislation

Under current law, the State of Alaska investigates and enforces violations construction contractor laws. Both the Departments of Labor and Community & Economic Development have authority to pursue violations of work performed by unregistered construction contractors. For the most part, they rely upon the public to complain, and then they investigate (depending on the availability of resources).

Under current laws, these agencies enforce violation by issuing citations. After a citation is issued, it is then up to the Department of Law whether or not to prosecute the matter in Court.

A bill is proposed for next session (2005) that would amend the law to allow DCED to issue civil penalty violations for first-time violations. Instead of going through the Dept. of Law, a violator would either pay a fine (proposed at $1,000) or appeal to an administrative hearing officer.

This system would be much more effective toward penalizing first-time violations quickly and effectively. Second-time and additional offenses would go through the criminal violation process.

Arguments against this proposal are expected to focus on the availability of due process within the administrative hearing process as opposed to the court system.

Handyman Issue Background

A handyman is a person providing construction services without a state registration as a contractor or subcontractor. In 2003, the Division of Occupational Licensing 1,678 business licenses in Alaska for "Construction-related EXEMPT from contractor registration" (code 2360).

Under current state law (AS.08.18) there are certain requirements for persons who represent themselves as either registered contractors or specialty contractors. For example, each must have a bond, general liability insurance, education/qualifications standards, and may not offer more than three specific construction trade services. There is an exemption for construction work on projects less than $5,000.

With over 1,600 unregistered contractors operating under this exemption, numerous reports have been made about these unregistered businesses offering construction services in violation of the laws. Enforcement efforts have proven to be difficult. The problem is that many consumers are unaware that their contractor may not be qualified to provide construction services, and even worse, have little or no insurance and warranty protections.

Other Measures That Have Been Taken

HB542

Following the March meeting of ASHBA in Juneau, the House Labor & Commerce Committee introduced HB 542. HB542 lowers the project cost exemption from $10,000 down to $5,000, and expands the work that can be done by a specialty contractor.

This bill passed the Legislature and was signed into law by Governor Murkowski. ASHBA issued a letter of support for the legislation during committee testimony.

Elimination of Business License Exemption Code

After hearing from ASHBA and other contractors, the Division of Occupational Licensing announced the elimination of the business license code for "Construction-related EXEMPT from contractor registration" and created the handyman code (8101) and moved it to a different business lines category.

Occupational Licensing confirmed what ASHBA has been saying – there was too much abuse by allowing business licenses for exempt contractors under construction services. Consumers were sometimes easily confused with the reference to construction on the business license.

This new business line will hopefully help clear up any confusion about whether a business should or shouldn't be offering construction services.

Other Ideas

The following is a short of list of potential ways to address this issue that were brought forward by ASHBA Board members and others:

- Require title insurance agencies to establish a residential endorsement on all new-construction home sales

- Increase contractor licensure fees toward additional enforcement officers and efforts
- Eliminate all construction contractor exemptions – require state registration for all construction work

These last few suggestions were discussed by ASHBA's Board, but no actions have been taken to actively pursue them.

Lines of Business:

23 - Construction *- Total under this code:* ***7,099*** *as of January, 2004*

CONSTRUCTION (Six digit code requires an occupational license)			In AK	% of Total	Outside AK	% of Total	Total	Business Activity TTL % of 23 Code Construction	Cross chk
2331		Land Subdivision, etc. (exempt no occ license required)	113	*1.59%*	7	*0.10%*	120	*1.69%*	120
233200		General Contractors	948	*13.35%*	39	*0.55%*	987	*13.90%*	987
233300		General Contractors (excluding residential)	1074	*15.13%*	312	*4.39%*	1386	*19.52%*	1386
Specialty Contractors									
234100		Road Construction	89	*1.25%*	13	*0.18%*	102	*1.44%*	102
234900		***Construction but 234900 not a true code***	***5***	***0.07%***	***5***	***0.07%***	***10***	***0.14%***	***10***
235100		Plumbing Heating and Air	244	*3.44%*	12	*0.17%*	256	*3.61%*	256
235200		Painting and Wall Covering	227	*3.20%*	19	*0.27%*	246	*3.47%*	246
235300		Electrical Contractors	235	*3.31%*	24	*0.34%*	259	*3.65%*	259
235400		Masonry, Drywall, Insulation, Tile Carpentry & Floor	305	*4.30%*	19	*0.27%*	324	*4.56%*	324
235500		Carpentry & Floor	810	*11.41%*	24	*0.34%*	834	*11.75%*	834
235600		Roofing, Siding and Sheet Metal	101	*1.42%*	16	*0.23%*	117	*1.65%*	117
235700		Concrete Contractors	89	*1.25%*	9	*0.13%*	98	*1.38%*	98
235800		Water Well Drilling	53	*0.75%*	1	*0.01%*	54	*0.76%*	54
235900		plaster, welding, gas tank and sewer systems, etc.)	479	*6.75%*	120	*1.69%*	599	*8.44%*	599
235991		Underground Storage Tank Workers	3	*0.04%*	2	*0.03%*	5	*0.07%*	5
2360		***Construction-related EXEMPT from contractor registration.***	1678	*23.64%*	19	*0.27%*	1697	*23.90%*	1697
2300		***Entry Error; nonexistent code***	1	*0.01%*	0	*0.00%*	1	*0.01%*	1
Blanks		***No Entry***	3	*0.04%*	1	*0.01%*		*0.06%*	4
		Totals:	**6457**	**90.96%**	**642**	**9.04%**	**7095**	**100.00%**	**7099**