



convicted of felonies may appeal their sentences only if they receive more than 2 years to serve. The pertinent portion of the statute reads:

A sentence of imprisonment lawfully imposed by the superior court for a term or aggregate terms exceeding two years of unsuspended incarceration for a felony offense . . . may be appealed to the court of appeals by the defendant on the ground that the sentence is excessive[.]

At the same time, the legislature enacted a corresponding limit on this court's jurisdiction to hear sentence appeals. See SLA 1995, ch. 79, §§ 11-12.<sup>1</sup>

As explained above, Rozkydal received only 16 months to serve. The State therefore asserts that Rozkydal has no right to appeal her sentence. Rozkydal concedes that the legislature has apparently eliminated her right to appeal her sentence. She argues, however, that the legislature's action denies equal protection of the law to felony defendants who receive 2 years or less to serve. Rozkydal also contends that the legislature's action denies due process of law to these defendants. Finally, Rozkydal contends that, regardless of how the legislature may try to restrict sentence appeals, the judiciary has an inherent power to review criminal sentences.

For the reasons explained in this opinion, we conclude that the legislative changes to AS 12.55.120(a) and AS 22.07.020(b) are constitutional and that Rozkydal has no right to appeal her sentence, either to this court or to the supreme court. However, we also conclude that Rozkydal retains the right to petition the Alaska Supreme Court to review her sentence. We therefore dismiss Rozkydal's appeal, but without prejudice to Rozkydal's filing a petition for review in the supreme court.

*The effect of the amendment to AS 12.55.120(a)*

[1] Before addressing Rozkydal's constitutional arguments, it is important to clarify

1. The current version of AS 22.07.020(b) provides:

Except as limited in AS 12.55.120, the court of appeals has jurisdiction to hear appeals of unsuspended sentences of imprisonment ex-

what was accomplished by the 1995 amendment to the sentence appeal statute. Certain legal concepts are key to our interpretation of the current statute: the definition of a "sentence appeal", and the distinction between an "appeal" and a "petition".

By its terms, AS 12.55.120 deals only with "sentence[s] of imprisonment lawfully imposed by the superior court" that are being appealed "on the ground that the sentence is excessive[.]" In order to interpret this language, we must look to a thirty-year-old decision of the Alaska Supreme Court: *Bear v. State*, 439 P.2d 432 (Alaska 1968).

In *Bear*, the supreme court held that, absent legislative authorization, it had no authority to review a lawful sentence "for abuse of discretion"—that is, for excessive severity or leniency. *Bear*, 439 P.2d at 435. The supreme court did not question its authority to decide cases in which the defendant claimed that the sentence was illegal, or cases in which the defendant claimed that the sentencing procedures were flawed. *Id.* at 436, 438. The issue presented in *Bear* was something different: whether the court had the authority to hear an appeal in which the defendant failed to allege any illegality in the sentence or the sentencing proceedings, but argued simply that a concededly legal sentence constituted an abuse of sentencing discretion. *Id.* at 434. The court ruled that it had no such authority.

The legislature responded to *Bear* the following year by enacting AS 12.55.120, a statute that explicitly granted the supreme court the authority to entertain sentence appeals. As the House Judiciary Committee explained in its report on the pending legislation (House Bill No. 281):

The majority of the courts have held that where a sentence imposed by a trial judge is within the limits prescribed by statute and otherwise lawful, an appellate court cannot review the discretion the trial judge exercised in determining the sen-

ceeding two years for a felony offense . . . on the grounds that the sentence is excessive or a sentence of any length on the grounds that it is too lenient.

tence, even though it may appear in retrospect to have been too severe or too lenient.

Enactment of [this legislation] would provide . . . jurisdiction . . . for appellate review of sentences in Alaska.

1969 House Journal 665.

We recognize that the term "sentence appeal" is not always used this narrowly. For instance, under current Alaska appellate practice, the "sentence appeals" filed under Appellate Rule 215 often include allegations that the sentencing proceedings were irregular or that the sentencing judge erred in making various factual and legal determinations affecting the range of authorized sentences. As an administrative matter, there is generally no problem with handling such appeals under the expedited procedures specified in Appellate Rule 215. In fact, this court encouraged this practice in *Juneby v. State*, 641 P.2d 823, 835 n. 18 (Alaska App. 1982).

However, the issue in *Rozkydal's* case is the scope of AS 12.55.120. In light of the legislative history described above, it is apparent that this statute was meant to authorize and govern a particular kind of appeal: appeals in which the defendant's sole assertion of error is that the sentencing judge abused his or her discretion by imposing too severe a sentence.

[2] Now that we have clarified the type of appellate claim governed by AS 12.55.120, it is also important to clarify the type of restriction that this statute places on a defendant's ability to obtain appellate review of such claims. AS 12.55.120(a) declares that sentences of more than 2 years' imprisonment "may be appealed . . . on the ground that the sentence is excessive[.]" To interpret this language, we must distinguish between an "appeal" and a "petition".

[3] The right of "appeal" means the right to require an appellate court to review a lower court's decision. The right of "petition", on the other hand, means the right to request an appellate court to review a lower court's decision—a request which the appellate court may grant or deny as it sees fit. See *Kerthula v. Abood*, 686 P.2d 1197, 1200-

01 (Alaska 1984); *Morgan v. State*, 472, 480-81 & n. 16 (Alaska 1981); *Browder*, 486 P.2d 925, 929-931 (1971).

In *Browder*, the supreme court dealt a legal question analogous to the one presented in *Rozkydal's* case. The defendant *Browder* was being prosecuted for coming of court (for bringing a shotgun into a courtroom). The district court ruled that *Browder* was entitled to a jury trial, and the defendant sought appellate review of this ruling by filing a petition for review. One key issue in *Browder* was whether the State could file a petition for review to seek appellate review of the trial court's ruling.

Under former AS 22.05.010 (as it existed in 1971), the legislature had placed substantial restrictions on the State's right of appeal in criminal cases: the State had no right of appeal except "to test the sufficiency of the indictment or [to assert] that the sentence [was] too lenient". See *Browder*, 486 P.2d at 929. Thus, under the governing statute, the State had no right to appeal the district court's jury trial order. Nevertheless, the supreme court concluded that the State could seek judicial review of the lower court's order through a petition for review:

[T]he limitation placed upon the state's right to appeal in a criminal case, found in AS 22.05.010, was intended to apply only to instances where our jurisdiction is . . . invoked by appeal. AS 22.05.010 clearly distinguishes between appeals and other forms of review. Appeals are specifically limited, whereas the other forms of review authorized under AS 22.05.010 . . . have no limitations placed on them.

*Browder*, 486 P.2d at 930. The supreme court noted that if AS 22.05.010 were construed to prohibit the court from reviewing any ruling in a criminal case except those rulings expressly made appealable, then the statute would raise serious constitutional problems under Article IV, Section 2 of the Alaska Constitution (the provision which declares the supreme court to be "the highest court of the State, with final appellate jurisdiction"). *Id.* at 931.

We believe that the supreme court's decision in *Browder* illuminates the proper construction of AS 12.55.120(a). The statute declares that felony sentences "may be appealed" only if they exceed 2 years to serve. The statute does not mention or purport to limit a defendant's right to petition a higher court for discretionary review of a sentence. Given *Browder's* interpretation of an analogous statute (the statute limiting the State's right of appeal in criminal cases), we conclude that AS 12.55.120(a) should be interpreted in the same way. The statute eliminates certain felony defendants' right to "appeal" their sentence (that is, their right to require an appellate court to review the sentence), but these defendants retain the right to seek discretionary appellate review of a sentence by filing a petition for review. This right is explicitly recognized in Appellate Rule 215(a)(2):

*Right to Seek Discretionary Review.* A defendant may seek discretionary review of an unsuspended sentence of imprisonment which is not appealable . . . by filing a petition for review in the supreme court under Appellate Rule 402.

To summarize: The sentence appeal statute, AS 12.55.120, governs a particular type of appellate claim—instances in which the defendant concedes the legality of his or her sentence but contends that the severity of the sentence constitutes an abuse of discretion. The statute declares that a felony defendant may raise such a claim on appeal only if the challenged sentence exceeds 2 years to serve. However, because the statute does not restrict a defendant's right to petition for discretionary review of a sentence, and because this right is explicitly codified in Appellate Rules 215(a)(2) and 402(a)(1), we conclude that a felony defendant who receives a lesser sentence retains the right to seek discretionary review of that sentence by filing a petition for review in the supreme court.

Thus, under current Alaska statutes and court rules, Rozkydal does not have the right to appeal her 16-month sentence, but she does have the right to petition the supreme court to review it. Against this background,

we now assess Rozkydal's constitutional challenges to AS 12.55.120(a).

*The constitutionality of AS 12.55.120(a)*

Rozkydal raises three constitutional challenges to AS 12.55.120(a). One of Rozkydal's arguments is that the judiciary has an inherent authority to review sentences, an authority that the legislature can not eliminate. However, as we explained in the previous section of this opinion, even after the 1996 amendment to AS 12.55.120(a), Alaska law still allows felony defendants who receive sentences of 2 years or less to seek discretionary review of their sentences. Given our construction of AS 12.55.120(a) and the supreme court's enactment of Appellate Rule 215(a)(2), Rozkydal's "inherent authority" argument is moot.

[4] Rozkydal next argues that AS 12.55.120(a) violates the equal protection clause of the Alaska Constitution (Article I, Section 1) because, under the statute, felony defendants sentenced to serve 2 years or less are treated differently from felony offenders sentenced to serve more than 2 years. However, not all differences in treatment violate the equal protection clause. As the supreme court stated in *Gonzales v. Safeway Stores, Inc.*, 882 P.2d 389, 396 (Alaska 1994), the equal protection clause commands the legislature to give the same treatment to "those who are similarly situated":

The common question in equal protection cases is whether two groups of people who are treated differently are similarly situated and thus entitled to equal treatment. Equal protection jurisprudence concerns itself largely with the reasons for treating one group differently from another[,] . . . asking whether a legitimate reason for disparate treatment exists, and, given a legitimate reason, whether the enactment creating the [different treatment] bears a fair and substantial relationship to that reason. *State, Dep't of Revenue v. Cosio*, 858 P.2d 621, 629 (Alaska 1993).

*Gonzales*, 882 P.2d at 396 (footnote omitted).

Rozkydal argues that the recent amendment to the sentence appeal statute has created two groups of felony offenders: those

who can obtain appellate review of their sentences, and those who can not. However, as explained in the previous section, AS 12.55.120 does not restrict a defendant's ability to seek appellate review of illegalities in either the sentence or the sentencing process. Moreover, even when a defendant's appellate claim deals solely with the excessiveness of a legal sentence, the combination of AS 12.55.120(a) and Appellate Rule 215(a)(2) still gives all felony offenders the right to seek judicial review. The distinction drawn by AS 12.55.120(a) involves the right of "appeal"—the right to demand appellate review of a sentence. Under the statute, only felony offenders who receive more than 2 years to serve are entitled to demand appellate review of the sentencing decision, but felony offenders who receive lesser sentences are still entitled to seek discretionary review of the sentencing decision.

For purposes of equal protection analysis, then, the question is whether the legislature can give one group of felony offenders the right of sentence review upon demand, while at the same time requiring a second group of felony offenders to convince the appellate court that their sentence merits review. We note that, from the time sentence appeals were first authorized in Alaska, the right of sentence appeal has always depended on the length of a defendant's sentence. As originally enacted in 1969, AS 12.55.120 limited the right of sentence appeal to defendants who received sentences of 1 year or more. Seven years later, when the supreme court promulgated an appellate rule to govern sentence appeals, the court continued the practice of denying appeals to defendants who received lesser sentences—although the supreme court's cut-off was 45 days' imprisonment, considerably lower than the legislature's dividing line. See *Johnson v. State*, 816 P.2d 220, 221-22 (Alaska App.1991). Now, both AS 12.55.120(a) and Appellate Rule 215(a)(1) establish the cut-off for felony sentence appeals at 2 years' imprisonment.

We first must ask whether there is a valid purpose behind the legislature's decision to restrict the right of sentence appeal based on the length of a defendant's sentence. *Gonzales, supra*. The legislature's apparent

purpose was to reduce the workload of the appellate courts and the workload of the prosecutors and defense attorneys funded by the state government. Rozkydal concedes that the legislature may properly concern itself with the cost and efficiency of state government. However, she contends that such concerns can not justify a statutory classification that denies some felony offenders the right to appellate review of their sentences. The next question, then, is whether the legislature's restriction of sentence appeals bears the necessary "fair and substantial relationship" to the legislature's goals. *Gonzales, supra*.

The aim of sentence review is to identify instances in which a judge has abused his or her admittedly broad sentencing discretion. *State v. Wentz*, 805 P.2d 902, 965 (Alaska 1991); *State v. Chaney*, 477 P.2d 441, 443 (Alaska 1970). In cases brought by defendants, the aim is to identify sentences that are excessive—sentences that are too severe as a matter of law.

The premise underlying any sentence appeal dividing line (whether that line is drawn at 45 days or at 2 years) is that lesser sentences are less likely to be excessive. If lesser sentences are less likely to constitute an abuse of discretion, then there is arguably less justification for conducting a full appellate review of each of these sentences. The legislative history of AS 12.55.120 shows that the legislature relied on this reasoning when it restricted felony sentence appeals to defendants receiving more than 2 years to serve.

Two years' imprisonment is the presumptive term for a second felony offender convicted of a class C felony—the lowest class of felony. See AS 12.55.125(e)(1). When a court sentences a defendant for a C felony, this 2-year presumptive term is the dividing line under *Austin v. State*, 627 P.2d 657, 657-58 (Alaska App.1981)—the case in which this court held that a first felony offender's sentence should be more favorable than the presumptive term established for second felony offenders unless the State proves aggravating factors under AS 12.55.155(c) or extraordinary circumstances under AS 12.55.165. See also AS 12.55.125(k).

Cite as 938 P.2d 1091 (Alaska App. 1997)

When the legislature was considering the current 2-year dividing line for felony sentence appeals, the legislature relied on statistical information indicating that ninety percent of appeals from felony sentences of 2 years or less ended in affirmance. See 1995 House Journal 469-490 (reprinting the Governor's transmittal letter accompanying House Bill No. 201, the bill that contained the proposed amendment to AS 12.55.120). Thus, the legislature apparently concluded that felony sentences of 2 years or less were unlikely to constitute an abuse of sentencing discretion.

Rozkydal asserts that, regardless of the legislature's statistics, significant legal errors have often occurred in felony cases where defendants received 2 years or less to serve. In her brief, she lists eleven published opinions from the years 1981 to 1993, ten decided by this court and one decided by the supreme court, in which felony sentences of 2 years or less were reversed on appeal. However, in each of these cases the defendants' sentences were reversed because of illegalities in the sentencing process.<sup>2</sup> That is, none of these eleven cases was the kind of appeal governed by AS 12.55.120; all of these cases would be appealable under current law.

Rozkydal also contends that, even if it could be shown that felony sentences of 2 years or less rarely involve an abuse of sentencing discretion, there would still be some instances of abuse, and it would still be unjust to deny those defendants the opportunity for sentence review. However, as explained above, Alaska law does not deny anyone the opportunity to seek sentence review. Instead, under AS 12.55.120(a) and Appellate

Rule 215(a)(2), certain felony defendants (those who have been sentenced to 2 years or less) must seek sentence review by petition rather than by appeal. The effect of this procedural distinction is to require those defendants who receive lesser sentences to convince the appellate court that there is good reason to hear their case before the criminal justice system devotes the time and money required to pursue and decide a sentence appeal.

The real issue, then, is whether the government violates the equal protection guarantee when it grants a right of sentence appeal to defendants who receive severe sentences, leaving all other defendants with only the right to petition for review of their sentences. Rozkydal cites no authority on this issue. However, as we have already noted, Alaska law governing sentence appeals (both statutes and court rules) has consistently distinguished among defendants on this very basis—the length of the defendants' sentences—since 1969, the year that sentence appeals were first authorized.

Authority on this issue from other jurisdictions is sparse. However, the cases indicate that a state government may properly create procedural distinctions based on a defendant's sentence.

In *Massie v. Hennessey*, 875 F.2d 1386, 1389 (9th Cir.1989), the petitioner asserted that California denied him equal protection of the law by providing different appellate procedures for those defendants sentenced to death. The Ninth Circuit upheld California's appellate procedures. In *State v. Delgado*, 161 Conn. 536, 290 A.2d 338, 344-45 (1971),

In *Harlow v. State*, 820 P.2d 307 (Alaska App. 1991), the sentencing judge mistakenly treated the defendant as a second felony offender, when the defendant's prior conviction from another state did not qualify under AS 12.55.145(a) as a prior felony conviction for purposes of Alaska sentencing law. In *DeHart v. State*, 781 P.2d 989, 990-92 (Alaska App.1989), the sentencing judge mistakenly ruled that the defendant was subject to a presumptive term. And in *Morris v. State*, 630 P.2d 13, 17-18 (Alaska 1981), the court upheld the length of the defendant's sentence but reversed because the sentencing judge utilized an improper legal standard in imposing sentence.

2. In eight of these cases—*Lewis v. State*, 845 P.2d 447 (Alaska App.1993), *Reynolds v. State*, 736 P.2d 1154 (Alaska App.1987), *Tate v. State*, 711 P.2d 536, 538-540 (Alaska App.1985), *Shaisnikoff v. State*, 690 P.2d 25, 27-28 (Alaska App. 1984), *Fleener v. State*, 686 P.2d 730, 736-37 (Alaska App.1984), *Poggas v. State*, 658 P.2d 796, 798 (Alaska App.1983), *Sears v. State*, 653 P.2d 349, 350 (Alaska App.1982), and *McManners v. State*, 650 P.2d 414, 416 (Alaska App.1982)—the defendants' sentences were reversed for violation of the *Austin* rule (the rule that a first felony offender must receive a sentence more favorable than the presumptive term for second felony offenders unless the sentencing judge finds aggravating factors or extraordinary circumstances).

the Connecticut Supreme Court rejected an equal protection challenge to a statute which authorized sentence appeals for all defendants who received a prison term of at least one year, but which denied sentence appeals to murder defendants sentenced to death or life imprisonment under a special sentencing procedure.

More pertinent to the issue raised in Rozkydal's case, the New Jersey Supreme Court has upheld an expedited appeal process for sentence appeals—a streamlined procedure in which sentence appeals are decided without briefs, based solely on the record and on oral argument. *State v. Bianca*, 103 N.J. 383, 511 A.2d 600 (1986). The Texas Court of Appeals has rejected an equal protection attack on a statute which denies any right of appeal to defendants who receive deferred adjudications (a variant of the same idea as Alaska's suspended imposition of sentence). *Buchanan v. State*, 881 S.W.2d 376, 380 (Tex. App.1994). And the Washington Court of Appeals has rejected an equal protection challenge to a Washington statute that precludes defendants from appealing their sentence if they receive a sentence within a pre-defined standard range for their offense. *State v. Rousseau*, 78 Wash.App. 774, 898 P.2d 870 (1995), review denied, 128 Wash.2d 1011, 910 P.2d 482 (1996).

Having considered this matter, we conclude that the Alaska legislature's decision to restrict the right of sentence appeal to felony offenders receiving more than 2 years to serve bears a fair and substantial relationship to a legitimate government purpose. Under the *Austin* rule, sentences of less than 2 years need not be supported by aggravating factors or extraordinary circumstances. The information in front of the legislature was that the great majority of these sentences are affirmed on appeal. The legislature could validly conclude that the resources of the appellate courts, the Department of Law, the Public Defender Agency, and the Office of Public Advocacy would be better spent if appellate review of these lesser sentences were discretionary.

[5, 6] For these same reasons, we reject Rozkydal's contention that the legislature's action violated her right to procedural due

process. The essence of due process is a "meaningful opportunity to be heard". *Boddie v. Connecticut*, 401 U.S. 371, 377, 91 S.Ct. 780, 785, 28 L.Ed.2d 113, 118 (1971). Rozkydal has not shown that a petition for review to the supreme court would deny her a meaningful opportunity for sentence review.

[7] We likewise reject Rozkydal's argument that the legislature's action violated substantive due process (that is, her argument that there was no legitimate government purpose to support the legislature's action). See *Gonzales*, 882 P.2d at 397-98.

We emphasize that our decision is influenced in large measure by our conclusion that defendants receiving lesser felony sentences retain the right to petition for review under Appellate Rule 215(a)(2). We express no opinion regarding the legislature's authority to preclude all forms of sentence review for specific sentencing ranges or groups of criminal defendants.

#### Conclusion

Because Rozkydal received only 16 months to serve, she has no right to appeal her sentence. Accordingly, this appeal is DISMISSED. Rozkydal is entitled, however, to petition the supreme court to review her sentence under Appellate Rule 215(a)(2).

Given the circumstances, we exercise our authority under Appellate Rule 521 to relax Appellate Rule 403(h)(1), the rule that sets the time limits for petitioning for review of a non-appealable sentence. If Rozkydal wishes to petition the supreme court to review the superior court's sentencing decision, the time limits specified in Appellate Rule 403(h)(1) shall be calculated, not from the distribution date of the superior court's judgement, but rather from the date our decision takes effect. See Appellate Rule 512(a)(2).



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[3] The right of "appeal" means the right to require an appellate court to review a lower court's decision. The right of "petition", on the other hand, means the right to request an appellate court to review a lower court's decision—a request which the appellate court may grant or deny as it sees fit. See *Kerttula v. Abood*, 686 P.2d 1197, 1200-

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*Browder*, 486 P.2d at 930. The supreme court noted that if AS 22.05.010 were construed to prohibit the court from reviewing any ruling in a criminal case except those rulings expressly made appealable, then the statute would raise serious constitutional problems under Article IV, Section 2 of the Alaska Constitution (the provision which declares the supreme court to be "the highest court of the State, with final appellate jurisdiction"). *Id.* at 931.

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 [1'N9] 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.<sup>n21</sup>

<sup>n20</sup> *Malloy, 1 P. 3d at 1287-89.*

<sup>n21</sup> *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."<sup>n22</sup> But it nonetheless reasoned that a mandatory parole restriction imposed under AS 12.55.125(a)(1)-(3) "represents a new, harsher **[\*\*13]** penalty"<sup>n23</sup> 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."<sup>n24</sup>

<sup>n22</sup> *Id. at 1285 (citing AS 12.55.115).*

<sup>n23</sup> *Id. at 1285.*

<sup>n24</sup> *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."<sup>n25</sup> 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.<sup>n26</sup> The court thus vacated Malloy's mandatory parole restriction and remanded the case for resentencing.<sup>n27</sup>

<sup>n25</sup> *Id. at 1285.*

<sup>n26</sup> *Id. at 1288, 1290.*

**[\*\*15]**

<sup>n27</sup> 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.<sup>n28</sup> 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*.<sup>n29</sup>

<sup>n28</sup> *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 nonnal 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

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## NOTICE: UNPUBLISHED OPINION

## NOTICE

Memorandum decisions of this court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding precedent for any proposition of law.

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,

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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.

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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.

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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

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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 MANNHEIMEK, 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.

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[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

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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.

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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. 1, § 9. Hester relies on *Lock v.*

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*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). [FNI] *Id.* at 546. In reaching its decision, the court noted:

FNI. 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 1275, 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

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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.

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

*Partially overturned  
 on unrelated issue*

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 l. 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
      - 350Hk2133 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 accommodated 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 1748 (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 than the presumptive sentence for a second offender.

[1] KC [2] KC 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 708 (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] KC 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] KC [5] KC 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. Chappell'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] KC [7] KC 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] KC 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] KC 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] KC 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.

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124 S. Ct. 2531, \*; 159 L. Ed. 2d 403, \*\*;  
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the victim with tape, and threatened her with injury and death to herself and others. He immediately coerced the victim into providing information by the threatening application of a knife. He violated a subsisting restraining order." App. 48-49.

The judge adhered to his initial determination of deliberate cruelty.

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

## II

[\*\*I.EdHR5] [5] [\*\*LEdHR6] [6]  
[\*\*LEdHR7A] [7A] This case requires us to apply the rule we expressed in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000): [HN5] "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This rule reflects two longstanding tenets of common-law criminal jurisprudence: that [HN6] the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours," 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that [HN7] "an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason," 1 J. Bishop, Criminal Procedure § 87, p 55 (2d [\*\*\*11] ed. 1872). n5 These principles have been acknowledged by courts and treatises [\*\*413] since the earliest days of graduated sentencing; we compiled the relevant authorities in *Apprendi*, see [\*2537] 530 U.S., at 476-483, 489-490, n 15, 147 L. Ed. 2d 435, 120 S. Ct. 2348; id., at 501-518, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (Thomas, J., concurring), and need not repeat them here. n6

n5 Justice Breyer cites Justice O'Connor's *Apprendi* dissent for the point that this Bishop quotation means only that indictments must

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

## [\*\*LEdHR7B] [7B]

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

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

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

[\*\*LEdHR16B] [16B]

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

[\*\*\*27]

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

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

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

**SB**

**67**



# Alaska State Medical Association

4107 Laurel Street • Anchorage, Alaska 99508 • (907) 562-0304 • (907) 561-2063 (fax)

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April 19, 2005

Honorable Lesil McGuire and  
House Judiciary Committee  
Alaska State House  
State Capitol, Room 120  
Juneau, AK 99801

Re: SB 67 – Medical Liability Reform

Dear Representative McGuire and House Judiciary Committee Members:

The Alaska State Medical Association (ASMA) represents physicians statewide and is primarily interested in ensuring that Alaska's citizens have access to high quality health care. ASMA strongly supports SB 67, which provides for meaningful medical liability reform and urges you to support it as well.

SB 67 establishes a \$250,000 maximum for the unquantifiable damages known as non-economic damages. Non-economic damages are also known as "pain and suffering" damages. SB 67 does not limit the quantifiable economic damages such as lost wages, and post and future medical care costs. (SB 67 defines economic damages, which are not currently defined in Alaska statutes.)

ASMA asserts that enactment of SB 67 will provide for equitable and more predictable settlements in medical injury cases. The result will be a more stable professional liability insurance marketplace and, most importantly, will help us recruit physicians to help fill our chronic shortage of physicians.

The American Academy of Actuaries<sup>①</sup> has stated that medical liability reform establishing a \$250,000 limit is imperative in stabilizing the physician professional liability insurance marketplace. A recent study<sup>②</sup> of medical students found the legal environment and the availability of affordable liability insurance plays a major part in a graduate's decision as to where to set up practice.

Access to medical services is limited in much of the state. Alaska has one of the smallest numbers of physicians per capita in the country. An American Medical News story pertaining to the special Medical payment reform for Alaska noted our precarious situation: "Alaska has long ranked among the worst states in terms of physician supply. In 2002, the state had fewer than 1,350 doctors in private practice and another few hundred in the military or other government posts...only six states had a lower doctor to patient ratio."<sup>③</sup> This data indicates that to reach the national average, Alaska would need about 500 more actively practicing physicians. This determination is further substantiated in Molly Southworth, MD, July 2004 Masters of Public Health Thesis, titled "Alaska's Physician Workforce: An Overview, a Summary of Training Background, and the Impact of the WWAMI Program".<sup>④</sup> Exacerbating the problem is the aged physician workforce. ASMA's database shows nearly 50% of our physician workforce over age 50. Dr. Southworth's Thesis<sup>⑤</sup> as well as Leslie Gallant of the State Medical Board<sup>⑥</sup> further validates that fact. The Providence Alaska Medical Center confirmed in its 2002 study that physicians in its service area were getting older and highlighted immediate acute shortages in psychiatrists, surgeons, and general internists, among

others.<sup>7</sup> In 2002, the total shortage identified in primarily the Anchorage bowl area totaled about 200. The Providence study was updated for 2005 and projected the physician workforce needs to 2009.<sup>8</sup> The Shortage in 2005 is still at around 200, with a projected shortage in 2009 of 261.

Further exacerbating the recruiting challenges for us is the predicted national shortage of doctors. US News and World Report, in an article appearing in its January 31, 2005 edition<sup>9</sup>, reported a predicted national shortage of physicians by 2020 of between 90,000 and 200,000.

The recruitment challenge is the main reason medical liability reform is so important to Alaska. Unfortunately, the state does not have the capacity to "grow" its own physicians. Alaska has no medical school, and of the small number of students graduating annually from the WWAMI program, some do not return to practice. Likewise, the state's lone residency training program is small. Alaska is, and will continue to be a net importer of doctors. As such, we have to compete with other states facing physician shortages, a competition that is influenced significantly by the state's medical-legal practice environment.

ASMA asserts that SB 67 is a critical element in helping us improve our practice environment so as to help in physician recruitment. Well trained physicians in sufficient numbers are ASMA's greatest concern so that all Alaskans have access to high quality care when it is needed. Alaskans need and deserve local health care without having to be flown out of state for treatment.

ASMA urges you to support SB 67.

Sincerely,



By: Paul Worrell, MD President  
For: The Alaska State Medical Association

cc: Senator Ralph Seekins  
Representative Tom Anderson, Vice Chair  
Representative John Coghill, Jr.  
Representative Nancy Dahlstrom  
Representative Pete Kott  
Representative Les Gara  
Representative Max Gruenberg, Jr.

Footnotes:

- ① Issue Brief, American Academy of Actuaries, "Medical Malpractice Tort Reform: Lessons from the States", Fall, 1996, p. 4.
- ② "AMA Survey: Medical Students' Opinions of the Current Medical Liability Environment: American Medical Association Division of Market Research and Analysis, November 2003.
- ③ "Medicare Law Aims to Bring Alaska Physicians in from the Cold." AM News, 1/19/2004.
- ④ "Alaska's Physician Workforce: An Overview, A Summary of Training Backgrounds, and the Impact of the WWAMI Program", Molly B. Southworth, MD, 7/2004, Masters of Public Health thesis, pp 26-33.
- ⑤ See Southworth<sup>④</sup>, pp 12-14.
- ⑥ "Shingle Shortage?", Anchorage Daily News, Ann Potempa, 9/3/2002
- ⑦ "Physician Workforce Analysis", Providence Health System Alaska, November 2002, pp 17-18.
- ⑧ "PAMC Physician Supply and Physician Need Estimate: Summary", Providence Alaska Medical Center, February 2005.
- ⑨ "Doctors Vanish From View", US News and World Report, Katherine Hobson, 1/31/2005

Testimony to House Judiciary Committee on CSSB 67 on Medical Liability Reform  
By: Rod Betit, President Alaska State Hospital & Nursing Home Association

Madam Chair, members of the Committee, I am offering this testimony on behalf of the membership of the Alaska State Hospital & Nursing Home Association. ASHNHA's membership includes all but one of the 31 hospitals and nursing homes throughout the State.

**ASHNHA's members strongly support SB 67. Why?**

Passage of SB 67 is important to protecting each Alaskan's ACCESS to needed physician care, particularly OB services and other specialty care including psychiatry, allergy/immunology, neurosurgery, rheumatology, cardiology and gastroenterology.

Some communities are already facing a shortage of physicians in these areas, and more will experience this in the years ahead if medical liability changes are not forthcoming.

My members believe passage of this bill will better balance the individual's non-economic damage entitlement with the need for physician access for all members of a community.

This change in State law will still leave each injured individual with full financial compensation for economic and punitive damages while preserving an insurance market that has only two carriers currently offering coverage to Alaska physicians.

**Why do we need to Act Now?**

Medical liability premium increases are a major factor contributing to the shortage of physicians in the state. A look at the numbers for Alaska is telling enough, but underneath those numbers it is even more worrisome because it does not reflect those physicians who limit their practice to that which their insurance will cover.

A good example of what happens when high premiums and scope of practice collide is a family practice physician in Soldotna who could not afford to handle prenatal care and delivery because of the added liability cost. This "practice shrinking" is happening in other communities and with other physician specialties. **My members could give you more details.**

Where physicians could get coverage for a broader scope of practice, some cannot afford to do so. Unlike other free market enterprises, physicians cannot raise their fees enough to offset the financial impact of dramatic increases in premiums.

This is largely because so much of their business is reimbursed by government programs (Medicare & Medicaid) which do not automatically respond to fee increases, or provided for no reimbursement at all due to bad debt or charity care (approximately 20% of Alaskans are uninsured at this time).

Testimony to House Judiciary Committee on CSSB 67 on Medical Liability Reform  
 By: Rod Betit, President Alaska State Hospital & Nursing Home Association

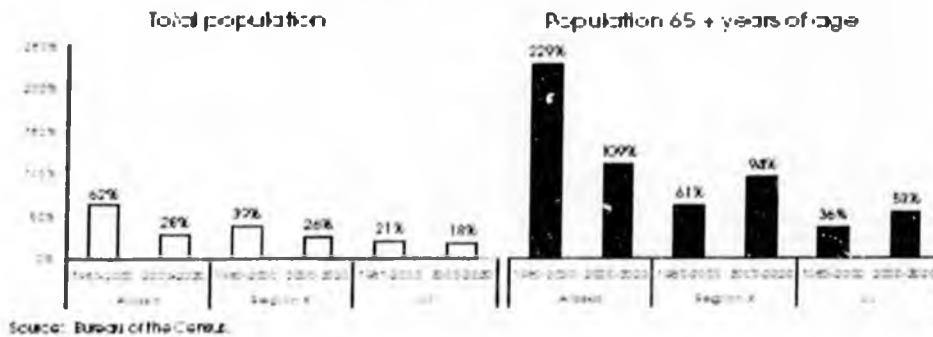
The population forecast for Alaska versus expected growth in physicians adds even more concern to this picture:

Consider these Facts:

- The total population of Alaska is projected to grow 28% by 2020. This is in addition to 62% growth between 1980 and 2000.
- The population over 65 is projected to grow 109% by 2020. This is in addition to 229% growth in this age group between 1980 and 2000. Note Table below.
- In 1998 Alaska ranked 47th in the number of hospital beds per 100,000 population and 49th in the number of nursing home beds for people 65 and older. Yet Alaska will be experiencing the greatest growth rate in the age group that most requires services in these complex environments dependent on a wide range of physician specialists.

POPULATION PROFILE

Projected percentage change in total population & population 65 + years of age, 1980-2000 & 2000-2020

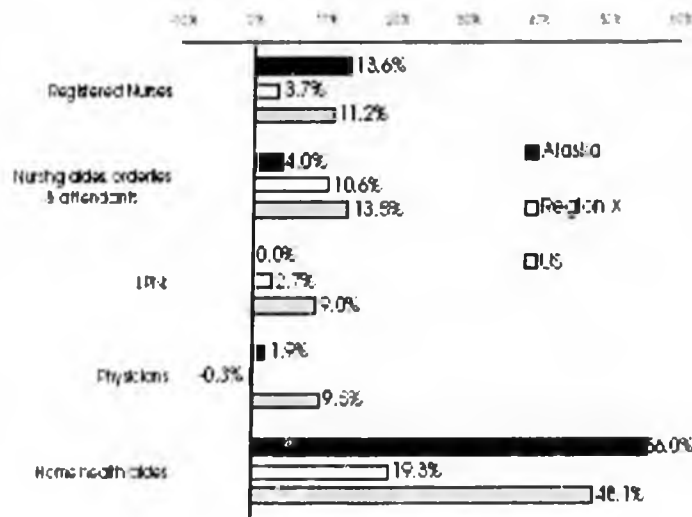


Testimony to House Judiciary Committee on CSSB 67 on Medical Liability Reform  
 By: Rod Betit, President Alaska State Hospital & Nursing Home Association

What can we expect for Alaska in terms of physicians/100,000 population to serve this growth in population in the years ahead? Here is what the federal government predicts for Alaska.

**HEALTH PROFESSIONS**

Projected percentage change in employment per 100,000 population in the five most numerous health care occupations in the U.S., 1996-2006



Source: Bureau of Labor Statistics.

Based on these numbers, Alaska's low representation of physicians to every 100,000 population is not expected to improve, yet we will clearly require more physicians per 100,000 in key specialty areas because we will have the fastest growth in seniors of any where in the country.

**Summary:**

- Alaska is already experiencing serious trouble retaining and attracting physicians, and the situation will get worse without your intervention to help stabilize the medical liability market.
- Growth in Alaska's population, particularly the elderly, will far outstrip growth in the number of physicians available to meet this need.

Testimony to House Judiciary Committee on CSSB 67 on Medical Liability Reform  
By: Rod Betit, President Alaska State Hospital & Nursing Home Association

- The elderly consume at least 2/3rds of all public spending in Medicare and Medicaid because they have chronic conditions, serious prolonged illnesses that are expensive to treat, and rely on an average of 5 medications to address their medical problems.
- Alaska will not only need many more physicians in the years ahead but we will need more physicians in specialty fields than any other state. This will not occur in my members view without addressing the medical liability insurance market in Alaska.
- Alaska does not have a medical school or a large residency program so we must keep our physicians in practice as long as possible, and create a fairer medical liability environment to attracting new physicians from outside the State.

For these reasons ASHNHA strongly encourages your support of SB 67.

We believe the narrow nature of this legislation addressing just the non-economic damages cap will go a long way to demonstrate that the State is committed to injured patients receiving fair compensation, but that we are also concerned about insuring a viable environment in which all Alaskans will be able to have timely access to a physician in the years ahead.

**Contact Info:**

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907 586-3881  
[rbetit@ashnha.com](mailto:rbetit@ashnha.com)

Metro Intergroup Communications  
136 11th Street, S.E.  
Washington, D.C. 20003

REGION \_\_\_\_\_

AK MLQ 05:01  
March 8-10, 2005

Interviewer: \_\_\_\_\_

Interview Date: \_\_\_\_\_

Length of Interview: \_\_\_\_\_  
(be accurate to the minute)

Phone #: (907) \_\_\_\_\_

Gender of Respondent: 1. Male  
2. Female

Name of Respondent: \_\_\_\_\_

---

Hello, my name is \_\_\_\_\_, and I'm from Metro Intergroup Communications, a national research firm. We're conducting a public opinion survey and I'd like to talk to the youngest man, age 18 or older, who is at home right now. **(IF NO MALE, ASK TO SPEAK TO THE YOUNGEST WOMAN, AGE 18 OR OLDER WHO IS AT HOME. WHEN RESPONDENT IS SELECTED:)** We're not selling anything and I won't ask you for a contribution or donation.

---

1. First, are you currently a resident of the State of Alaska, or not? **(If "NO", ask to speak to someone else in the household who is a resident of Alaska.)**

1. Yes/100%	Go to Q2
2. No	We need to talk to people who are residents of Alaska. Would anyone else in the household qualify? <b>(If "YES", return to Introduction. If "NO", Terminate.)</b>
3. Don't Know	

2. And for this survey, I need to know if you are registered to vote at this address we're now calling, or not? **(If "NO", ask to speak to someone else in the household who is a registered voter.)**

1. Yes/100%	Go to Q3
2. No	We need to talk to people who are registered voters. Would anyone else in the household qualify? <b>(If "YES", return to Introduction. If "NO", Terminate.)</b>
3. Don't Know	

3. Tell me please, how long you've been a resident of Alaska. Is it... (Read List).

1. All your life./25%
  2. More than 20 years./33%
  3. Between 10 and 20 years./23%
  4. Between 5 and 10 years./11%
  5. Between 3 and 5 years./3%
  6. Between 1 and 3 years, or/3%
  7. Less than 1 year./2%
  8. Refused (VOL.)/1%
- 


4. What is your overall opinion about the way things are generally going here in Alaska? Would you say things are generally going in the right direction, or do you feel things are pretty seriously off on the wrong track?

1. Right direction/58%
  2. Wrong track/27%
  3. Can't Say/15%
- 

5. Generally speaking, how would you rate the job Frank Murkowski (mer-COW-ski) is doing as Governor? Do you strongly approve; somewhat approve; somewhat disapprove; or strongly disapprove of the way he is handling the job of Governor?

- |                         |                            |
|-------------------------|----------------------------|
| 1. Strongly Approve/8%  | 3. Somewhat Disapprove/20% |
| 2. Somewhat Approve/41% | 4. Strongly Disapprove/19% |
| 5. Can't Say/11%        |                            |
- 

6. Would you say the quality of health care you receive today is better than; about the same; or worse than the health care you received, say 10 years ago?

- |                       |          |             |   |
|-----------------------|----------|-------------|---|
| 1. Better/31%         | Go to Q8 | (NEXT PAGE) | → |
| 2. About the same/40% |          |             |   |
| 3. Worse/23%          | Go to Q8 | (NEXT PAGE) | → |
| 4. Can't Say/6%       |          |             |   |
- 

7. **IF "ABOUT THE SAME" IN Q6, ASK:** Is that generally good or generally bad?

1. Generally Good/80%
2. Generally Bad/11%
3. Can't Say/9%

8. **ASK OF EVERYONE** And would you say the value you get for your health care dollar is better; about the same; or worse than it was say 10 years ago?

- |                       |                 |
|-----------------------|-----------------|
| 1. Better/14%         | 3. Worse/47%    |
| 2. About the same/32% | 4. Can't Say/8% |


9. How frequently would you say you hear or read about medical errors and patients who have been injured during medical treatment – quite frequently; fairly regularly; occasionally; hardly at all; or not at all?

- |                         |                      |
|-------------------------|----------------------|
| 1. Quite Frequently/8%  | 4. Hardly At All/25% |
| 2. Fairly Regularly/10% | 5. Not At All/4%     |
| 3. Occasionally/52%     | 6. Can't Say/1%      |

---

10. Are you aware of the on-going debate about medical malpractice liability and medical malpractice insurance costs for doctors, or not?

1. Yes/63%	Go to Q11
2. No/36%	Go to Q12
3. Can't Say/1%	



11. **IF YES, IN Q10, ASK:** Whom do you feel is most to blame for these medical malpractice insurance problems? Please choose the one – only one – you feel is the one most to blame. (READ LIST) (ACCEPT ONLY ONE RESPONSE)

**ROTATE**

1. Doctors and Hospitals,/17%
2. Insurance Companies,/21%
3. Injured Patients,/5%
4. Juries,/3%
5. Lawyers who represent Injured Patients,/33%
6. Politicians, or/4%
7. Lawyers for Doctors and Hopsitals,/5%
8. Can't Say (DO NOT READ)/11%

---

12. **ASK OF EVERYONE** Please tell me if you think that health care providers overall are doing an excellent job, a good job, only a fair job, or a poor job at preventing medical errors and promoting patient safety?

- |                     |                        |
|---------------------|------------------------|
| 1. Excellent Job/9% | 3. Only a Fair Job/20% |
| 2. Good Job/63%     | 4. Poor Job/5%         |
| 5. Can't Say/4%     |                        |

The cost to have malpractice insurance coverage that doctors and nurses in Alaska have to pay has been going up at a considerate rate in recent years. Let me read to you some reasons others have told us are the cause of these high malpractice insurance rates on doctors and nurses. After each please tell me if you feel it is a major reason, a minor reason, or **NOT** a reason for these increases in malpractice insurance.

**ROTATE**

	A Major Reason	A Minor Reason	Not a Reason	Can't Say
13. State Government not passing necessary laws that would reduce frivolous malpractice lawsuits.	38%	38%	18%	6%
14. Juries awarding excessive amounts of money to patients in malpractice cases.	50%	35%	10%	5%
15. More medical errors or mistakes by Doctors.	29%	47%	16%	8%
16. Patients and their lawyers filing frivolous lawsuits against doctors for financial gain.	60%	30%	5%	5%

17. Do you think many doctors; some doctors; or a very few doctors here in Alaska are practicing defensive medicine by performing additional tests or procedures that are not necessary to protect themselves from frivolous lawsuits?

- |                  |                   |
|------------------|-------------------|
| 1. Many/13%      | 3. Very few/25%   |
| 2. Some/45%      | 4. None (VOL.)/3% |
| 5. Can't Say/15% |                   |

For the following please tell me if you are very concerned; somewhat concerned; not too concerned; or not at all concerned that the increasing malpractice insurance costs and the ability to get malpractice insurance for doctors and nurses here in Alaska will lead to each of these possible outcomes for you and your family. The first one is...(READ QUESTIONS AND REPEAT ANSWER SET FOR THE FIRST FIVE)

	<b>ROTATE</b>	Very Concerned	Somewhat Concerned	Not Too Concerned	Not At All Concerned	Can't Say
18.	That you'll have to pay more for healthcare or health insurance.	42%	44%	10%	4%	1%
19.	You won't be able to afford health insurance coverage or necessary health care.	45%	34%	15%	5%	1%
20.	You'll have trouble finding a doctor when you need one.	26%	40%	27%	7%	1%
21.	Your current doctor will stop practicing or move out of the state.	24%	31%	34%	10%	2%
22.	You'll have a more difficult time getting specialized care when you need it.	29%	43%	19%	8%	1%

23. Do you think many doctors; some doctors; or very few Alaskan doctors have stopped providing certain complex or high risk medical services or refused to treat patients with serious illnesses to protect themselves from frivolous lawsuits.

- |    |          |    |                |
|----|----------|----|----------------|
| 1. | Many/7%  | 3. | Very few/30%   |
| 2. | Some/41% | 4. | None (VOL.)/3% |
|    | 5.       |    | Can't Say/19%  |

24. There is bill right now in front of the legislature that would put a cap or a limit on what is called non-economic damages of more than \$250 thousand dollars in medical malpractice cases. Non-economic damages are usually referred to as getting money for pain and suffering. First of all are you aware there is an effort to pass this, or not?

1. Yes/43%
2. No/53%
3. Can't Say/4%

25. Again, this legislation calls for putting a limit of \$250 thousand dollars on medical malpractice cases for non-economic damages, for pain and suffering. The bill would still allow people to be awarded damages for the full amount for monetary losses – for past and future medical expenses, past and future earnings, loss of employment: all cost associated with any medical accident. Generally would you say you strongly favor; somewhat favor; somewhat oppose; or strongly oppose this legislation that would put a limit of \$250 thousand dollars on suing for non-economic, pain and suffering damages?

- |                       |                        |
|-----------------------|------------------------|
| 1. Strongly Favor/30% | 3. Somewhat Oppose/17% |
| 2. Somewhat Favor/30% | 4. Strongly Oppose/11% |
| 5. Can't Say/12%      |                        |

Here are some statements others have told us about this problem. After each please tell me if you strongly agree; mostly agree; mostly disagree, or strongly disagree with each statement. The first one is...

**(ROTATE Q26-Q31)**

26. The national medical malpractice crisis is affecting us and our healthcare needs here in Alaska.

- |                       |                         |
|-----------------------|-------------------------|
| 1. Strongly Agree/29% | 3. Mostly Disagree/13%  |
| 2. Somewhat Agree/45% | 4. Strongly Disagree/2% |
| 5. Can't Say/10%      |                         |

27. Having the legislature pass legislation that will lower the current limits on non-economic, pain and suffering damages to \$250 thousand dollars in medical malpractice cases will be in the best interest of Alaska.

- |                       |                         |
|-----------------------|-------------------------|
| 1. Strongly Agree/29% | 3. Mostly Disagree/15%  |
| 2. Somewhat Agree/34% | 4. Strongly Disagree/8% |
| 5. Can't Say/15%      |                         |

28. Limiting monetary awards for non-economic pain and suffering damages to no more than \$250 thousand dollars will help to control health care costs here in the state.

- |                       |                         |
|-----------------------|-------------------------|
| 1. Strongly Agree/29% | 3. Mostly Disagree/16%  |
| 2. Somewhat Agree/33% | 4. Strongly Disagree/8% |
| 5. Can't Say/15%      |                         |

29. If medical malpractice lawsuits aren't controlled, it's going to damage our cities, communities, and villages as we lose our doctors because they can't afford to pay their medical malpractice insurance.

- |                       |                         |
|-----------------------|-------------------------|
| 1. Strongly Agree/29% | 3. Mostly Disagree/16%  |
| 2. Somewhat Agree/37% | 4. Strongly Disagree/7% |
| 5. Can't Say/12%      |                         |

30. Setting a limit of \$250 thousand dollars on non-economic damages – for pain and suffering – will help promote quicker settlements.

- |                       |                         |
|-----------------------|-------------------------|
| 1. Strongly Agree/29% | 3. Mostly Disagree/13%  |
| 2. Somewhat Agree/35% | 4. Strongly Disagree/6% |
| 5. Can't Say/18%      |                         |

31. Alaska really does have a critical shortage of nurses and doctors.

- |                       |                         |
|-----------------------|-------------------------|
| 1. Strongly Agree/30% | 3. Mostly Disagree/16%  |
| 2. Somewhat Agree/36% | 4. Strongly Disagree/2% |
| 5. Can't Say/15%      |                         |

---

Let me go through some facts for you. After each please tell me if you find it to be a very convincing reason to be in favor of putting a \$250 thousand dollar limit on pain and suffering in medical malpractice lawsuits; it is somewhat of a convincing reason; not convincing at all; or it would have no affect on you. The first one is...

32. Alaska is one of the most expensive state's in the nation for doctors to practice medicine. Is this a ... (READ LIST)

1. A very convincing reason,/27%
2. Somewhat of a convincing reason,/40%
3. Not convincing at all, or/19%
4. It would have no affect on you./8%
5. Can't Say (**DO NOT READ**)/6%

33. Because of the high cost to insure doctors and nurses, two of the state's medical malpractice insurance companies have left the state after suffering significant losses and the last two remaining companies are limiting the amount of insurance coverage that doctors and/or nurses in specialty areas, such as OB/GYN and cardiology, can purchase. Is this a...

1. A very convincing reason,/34%
2. Somewhat of a convincing reason,/37%
3. Not convincing at all, or/16%
4. It would have no affect on you./8%
5. Can't Say (**DO NOT READ**)/5%

34. States that have reasonable limits on non-economic, pain and suffering damages, have 12 percent more doctors per capita than states that don't have these limits. Is this...

1. A very convincing reason,/27%
2. Somewhat of a convincing reason,/39%
3. Not convincing at all, or/19%
4. It would have no affect on you.../7%
5. Can't Say (**DO NOT READ**)/8%

35. Alaska has difficulty attracting and maintaining an adequate number of doctors. Right now Alaska ranks 46<sup>th</sup> out of 50; in the number of doctors per capita. Is this..

1. A very convincing reason,/32%
2. Somewhat of a convincing reason,/36%
3. Not convincing at all, or/19%
4. It would have no affect on you./8%
5. Can't Say (**DO NOT READ**)/5%

36. Lowering the existing limits on non-economic, pain and suffering damages to \$250 thousand dollars has proven to be the single most important tool in controlling the cost of medical malpractice insurance. Is this...

1. A very convincing reason,/26%
2. Somewhat of a convincing reason,/38%
3. Not convincing at all, or/21%
4. It would have no affect on you./9%
5. Can't Say (**DO NOT READ**)/6%

37. Nurses, doctors, dentists, physician assistants, specialists – the whole medical community would be helped by having this legislation passed. Is this...

1. A very convincing reason,/31%
2. Somewhat of a convincing reason,/36%
3. Not convincing at all, or/18%
4. It would have no affect on you./9%
5. Can't Say (**DO NOT READ**)/7%

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38. Now that we've had a few minutes to talk about this legislation. How do you feel about it now. Do you strongly favor; somewhat favor; somewhat oppose; or strongly oppose this legislation which would put a limit of \$250 thousand dollars on non-economic, pain and suffering damages, in a medical malpractice lawsuit.

- |                        |                        |
|------------------------|------------------------|
| 1. Strongly Favor /34% | 3. Somewhat Oppose/13% |
| 2. Somewhat Favor/33%  | 4. Strongly Oppose/10% |
| 5. Can't Say/10%       |                        |

=====

**THAT COMPLETES THE MAJOR PART OF THE SURVEY. NOW FOR A FEW  
QUESTIONS FOR STATISTICAL PURPOSES ONLY.**

=====

39. Please tell me, in which age group are you? **(READ LIST)**

- |    |            |    |                  |    |            |
|----|------------|----|------------------|----|------------|
| 1. | 18-24,/8%  | 4. | 45-54,/22%       | 7. | Refused/1% |
| 2. | 25-34,/15% | 5. | 55-64, or/16%    |    |            |
| 3. | 35-44,/26% | 6. | 65 or older./12% |    |            |

40. What was the last grade of schooling you have completed? **(READ LIST)**

1. 8th Grade or less,/1%
2. Some high school, a,/3%
3. High school graduate or GED,/30%
4. Some college,/22%
5. 2 year college graduate,/10%
6. 4 year college graduate, or/26%
7. Post graduate./7%
8. Refused **(DO NOT READ)**/1%

41. Do you work for the federal, state, local government, for the local public school system, or do you work for a private company?

1. Federal Government/6%
  2. State Government/5%
  3. Local Government/5%
  4. Public School System/4%
  5. Private Company/44%
  6. Not in workforce **(VOL.)**/34%
  7. Refused/2%
- =====

42. What type of work do you do? What is your job called?

Job Description: \_\_\_\_\_  
(be specific)

1. Professional/Executive/Managerial/10%
2. Self-employed/Proprietary/Own Business/White Collar/5%
3. Sales/5%
4. Clerical/Administrative/5%
5. School Teacher/College Professor/3%
6. Information Services (**Computer workers**)/3%
7. Military (**Officer**)/0%
8. Military (**enlisted/civilian**)/1%
9. Self-employed/Proprietary/Own Business/Blue Collar/7%
10. Other Service workers (**Day care/Police/Fire/Waitress**)/10%
11. Commercial Fisherman/Farmer/2%
12. Skilled Technician/Tradesman/9%
13. Semi-skilled labor/Factory worker/Production/3%
14. Unemployed (**not retired**)/4%
15. Retired/15%
16. Housewife/10%
17. Student/2%
18. Refused/5%

43. I need to know if you are registered to vote as a Democrat; as a Republican; registered Non-partisan or Undeclared; as a Libertarian; in the Green Party, the Alaska Independent Party, or as something else?

1. Democrat/22%
  2. Republican/33%
  3. Non-Partisan/16%
  4. Undeclared/19%
  5. Libertarian/2%
  6. Green Party/0%
  7. Alaska Independent Party/3%
  8. Something Else/1%
  9. Refused/Unsure/4%
- 

44. What is your race or ethnic group? Is it...

1. Caucasian (**White**),/84%
2. African American (**Black**),/1%
3. Native Alaskan/Indian,/10%
4. Pacific Islander/Asian, or/2%
5. Hispanic./1%
6. Other (**DO NOT READ**)/1%
7. Refused (**DO NOT READ**)/1%

V- Bill Packet plz -L



2207 East Tudor Road, Suite #34  
Anchorage, Alaska 99507  
907-222-6847

Representative Lesil McGuire  
State Capitol, Room 118  
Juneau, AK 99801-1182

April 17, 2005

Dear Representative McGuire,

The Alaska Nurse Practitioner Association supports Senate Bill 67, a bill that limits financial compensation on noneconomic damages in medical malpractice determinations.

While much discussion has centered on the impact of these issues on physicians, Alaskan Advanced Nurse Practitioners and their patients are also being affected. Through out Alaska there are over 500 ANPs practicing in rural, urban, out-patient and hospital settings. Advanced Nurse Practitioners provide about 18% of the independent primary healthcare to Alaskans and provide an increasing proportion of specialty care. While Advanced Nurse Practitioners are rarely sued for malpractice in Alaska (only 3 occurrences in the last 15 years in Alaska), our malpractice insurance rates have increased 20-30%, with some specialty premiums tripling in 2005.

We believe that maintaining high quality, cost-effective, accessible health care to all Alaskans is vital. Senate Bill 67 is a valuable piece in preserving this high standard of care. Currently, the cost and expectations for disproportionate increases in malpractice insurance, required for all healthcare providers in Alaska are creating a financial burden and disincentive to practicing in Alaska. In addition, the costs for protection against increasing liability insurance premiums are being passed on to consumers.

Please support SB 67 (version B). If we do nothing, we will ensure a worsening of the situation.

I am available and will be happy to discuss issues related to malpractice reform and preservation of access to high quality health care. Please do not hesitate to contact me.

Respectfully,

*Mary Margaret Hillstrand ANP*

Mary Margaret Hillstrand ANP  
President Alaska Nurse Practitioner Association

**Carolyn Holbert**

D-31

**From:** Cathy Giessel [cgiessel@mac.com]  
**Sent:** Saturday, April 16, 2005 4:51 AM  
**To:** Rep. Lesil McGuire  
**Subject:** SB 67, H-JUD, 4-19

Dear Representative McGuire

I am writing to urge you to support SB 67, a bill that would cap noneconomic damage awards against healthcare providers.

This is critically needed legislation. The cost of malpractice liability insurance for healthcare providers in Alaska is skyrocketing.

You will hear a lot of data about physician premiums but these are not the only people being impacted. Advanced Nurse Practitioners (ANP), who comprise 18% of the primary care providers in Alaska, are also being impacted with insurance premium increases of 20-30% annually.

Some ANPs found their premiums increase by 300% in 2005 alone.

The ultimate effect of these increases is decreased access to healthcare for Alaska's citizens. Insurance premium costs get passed on to consumers, adding to the increasing cost of healthcare. New healthcare providers consider the cost of insurance in Alaska when considering locating their practices here. If we are going to build a gas pipeline, continue to develop our natural resources and expand tourism, demands for excellent healthcare will only be increasing, further straining our healthcare resources.

SB 67 alone will not solve all the problems of healthcare resources and access, but not passing this legislation will assure that the situation will only worsen.

I urge you to support SB 67.

Thank you for your service to Alaskans.

Cathy Giessel, MS, FNP-CS  
cgiessel@mac.com

12701 Ridgewood Road  
Anchorage, AK 99516  
907 345 5470

*Vanessa -  
p13 include this  
letter in SB 67's  
packet p13  
J*

SIB 67

TO: VANESSA TONDINI

FROM: MIKE STRONG

FAX: 272-0930

DEAR,

VANESSA PLEASE GIVE COPIES  
OF THIS LETTER TO OTHER  
JUDICIARY MEMBERS

THANK

MJ

April 18, 2005

House Judiciary Committee  
House of Representatives  
Juneau, Alaska 99801

Dear House Judiciary Committee:

I am a longshoreman and a resident of Anchorage, Alaska. I learned this week that the legislation that would limit damages for pain and suffering in medical negligence cases to \$250,000 is back and that the Senate has passed the bill. I was surprised to learn that the Senate actually voted to apply this limit even in cases where doctors are reckless or grossly negligent.

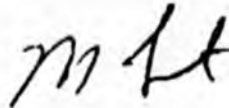
I am writing to tell you why passing this legislation would be wrong. My wife, Elizabeth, wasn't murdered by a reckless driver. If she had been, at least the perpetrator would have been jailed. Instead, she was killed by a seasoned, professionally trained doctor and her nurses. They killed my wife by administering an 8 times overdose of chemotherapy, not once, not twice but four times. Please see the attached Anchorage Daily News article that describes the case. When my wife was killed by Dr. Stewart and her nurses, we had two young children. My son was ten and my daughter was twelve. If the \$250,000 cap were in place I doubt I would have even been able to find a lawyer to help me bring the case because most of the harm my wife and my family suffered had nothing to do with economic loss.

Capping the responsibilities of conglomerates, such as insurance companies, seems very wrong. It certainly won't give the doctors and nurses in Alaska any incentive to be careful or thoughtful in caring for their patients. The medical professionals who killed my wife were not thrown in jail and as far as I know they still practice medicine. The case I was able to bring was the only way I could seek justice. The jury is the people's last line of defense against these kinds of unconscionable mistakes.

House Judiciary Committee  
April 18, 2005  
Page 2

I hope that you will oppose this legislation.

Sincerely,

A handwritten signature in black ink, appearing to read "m st", written in a cursive style.

Mike Strong  
740 Dogwood Street  
Anchorage, AK 99501

# ALASKA AFL-CIO

2501 Commercial Drive · Anchorage, Alaska 99501 · 907-258-6284 · Fax 274-0570

**JIM SAMPSON**  
Executive President



**BRUCE LUDWIG**  
Secretary / Treasurer

April 19, 2005

Mr. John Harris  
Speaker of the House  
Alaska State House of Representatives  
State Capitol  
Juneau, AK 99801

Re: Senate Bill No. 67

Dear Speaker Harris,

This letter is sent in opposition to Senate Bill No. 67, "An Act relating to claims for personal injury or wrongful death against health care providers".

This legislation will harm Alaskans, many of whom have already suffered injury. It will limit the ability of Alaskans injured through negligence or recklessness to seek appropriate redress for their injuries. Even more troublesome is that there is no corresponding assurance from insurance companies that this legislation will have any effect whatsoever on medical malpractice rates. In 1997, when the legislature enacted "tort reform", it was stated that insurance premiums would be reduced. This has not occurred. The only thing that will happen if this legislation passes, is that Alaskans, many of whom are retired or elderly, those with limited income or children, will be prohibited from being treated fairly.

Please vote against this legislation.

Sincerely,

Jim Sampson  
President

cc: Members of the Alaska House of Representatives

ALASKA ACTION TRUST  
813 WEST THIRD AVENUE  
ANCHORAGE, ALASKA 99501  
(907) 258-4040  
AKACTIONTRUST@AOL.COM

INFORMATION IN OPPOSITION TO SENATE BILL 67

I. POSITION PAPER

II. CHART: NUMBER OF ALASKA MEDICAL MALPRACTICE  
PAYOUTS REPORTED TO THE NATIONAL PRACTITIONER DATA  
BANK

PAYOUTS NOT INCREASING

III. CHART: NUMBER OF PHYSICIANS IN ALASKA: 1996 TO  
2003

INCREASED FROM 1146 TO 1545

IV. CHART: NUMBER OF OBGYNs IN ALASKA

NUMBER OF OBGYNs INCREASING

V. ANALYSIS: MEDICAL MALPRACTICE MISMANAGEMENT  
MISMANAGED UNDERWRITING PRACTICES, NOT CLAIMS,  
HAVE DRIVEN INSURERS OUT OF THE MARKET

*THE ALASKA ACTION TRUST  
PO Box 102323  
ANCHORAGE, ALASKA 99501  
907-258-4040  
AKACTIONTRUST@AOL.COM*

**POSITION PAPER ON SENATE BILL 67**

**INTRODUCTION**

**In Alaska, to suggest that there is a medical malpractice crisis is at best disingenuous and at worse fraudulent. In short, there is no empirical evidence to support the proposition of a relationship between medical malpractice premiums, medical malpractice litigation and availability of health care providers.**

If this proposed legislation passes, you will be responsible for eliminating the ability of stay at home moms and dads, retired or elderly citizens, children, and those with subsistence lifestyles or limited incomes to bring claims against negligent or even reckless doctors or other health care providers. This will be true even when they are blinded, maimed, suffer serious neurological injuries, rendered sexually dysfunctional or even killed by medical malpractice. What makes this proposed legislation even more egregious is that the entire premise for its utility is based upon anecdotal information, unsupported by credible empirical evidence and indeed is contrary to conclusions reached in existing and reliable studies.<sup>1</sup> Even more appalling, there is no corresponding assurance from those most benefited (the insurance industry) that the legislation will have any effect whatsoever on medical malpractice rates.

**THE HISTORY OF TORT REFORM IN ALASKA**

While the following discussion will illustrate the points referenced above, a brief chronological history of similar tort reform efforts in the State of Alaska demonstrates that capping or limiting damages will have absolutely no effect on medical malpractice insurance rates or the availability of medical malpractice insurance to doctors in Alaska or the availability of health care in Alaska.

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<sup>1</sup> Studies repeatedly relied upon by the insurance industry and health care providers pushing similar legislation have been widely discredited. The Milliman report, for instance, relies on data from the National Practitioner Data Bank (NPDP) that has been slammed by the Government Accounting Office (GAO). (See, e.g., GAO: "National Practitioner Data Bank: Major Improvements are Needed to Enhance Data Bank's Reliability," Nov. 2000; Mary Jane Fisher, "GAO Report Slams National Practitioner Data Bank," *National Underwriter*, Jan. 1, 2001). It also fails to adjust any of its figures for medical inflation to offset its conclusion that medical malpractice losses have risen 32% over the last decade in states without caps. When adjusted for 51% in medical inflation for the same time period, paid losses are actually *falling*.

Dating back to 1976 with the passage of A.S. 09.55.548, medical malpractice insurers and health care providers have enjoyed a unique benefit unavailable to other insurers or private citizens. A.S. 09.55.548(b) in effect immunizes these entities and individuals from payment for all past medical expenses incurred as a result of physician and/or health care malpractice paid by private health care plans.

This has resulted in a significant windfall to medical malpractice carriers (and uninsured health care providers) since a private health care plan has no subrogation rights under the statute. The only exception to this windfall is when the collateral source of payment is governmental or quasi governmental such as under Medicare, Medicaid or federal employees who are insured under the federal health care plan. In many cases, this results in savings totaling hundreds of thousands of dollars which are absorbed, unfairly, by other health care plans and ultimately by the citizens of this state through higher health care premiums.

In 1978, again at the urging of medical malpractice insurance carriers and health care providers, the Legislature passed A.S. 09.55.536 requiring the appointment of expert advisory panels in all medical malpractice actions. These panels were appointed by the court and reviewed claims brought by injured Alaskans to determine whether or not malpractice had occurred and, if so, whether the malpractice had caused the patient's injuries. The purported basis for this legislation (as argued by its proponents) was to eliminate or at least minimize frivolous malpractice claims. While the efficacy of the expert advisory panel was always questionable, it has been all but abandoned by health care providers themselves and is no longer requested (it is waived in virtually all cases).

In 1986, the Legislature enacted tort reform legislation placing damage caps on non-economic damage. That legislation capped non-economic damages for injuries that did not result in severe permanent physical impairment or severe disfigurement to \$500,000. There was no cap, however, on those injuries that did result in severe permanent impairment or severe disfigurement.

In 1997, sweeping tort law revision was enacted by the Legislature. The previous cap on non-economic damages in cases involving physical injury was reduced to \$400,000 (or the injured person's life expectancy multiplied by \$8,000) A definitive cap was placed on cases involving severe permanent physical impairment and severe disfigurement of \$1,000,000 or the injured persons life expectancy in years multiplied by \$25,000. In other words, to exceed the \$1,000,000 limitation, a person's life expectancy would have to exceed 40 years.<sup>2</sup>

While the 1997 changes benefited all insurance carriers in the state of Alaska, health care providers were given additional protection in the form of limiting expert witnesses who could testify on behalf of an injured Alaskan in medical malpractice actions.

A.S. 09.20.185 was enacted requiring that only board certified physicians having

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expertise and training directly related to the particular field or matter at issue would be allowed to testify regarding standard of care. This requirement is now necessary even though the offending doctor is not board certified in any practice group or specialty. Needless to say, this has made it even more difficult to obtain expert witnesses to testify against offending doctors, particularly since the same doctors belong to national organizations and often know each other personally.

In the face of these sweeping reforms, the insurance industry has repeatedly argued that tort reform benefits policyholders and the public at large. To date, there have been *no* reductions to my knowledge in any insurance rates charged to individual Alaskans. The current legislation that will benefit only health care providers will result in the same outcome. There will be no reduction in health care costs and no reduction in medical malpractice premiums charged in the state of Alaska. As discussed below, this has been repeatedly demonstrated throughout the United States.

### **THE HISTORY OF MALPRACTICE PREMIUMS IN ALASKA**

To best illustrate this point, it is helpful to review the medical malpractice premiums charged in this state dating back to 1993 and compare those to California, the state much touted by the insurance industry because of its previously imposed caps on non-economic damages through the Medical Injury Compensation Reform Act (MICRA). Although the only published premium information readily available deals with the specialties of Internal medicine, General Surgery and OB/GYN, these seem to be the specialties of most concern at least by those physicians and health care providers who testified before the House Judiciary last week.<sup>3</sup>

A cursory review of the premiums charged illustrates the utter lack of credibility of the positions taken by this legislation's proponents. An important thing to remember when reviewing the premiums discussed below is that these are the amounts *charged* by the malpractice carriers. Both NORCAL and MIEC (the current and historical dominant carriers in the Alaska market) give credits back to their insureds. These credits are not reported in the data available but it is highly likely that these credits would further substantially reduce the published premiums paid by individual health care providers<sup>4</sup>

In 1993, NORCAL's premium rates were \$12,102 for Internal Medicine doctors, \$37,750 for General Surgeons, and \$64,518 for OB/GYN's. MIEC's premium rates for the same specialties were \$5,487, \$19,752, and \$32,916 respectively. From 1994 through 1996, NORCAL's rates remained relatively stable. In 1994, MIEC raised its premiums for

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<sup>3</sup> Medical Liability Monitor [MLM] of Chicago publishes annual rate surveys from premium submissions provided by medical malpractice carriers or obtained directly from state insurance departments throughout the United States.

<sup>4</sup> MLM notes in all of its annual surveys that such credits, discounts and other factors can greatly diminish and sometimes completely offset rate increases. None of the surveys reflect this data, however.

General Surgeons and OB/GYN's to \$38,228 and \$63,712 respectively. In 1995, MIEC reduced those rates by about 10 percent.<sup>5</sup>

Between 1997 and 1999, premium rates actually decreased significantly. NORCAL's rates dropped to \$8,770 for Internal Medicine doctors, \$28,587 for General Surgeons, and \$48,706 for OB/GYN's. MIEC reduced its rates to \$8,172, \$29,420, and \$49,032 respectively.<sup>6</sup>

There is no dispute that during this time frame and extending into 2001, most carriers in most states were reducing malpractice premiums because of intense competition in the industry. This competition was reflected in the state of Alaska by the joining of at least two other malpractice carriers to the competitive market.<sup>7</sup> The introduction of new carriers into the competitive market was a national phenomenon. Fierce competition continued to drive down rates for medical professional liability insurance in 1997.<sup>8</sup> In 1999, medical malpractice carriers had been battered from several years of brutal competition, with price cutting the name of the game, even when it meant selling *below* the break-even point.<sup>9</sup>

Back then, leaders in the industry were optimistic that the market would "harden" over the next three years.<sup>10</sup> Then vice president of Florida Physicians Insurance Company, Melodee Dixon, stated, "It will take that amount of time [three years] for claims on policies written at today's grossly inadequate rates to shake out."

Everyone in the industry during this time frame recognized that the amount of competition in the industry was causing drastic price cutting and exposing numerous carriers to significant future financial. These risks were self-inflicted and the resulting losses from malpractice claims were anticipated and predicted by competent actuaries.

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<sup>5</sup> MLM annual surveys for 1993-1995.

<sup>6</sup> MLM annual surveys for 1997-1999.

<sup>7</sup> Although other carriers may have been in the Alaska market during this time frame, the only entities reporting premiums to MLM appear to be NORCAL, MIEC and joined in 1996 by Physicians Ins. Ex. of Washington and Doctors Co. in 1997. Northwest Physicians Mutual began reporting in 1999. It is unknown when CNA began writing coverage in Alaska.

<sup>8</sup> MLM annual survey comments, 1997.

<sup>9</sup> "Medical professional liability writers express a very pragmatic, but somewhat optimistic outlook about their market niche. Battered from several years of brutal competition, with price-cutting the name of the game, even when it means selling below the break-even point, these insurers nevertheless think that a market shake-out will come." MLM annual survey, 1999.

<sup>10</sup> Market "hardening" is discussed, *infra*.

The trend of lower malpractice premiums continued through 2000 in the state of Alaska. In 2001, as competition in Alaska and the national market waned, the predicted market "hardening" began to take form. Those carriers that had engaged in risky if not reckless underwriting began to pull out of markets in this state and across the United States. Notwithstanding, the malpractice premium rates in Alaska remained unchanged at MIEC through 2002 and were increased only slightly by NORCAL. In 2001, NORCAL raised its rates to \$9,580 for Internal Medicine doctors, \$30,872 for General Surgeons, and \$52,600 for OB/GYN's.<sup>11</sup>

In 2003, with the market firmly "hardened," the rates from both carriers increased. NORCAL raised its rates for Internal Medicine doctors to \$11,209, for General Surgeons to \$36,122 and for OB/GYN's to \$61,545. MIEC's premium rates were \$7,432, \$26,748, and \$44,580 respectively. Notwithstanding, the premiums charged for 2003 were less than those charged by NORCAL for the same practice specialties in 1993, 1994, 1995, 1996 and only slightly higher than those charged in 1997 and 1998. The premium rates charged by MIEC in 2003 were less than those charged by the carrier in 1994, 1995, 1996, 1997, 1998, 1999, and only slightly higher than the premiums charged in 2001 and 2002.<sup>12</sup>

The significance of this rate comparison is even greater when comparing the discounted value of 2003 dollars with the previous years of lower premium rates. In short, these figures reflect an actual *reduction* in malpractice premiums over this time period when viewed in that light without considering the premium credits refunded to health care providers over this same time period. Moreover, when comparing these premiums to the inflation rate of health care costs (and resulting income to physicians), it is clear that these rates have not resulted in *any* increase to the cost of malpractice insurance premiums to health care providers in Alaska through 2003.

## THE CALIFORNIA EXPERIENCE

Since California's non-economic damage cap legislation is the model being touted by the proponents of this legislation, it is helpful to review the medical malpractice premiums charged in that state.

Between 1991 and 1997 in California, the medical malpractice premiums for internal medicine doctors, general surgeons and OB/GYNs remained relatively constant between 1991 and 1997. The premium rates charged by NORCAL over that time period for Internal Medicine doctors ranged from \$5,692 to \$9,472, for General Surgeons, \$18,916 to \$29,440, and for OB/GYN's, from \$31,624 to \$49,208. MIEC's premium rates were \$5,776, \$20,792, and between \$34,648 and \$39,268 respectively.<sup>13</sup>

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<sup>11</sup> MLM annual survey 2000-2001.

<sup>12</sup> MLM annual survey 2003.

<sup>13</sup> MLM annual surveys, 1991-1997.

Of particular note, and as recognized by numerous commentators, the reason for the relative consistency over this time period had little or nothing to do with medical malpractice non-economic damage caps.

In 1975, California enacted the Medical Injury Compensation Reform Act (MICRA) that placed a cap of \$250,000 on non-economic damages in medical malpractice actions. MICRA was touted by the insurance industry and health care practitioners as the solution to the "malpractice crisis" and the solution to increasing malpractice insurance rates. By 1988, however, medical malpractice premiums were 190% higher than 1976 levels (40% when adjusted for inflation to 2001 levels).<sup>14</sup>

In 1988 California voters passed Proposition 103, an insurance reform proposal. This proposition rolled back insurance rates 20% and froze rates for one year. It mandated billions of dollars worth of refunds to policyholders and created a system that required approval of insurance rates, allowing the insurance Commissioner to deny rate proposals that were too high or too low to be actuarially justified. It is following this proposition through 1996 that malpractice insurance rates actually stabilized.<sup>15</sup>

Beginning in 1997, insurance rates in California *again* began to increase substantially. In 1997, NORCAL's premium rates for Internal Medicine doctors ranged up to \$9,472, for General Surgeons, up to \$29,440 and for OB/GYN's, up to \$49,208. The rates continued to increase slightly between 1999 and 2001. Since that time, through 2003, the rates have increased to ranges up to \$25,178, \$58,830, and \$77,814 respectively. During this same time period, MIEC's premium rates have increased from their 1996 -- 1998 rates to a range up to \$9,305, \$27,682, and \$50,340 respectively. Accordingly, even with MICRA reform, malpractice rates have steadily *risen* in California and are comparable to or substantially greater than malpractice premium rates charged in this state by the same companies notwithstanding the lack of additional caps on non-economic damages.<sup>16</sup>

#### **THE INSURANCE INDUSTRY ADMITS THAT CAPS WILL NEITHER REDUCE PREMIUMS NOR ARE CAPS RELATED IN ANY WAY TO THE AVAILABILITY OF HEALTH CARE**

Misinformation regarding the efficacy of caps on non-economic damages and purported decreases in medical malpractice premiums has been disseminated by health care providers and malpractice insurers in other states as well.

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<sup>14</sup> *How Insurance Reform Lowered Doctors Medical Malpractice Rates in California*, The Foundation for Taxpayer and Consumer Rights, February 10, 2003, excerpted from N.C. trial lawyers expose on malpractice rates in N.C.

<sup>15</sup> *Id.*

<sup>16</sup> MLM annual surveys, 1996-2003.

In Florida, after pushing through a sweeping medical malpractice bill with a promise to reduce ever-increasing insurance premiums for Florida's physicians, malpractice insurance carriers followed up the bill's passage with a request to increase premiums by as much as 45 percent.<sup>17</sup>

In 2003, Oklahoma passed a tort reform bill that included a severe cap on compensation available to certain medical malpractice victims. Following passage of that bill, the insurance company owned by the state medical association requested an astounding 83 percent rate hike which was subsequently approved on the condition that it be phased-in over three years.<sup>18</sup>

In January 2003, Ohio lawmakers enacted a cap on compensation for patients injured by medical malpractice. Almost immediately, all five major malpractice insurance companies in Ohio announced that they would not reduce their rates. One insurance executive predicted his company would seek a 20 percent rate increase.<sup>19</sup>

This should come as no surprise to those familiar with the insurance industry and particularly with malpractice carriers.

Bob White, president of First Professional Insurance Co., the largest medical malpractice insurer in Florida stated that "no responsible insurer can cut its rates after a [medical malpractice tort reform] bill passes."<sup>20</sup> Cliff Webster representing the Washington State Medical Association and Chairman of the Washington Liability Reform Coalition told the Washington State Legislature, House Judiciary Committee in 2003 that "I don't think we would argue that the premiums are likely to go down."<sup>21</sup> Sherman Joyce, President of the American Tort Reform Association candidly acknowledged, "We wouldn't tell you or anyone that the reason to pass tort reform would be to reduce insurance rates."<sup>22</sup> James Robertson, Assistant Vice President and

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<sup>17</sup> See, e.g., Julie Kay, "Medical Malpractice; Despite Legislation that Promised to Rein in Physicians Insurance Premiums, Three Firms File For Big Rate Increases," *Palm Beach Daily Business Review*, Nov.20, 2003.

<sup>18</sup> *BestWire*, Dec. 2, 2003.

<sup>19</sup> Laura Bischoff, "Taft Signs Malpractice Reform Bill; Cap on Awards for Pain and Suffering," *Dayton Daily News*, Jan. 11, 2003; Andrew Welsh-Huggins, "Doctors Pushing for Short-Term Relief From Malpractice Rates," *Associated Press*, Jan. 10, 2003; "Despite New Law, Insurance Companies Won't Lower Rates Right Away," *Associated Press*, Jan. 9, 2003.

<sup>20</sup> *Palm Beach Post*, Jan. 29, 2003.

<sup>21</sup> Testimonial excerpt from testimony before the Washington State Legislature, House Judiciary, Feb. 21, 2003.

<sup>22</sup> "Study Finds No Link Between Tort Reforms and Insurance Rates," *Liability Week*, July 19, 1999.

Associate Actuary for SCPIE Indemnity Company (California's second largest medical malpractice insurer) stated "while MICRA was the Legislature's attempt at remedying the medical malpractice crisis in California in 1975, it did not substantially reduce the relative risk of medical malpractice insurance in California." He made that statement in a written response to a question from an administrative law judge overseeing the case in which his company had requested another 15.6% rate hike.

In short, virtually every reliable source underscores the certainty that limiting an injured persons access to the court system for damages has little or nothing to do with insurance premiums for the cost of health care delivery.

In January 2004, the Congressional Budget Office (CBO) concluded that legislation to cap damages in medical malpractice lawsuits would do little to hold down health care spending or eliminate the practice of defensive medicine. Moreover, the report found that medical malpractice insurance premiums have increased in part because of reduced income from insurer investments and short-term factors in the insurance market. The report found that although malpractice insurance premiums are somewhat lower in states with caps on damages, even a large savings in premiums would have a small impact on total health care spending because malpractice insurance costs account for less than two percent of health care spending. The CBO concluded that caps on damages in malpractice suits would not likely end the practice of defensive medicine. That is because physicians who practice defensive medicine may do so less because they fear liability than to generate more income. Equally compelling, the GAO concluded that many reported shortages of health care services [based on these factors] could not be substantiated or did not widely affect access to health care.<sup>23</sup>

In a sweeping and thorough investigation for AIR under the direction of Mr. **Robert Hunter** (former Federal Insurance Administrator and Texas Insurance Commissioner) it was determined that insurers make most of their profits from investment income. During years of high interest rates or excellent returns in the market, insurance companies engaged in fierce competition for premium dollars to invest and maximum returns. They severely under price premiums for policies and insure very poor risks to get premium dollars to invest. This is known as the "soft" insurance market. When the investment climate turns sour, however, the industry responds by sharply increasing premiums and reducing coverage, creating a "hard" insurance market, usually

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<sup>23</sup> *Congress Daily*, Jan. 13, 2004. The same argument of "fleeing" doctors and fear of inability to attract new ones has been completely debunked in Washington. Doctors for Medical Liability Reform claimed that 500 doctors had left the state between 1998 and 2004. They failed to mention, and did not research, however, how many doctors had moved to Washington over the same time frame. According to the 2003 GAO report, there were more doctors per capita in 2001 than in 1998. Moreover, despite arguments to the contrary, there was no indication that health care delivery was being curtailed or eliminated. Carol Ostrom, "Contrary to Ads, Doctors Replaced, Clinics Still Open," *Seattle Times*, Feb. 23, 2004.

degenerating into a "liability insurance crisis."<sup>24</sup> This is precisely what is proven conclusively by reviewing the comments and premium surveys discussed above.

Moreover, the Hunter report concluded that since the early 1980's, medical malpractice paid claims per doctor has tracked (approximately) medical inflation. In fact, inflation-adjusted payouts for physicians dropped between 2000 and 2002.<sup>25</sup> This data confirms that neither jury verdicts nor any other factor affecting total claims paid by insurance companies that write medical malpractice insurance have had much impact on the system's overall costs over time. Even more compelling, since 1975, the data shows that in terms of constant dollars, per doctor written premiums, the amount of premiums that doctors have paid insurers have gyrated almost precisely with the insurer's economic cycle which is (again) driven by such factors as changing insurance rates, mismanaged business and accounting practices as well as other causes.<sup>26</sup>

### MEDICAL MALPRACTICE IN ALASKA – THE REALITY

In summary, this legislation is without merit. The following facts underscore why this legislation is bad for Alaskans.

1. **Fact:** Citizens who are elderly or retired, citizens living a subsistence lifestyle, stay at home parents, and children will be without any legal remedy for even the most egregious instances of medical malpractice. Since they have little or no economic loss, they will not be able to obtain legal counsel to pursue a medical malpractice claim even if they are blinded, crippled, maimed, rendered sexually dysfunctional, or die after a sustained period of suffering. The cost of bringing such claims will easily exceed any potential recovery.

#### Real-Life Examples:

Linda McDougal -- this is the much-publicized national case involving the 46-year-old Navy veteran who underwent a double mastectomy after mistakenly being diagnosed with an aggressive breast cancer. Her pathology results had been mistakenly switched with another woman who in fact had breast cancer. This woman is now horribly scared for life.

Jennifer -- Jennifer was a beautiful and vibrant 12-year-old Alaskan who was misdiagnosed twice over a three-day period with gingivitis. She was actually suffering from acute leukemia, which was very treatable and survivable but requires a timely

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<sup>24</sup> Americans for Insurance Reform, Medical Malpractice Insurance: Stable Losses/Unstable Rates in Wyoming, Feb. 2004.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

diagnosis and urgent medical intervention. This could have been determined with a simple and inexpensive blood test. Unfortunately, given the delay in her diagnosis, she hemorrhaged and died before she could be properly diagnosed. Although this was a clear-cut case of negligence, over \$100,000 in out-of-pocket costs were expended before the case settled. Under the proposed legislation, this case could never have been prosecuted and Jennifer, her parents, and three siblings would have been without any remedy at all.

Susan -- Susan was an Alaskan in her early 30's when she was misdiagnosed and refused treatment by several health care providers over a five-day period. Unfortunately, she was suffering from a well-known medical and orthopedic emergency known as cauda equina syndrome. By the time she was finally correctly diagnosed, she had suffered permanent saddle anesthesia (no feeling from her waist to her mid thigh); permanent lower extremity neurological injuries requiring leg braces; and intermittent bowel and bladder dysfunction. Under this legislation, since she could still work at her profession, she would be left with a remedy of \$250,000. Despite clear-cut negligence, costs of over \$200,000 were expended before settlement was reached.

Traven -- Traven was an adventurous eight-year-old Alaskan boy who sustained lower extremity burns that were entirely survivable and treatable. Unfortunately, due to a series of medical mistakes, he languished for days with an increasingly more severe infection and ultimately lapsed into a coma (with his parents present). He was finally flown to Seattle Children's Hospital where he died. Under this legislation, it would be financially difficult or impossible to bring this claim since his entire family, like Jennifer's above, as well as his estate would be limited to \$250,000 in non-economic damages. Although an economic loss to his estate could be claimed, those losses are more difficult to establish for children and are usually so low as to not warrant prosecution of a claim absent non-economic damages.

Mrs. Strong -- Mrs. Strong was a 32-year-old Alaskan mother of two children who was drastically over dosed with a highly caustic chemotherapy drug. The overdose was approximately 8 times what she was supposed to be given and was repeatedly administered over the course of 4 days. She died a horrible death, essentially burning up from the inside out over the course of 6 days. She never had a chance to say goodbye to her children, husband, or her parents. Since she was a mom and essentially out of the work force, she would have had little economic loss and, under this bill, her estate and entire family would be limited to \$250,000 in losses.

These are only a few of the many actual cases that we can provide this committee as concrete examples of why this bill works such gross inequities on the innocent people in our State who are the most vulnerable.

**Fact:** The passage of this legislation will have no impact on medical malpractice premiums in this state and will have no impact on the ability to attract health care professionals to practice here. Other than anecdotal and unsupported comments to the

contrary, there is absolutely no evidence to suggest that health care providers stay away from Alaska because of medical malpractice insurance premiums. Indeed, it is considered one of the top 75 places in the United States to practice medicine.<sup>27</sup> This is based in no small part on the lack of managed-care not caps on non-economic damages. Further, according to the State Medical Board, the number of medical board licensees has more than doubled since 1985.<sup>28</sup>

**Fact:** The Institute of Medicine reported three years ago that as many as 98,000 Americans die annually from medical errors in hospitals. On December 12, 2002, the *New England Journal of Medicine* reported that 4 out of 10 Americans and 1 out of 3 doctors say that they or their family members have been the victims of a preventable medical error; 10% of doctors say that a family member died as a consequence.<sup>29</sup> How will this legislation address these problems other than to make it financially easier on negligent health care providers and their insurance carriers?

**Fact:** Repeat offender physicians are responsible for most medical errors. According to a study recently conducted in North Carolina, 3.2% of North Carolina doctors had paid out two or more medical malpractice settlements to patients but were responsible for a total of nearly 42% of all payments reported to the National Practitioner Data Bank.<sup>30</sup> A study conducted by researchers at Vanderbilt University found that doctors with a history of malpractice claims can be expected to have "appreciably worse claims experience" than other doctors in the future.<sup>31</sup> This legislation would protect those health care providers by sharply limiting their exposure for continued malfeasance.

**Fact:** Medical Malpractice insurance costs are declining as a percentage of physician expenses. A recent USA Today report stated that, on average, doctors currently pay 3.2% of their revenue for medical liability insurance.<sup>32</sup> In 1987, medical malpractice insurance costs were, on average, 12.1% of the physician's total expenses. In the ensuing decade that share was cut in half, falling to less than 7% of total expenses in the late 1990's. Based on statistics available from the American Medical Association, there is a clear and consistent decline in medical malpractice costs as a

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<sup>27</sup> Modern Physician, "The List" [www.modernphysician.com](http://www.modernphysician.com).

<sup>28</sup> Chart "Total Medical Board Licensees by Fiscal Year, 1985-2003." Division of Occupational Licensing

<sup>29</sup> *New England Journal of Medicine*, December 12, 2002.

<sup>30</sup> *Medical Misdiagnosis in North Carolina*, Public Citizens Congress Watch, April 2003.

<sup>31</sup> "Medical Malpractice Experience of Physicians: Predictability or Haphazard?" *Journal of the American Medical Association*, 1989--cited in *Medical Misdiagnosis, Id.*

<sup>32</sup> "Hype Outpaces Facts in Malpractice Debate," *USA Today*, March 3, 2003.

percentage of a physician's total expenses.<sup>33</sup>

**Fact:** Medical malpractice cases make up a very small percentages of cases filed in Alaska.

**Fact:** Most medical malpractice verdicts in Alaska are in favor of the defendant doctor.

In conclusion, this is without a doubt the most offensive example of self-interest legislation proposed in the last 25 years in Alaska. It is utterly without any reliable factual support for the premise of its proposed utility. It will only serve to benefit the insurance industry and those physicians who engage in negligent and sometimes reckless misconduct. While there are relatively few cases filed in this state alleging medical malpractice, this legislation will severely impact if not entirely eliminate a substantial portion of legitimate and worthy claims. It will leave horrifically injured patients and their families with a lifetime of misery, pain, and suffering with no remedy.

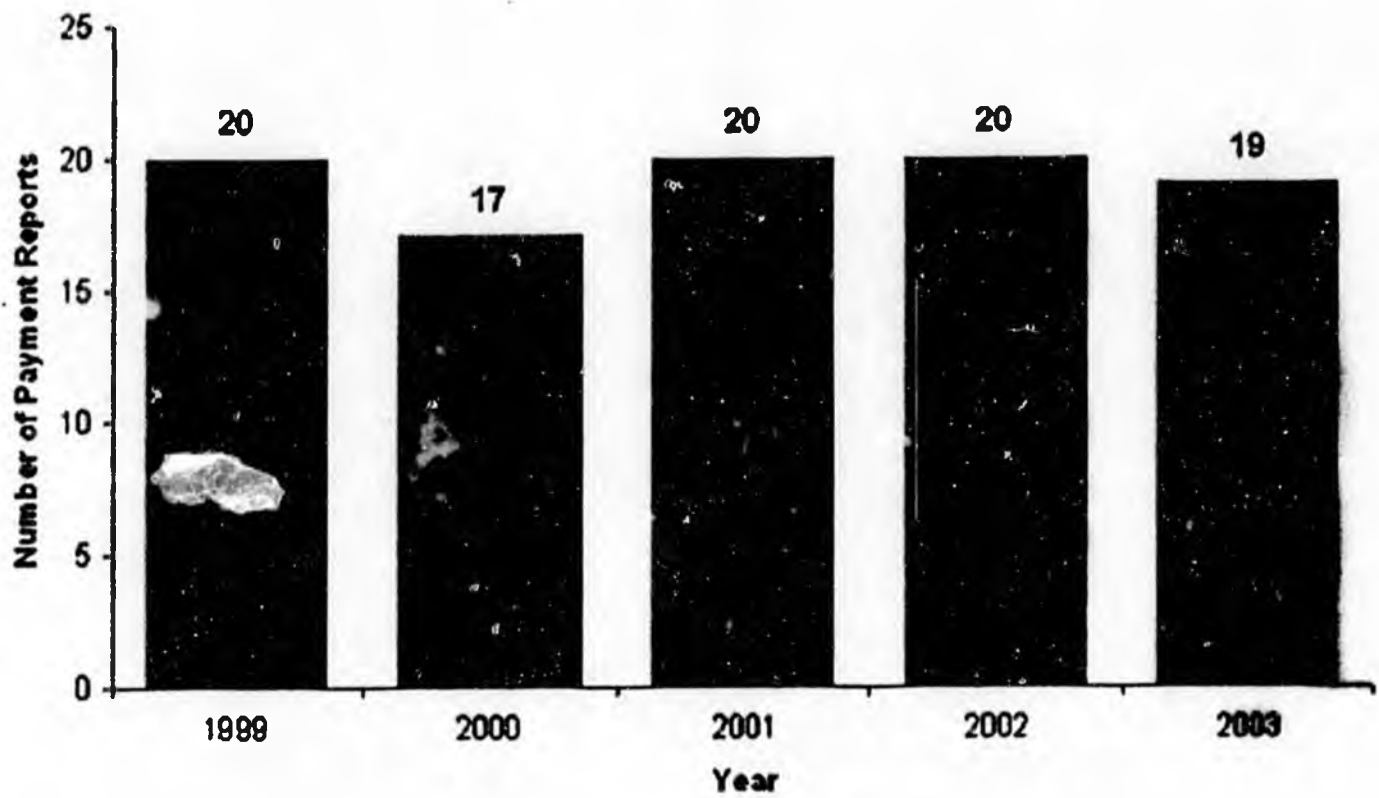
There is a substantial statistical chance that this legislation will affect one or more of you or a member of your family on a very personal basis during your lifetime. When you consider that it is estimated by health care safety monitors in Alaska that over 30 percent of providers don't even wash their hands before examining a patient, the chances of negligently passing on infectious disease is very high.<sup>34</sup> At least consider your safety and the safety of others before passing this grossly unfair legislation.

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<sup>33</sup> American Medical Association, *Socioeconomic Characteristics of Medical Practice*, 2000 as quoted from N.C. trial lawyer expose.

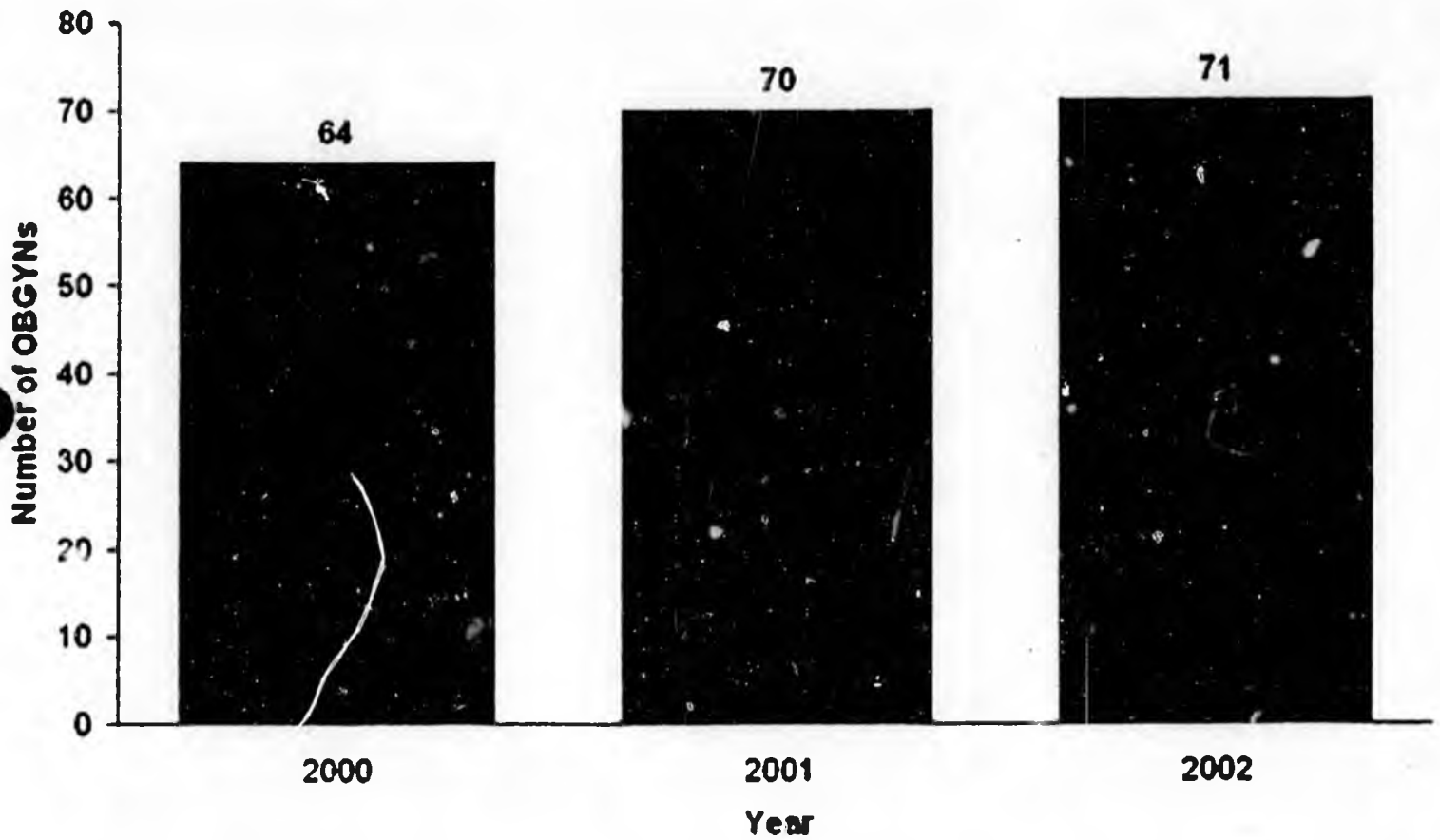
<sup>34</sup> Anchorage Daily News, March 2, 2004, Page D-1 "Patient Power"

## Number of Alaska Medical Malpractice Payments Reported to the National Practitioner Data Bank



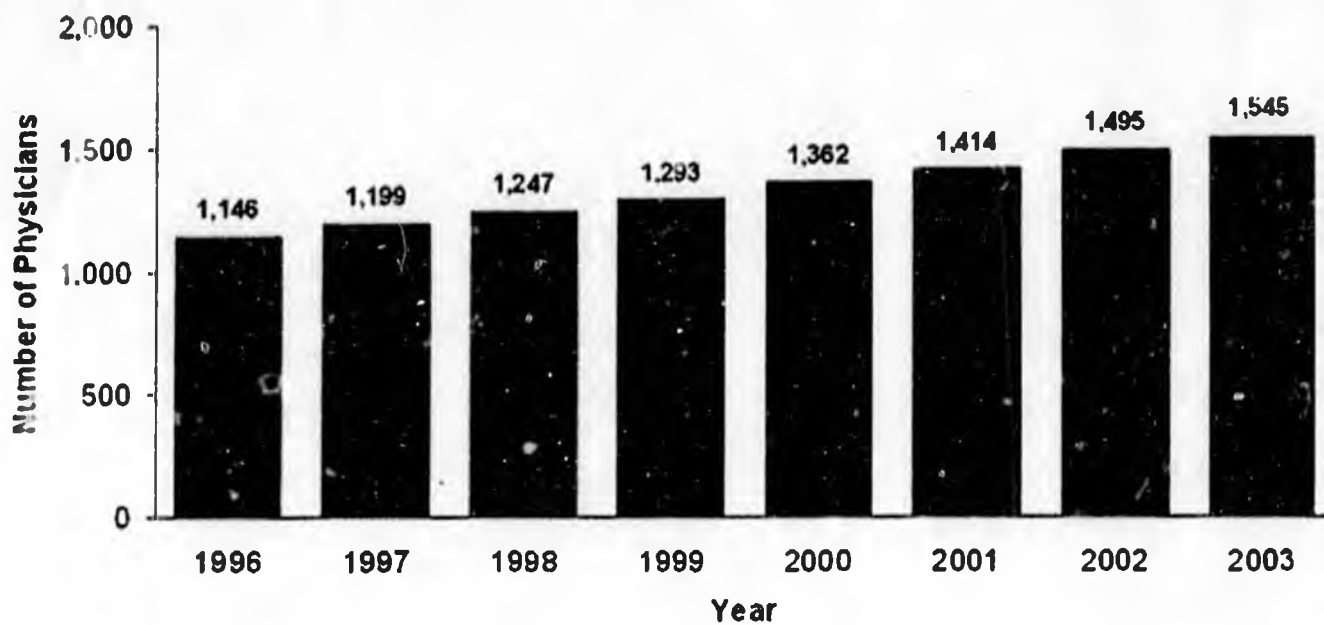
Source: National Practitioner Data Bank Annual Report 2003

## Number of OBGYNs in Alaska



Source: American Medical Association, "Physician Characteristics and Distribution in the U.S." (2003-2004 edition)

### Number of Physicians In Alaska: 1996 to 2003



Source: Physician Characteristics and Distribution in the U.S., Various Editions, American Medical Association



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## MYTHBUSTER!

### Medical Malpractice Mismanagement – Why Some Major Insurers Have Pulled Out of the Market

It's a common theme: insurance companies are abandoning policyholders, leaving states or pulling out of the market altogether because jury verdicts are too high and are costing insurers too much money. The solution, they say, is to limit what judges and juries are allowed to give injured patients.

Yet insurance insiders know that jury verdicts aren't to blame. Rather, the collapse of many medical insurance companies has been directly brought on by the mismanaged underwriting practices of the industry as a whole.

As one insider recently put it, "The [medical malpractice insurance] market is in chaos.... Throughout the 1990s ... insurers were ... driven by a desire to accumulate large amounts of capital with which to turn into investment income. Regardless of the level of ... tort reform, the fact remains that if insurance policies are consistently underpriced, the insurer will lose money."<sup>1</sup> Or as the head of a leading medical malpractice insurer put it, "I don't like to hear insurance-company executives say it's the tort [injury-law] system – it's self-inflicted."<sup>2</sup>

The mismanaged underwriting practices of the following companies, which have left thousands of policyholders high and dry, have wreaked havoc on the nation's health care professionals:

#### ST. PAUL

In 2001, one of the country's largest medical malpractice insurance companies, St. Paul, pulled out of the medical malpractice insurance market, creating significant supply and demand problems in states like Nevada and West Virginia.

According to a June 24, 2002 *Wall Street Journal* front-page investigative article, St. Paul, with 20% share of the national market, pulled out after mismanaging its underwriting and reserves.<sup>3</sup> In the 1980s, the company set aside too much money for malpractice claims. So, using a tricky accounting method, in the 1990s the company "released" \$1.1 billion in reserves, which flowed through its income statements and appeared like big profits. Seeing these profits, many new, smaller carriers came into the market. Everyone started slashing prices to attract customers. From 1995 to 2000, rates fell so low that they became inadequate to cover malpractice claims. Many companies collapsed as a result. St. Paul eventually pulled out, creating problems for doctors in many states.

Even after getting out of the medical malpractice business, St. Paul's problems continued to demonstrate that poor business practices, not medical malpractice insurance, have really been at the heart of the company's downfall. In May 2002, the company was placed on credit watch with negative implications,<sup>4</sup> and in July 2002, St. Paul had its ratings lowered again by Standard and Poor's due to its handling of asbestos and other environmental claims.<sup>5</sup>

In May 2002, the Nevada Attorney General's office filed an administrative complaint against St. Paul in connection with its decision to pull out of the medical malpractice market.<sup>6</sup> The complaint cites St. Paul for alleged unlawful business practices, unauthorized policy modifications, payment of commissions to unlicensed agents, unlawful policy cancellations and nonrenewals and failure to return unearned premium payments.

A group of Charleston surgeons have sued St. Paul for "grossly poor management" that led St. Paul to drop malpractice coverage.<sup>7</sup> The case is still pending.

### PHICO

In November 2001, Pennsylvania regulators filed a civil fraud suit against the Pennsylvania Hospital Insurance Co. (Phico), which filed for bankruptcy in December. The company's board was allegedly misled about the adequacy of Phico's premium rates and funds set aside to pay claims. According to the *Wall Street Journal*, "On the way to becoming the nation's seventh-largest malpractice insurer, the company had suffered mounting losses on policies for medical offices and nursing homes as far away as Miami."<sup>8</sup>

More specifically, the suit accuses Phico officials of "fundamentally unsound" financial practices.<sup>9</sup> Regulators claim that company officials and directors knew "the strategy of offering low prices in highly competitive and unfamiliar markets was fraught with risk" yet "pushed for still higher dividends as the premium volume increased."<sup>10</sup> The state also alleges that Phico's chairwoman and two other directors engaged in self-dealing when they pressed for dividends despite knowing that the company's surplus was "declining drastically and significant strengthening of loss reserves was required."<sup>11</sup>

A Pennsylvania court placed the company into liquidation in February 2002 after an insurance department investigation revealed that the extent of Phico's insolvency made rehabilitation "futile" – as of June 30, 2001, Phico had been under-reserved by more than \$250 million for losses and loss-adjustment expenses.<sup>12</sup>

### RELIANCE

In October 2001, a Pennsylvania court placed Reliance into liquidation "after concluding that it was insolvent by \$1.05 billion as of March 31 and would run out of cash to pay claims before the end of 2001."<sup>13</sup>

In June 2002, the Pennsylvania Insurance Commissioner filed suit against directors of the defunct Reliance Insurance Co., alleging breach of fiduciary duty and negligence. From 1998 through the first half of 2000, the company's directors allowed more than half a billion dollars in dividend and other payments to be distributed to holding companies of which Reliance directors were major shareholders. According to an August 2002 Insurance Information Institute *Insurance Issues*

*Update*, the Commissioner charged the executives with "draining cash from the company to support their 'lavish lifestyle.'" <sup>14</sup>

As reported by the Insurance Information Institute, "[a]ccording to the last publicly available financial data, filed in June 2001, Reliance's liabilities exceeded assets by about \$1.2 billion. Every state has been affected by the insolvency, but those most severely impacted are California, New York and Texas."<sup>15</sup>

#### FRONTIER INSURANCE CO.

In March 2001, the company stopped writing new and renewal business because of mismanaged underwriting and pricing of medical malpractice policies in the early and mid-1990s.<sup>16</sup> Frontier's CEO and president, Harry W. Rhulen said, "The problem really was we lacked the underwriting controls and infrastructure to properly do that type of business."<sup>17</sup>

According to *BestWire* (March 20, 2001),

Rhulen said the company started writing med-mal in New York, where the business did turn a profit. Medical malpractice in New York is different than any other states, because the insurance department sets the rates, Rhulen said. "We weren't competing based on rates, like in any other state," he said. The company believed medical malpractice was a profitable line because of the long-tail nature of the claims.

However, the company expanded the business to competitive medical malpractice states, such as Florida and Texas, where many companies were doing "cash-flow underwriting" – underpricing premiums with the expectation that lost revenue would be made up through investments. "That's where we really got ourselves in trouble," Rhulen said. "We didn't realize companies were intentionally writing at a very significant underwriting loss... we priced to that level, but reserved to our historic profitable levels (from New York business)."

In the early days, as much as 50% of the company's business was medical malpractice. That percentage was later dropped down to as low as 25%. But the losses from the medical malpractice business began to outweigh the rest of the company's business and dragged the bottom line into the red. "When you're writing \$100 million in premium at a 150 combined ratio, you're losing \$50 million a year. To make up that profitability... it's almost impossible," Rhulen said.<sup>18</sup>

In August 2001, Frontier entered voluntary rehabilitation, allowing the New York Insurance Department to take control of the insurer.<sup>19</sup> As of October 2002, the Department was still attempting to rehabilitate the company.<sup>20</sup>

#### MIXX

In May 2002, the seventh-largest medical malpractice insurer in the United States announced that it would shut down operations after losing \$200 million in a little more than a year, leaving 17,000 policyholders in 24 states without replacement coverage.<sup>21</sup> As explained by *Medical Economics* in September 2002, "MIIX achieved much of its out-of-state growth by offering low premiums to gain a share of what had become a highly competitive market. In a rush to sign up new policyholders, MIIX may also have taken on an unhealthy amount of high-risk business."<sup>22</sup>

And according to a June 2, 2002 *New York Times* investigative article, the company "performed well enough through much of the 1980's and early 90's. But by the end of the decade it was in trouble after it embarked on a rapid national expansion and went public at the height of the stock market boom."<sup>23</sup>

## Notes

- <sup>1</sup> Charles Kolodkin, Gallagher Healthcare Insurance Services, "Medical Malpractice Insurance Trends? Chaos!" (September 2001), found at <http://www.irmi.com/expert/articles/kolodkin001.asp>.
- <sup>2</sup> Quotation of Donald J. Zuk, chief executive of Scpie Holdings Inc., a leading malpractice insurer in California, from Christopher Oster and Rachel Zimmerman, "Insurers' Missteps Helped Provoke Malpractice 'Crisis,'" *Wall Street Journal*, June 24, 2002.
- <sup>3</sup> Christopher Oster and Rachel Zimmerman, "Insurers' Missteps Helped Provoke Malpractice 'Crisis,'" *Wall Street Journal*, June 24, 2002.
- <sup>4</sup> "S&P downgrades The St Paul and subsidiaries," *Insurance Day*, July 18, 2002; Sheryl Jean, "St. Paul Cos.' rating falls," *Saint Paul Pioneer Press*, July 17, 2002.
- <sup>5</sup> *Ibid.*
- <sup>6</sup> "Late News," *Business Insurance*, June 3, 2002; "Nevada Complaint Blames St. Paul Cos. For Med-Mal Crisis," *BestWire*, May 31, 2002; Brendan Riley, "Nevada moves against St. Paul Cos. in docs' insurance crisis," *Associated Press*, May 30, 2002.
- <sup>7</sup> Mary Massingale, "Judge delays proceedings in surgeons' lawsuit against insurer," *Associated Press*, August 30, 2002; Lawrence Messina, "West Virginia Judge Refuses to Dismiss Malpractice Insurance Suit," *Charleston Gazette*, July 9, 2002; Lawrence Messina, "Charleston, W. Va. Surgeons Demand Refund from Insurer," *Charleston Gazette*, July 8, 2002; "Surgeons file brief seeking refund from insurer," *Associated Press*, July 8, 2002.
- <sup>8</sup> Christopher Oster and Rachel Zimmerman, "Insurers' Missteps Helped Provoke Malpractice 'Crisis,'" *Wall Street Journal*, June 24, 2002.
- <sup>9</sup> Lawrence Messina, "Medical insurer bankrupt," *Charleston Gazette*, December 20, 2001.
- <sup>10</sup> Tim Darragh, "Past business ties cloud regulators' tasks," *Morning Call*, April 21, 2002.
- <sup>11</sup> *Ibid.*
- <sup>12</sup> David Wenner, "Pennsylvania Medical Malpractice Insurer Declared Insolvent," *Patriot-News*, February 24, 2002; Lori Litchman, "Court Places Insurer Into Liquidation," *Pennsylvania Law Weekly*, February 11, 2002; "Pennsylvania's Phico Placed In Liquidation," *BestWire*, February 4, 2002.
- <sup>13</sup> Dudley Price, "Business failure will cost state a lot," *News and Observer*, June 4, 2002; Lori Litchman, "Court Places Insurer Into Liquidation," *Pennsylvania Law Weekly*, February 11, 2002.
- <sup>14</sup> Ruth Gastel (ed.), "Insolvencies/Guaranty Funds," *III Insurance Issues Update* (August 2002).
- <sup>15</sup> *Ibid.*
- <sup>16</sup> "Rhulen: Frontier Will No Longer Bear Risk, But Legacy Will Live On," *BestWire*, March 20, 2001.
- <sup>17</sup> *Ibid.*
- <sup>18</sup> *Ibid.*
- <sup>19</sup> "Frontier Enters Rehabilitation; Frontier Insurance Co.," *Best's Review*, October 1, 2001; "Updates," *Business Insurance*, September 3, 2001; Joseph P. Fried, "Albany Seizes Insurance Company; Seeking to Rescue It From Insolvency," *New York Times*, August 31, 2001.
- <sup>20</sup> "Court Orders Segregation of Amount Liquidated From Trust Fund," *New York Law Journal*, October 31, 2002.
- <sup>21</sup> Berkeley Rice, "How a malpractice insurer grew too big too fast," *Medical Economics*, September 23, 2002; Susan Warner, "Practicing Without A Net," *New York Times*, June 2, 2002; "Northeast Zone: MedMal Insurer Halting in N.J.," *Insurance Chronicle*, May 13, 2002; "MIIIX Reorganization Spotlights National Med-Mal Woes," *BestWire*, May 10, 2002.
- <sup>22</sup> Berkeley Rice, "How a malpractice insurer grew too big too fast," *Medical Economics*, September 23, 2002.
- <sup>23</sup> Susan Warner, "Practicing Without A Net," *New York Times*, June 2, 2002.

# LEGISLATIVE RESEARCH REPORT

APRIL 19, 2005



REPORT NUMBER 05.256

## PHYSICIANS LICENSED IN ALASKA

PREPARED FOR REPRESENTATIVE LES GARA

BY CHUCK BURNHAM, LEGISLATIVE ANALYST AND  
PATRICIA YOUNG, MANAGER

You asked about physicians licensed in Alaska. Specifically, you wanted to know the number of state-licensed physicians as compared to the population over the last several years. You particularly wished to know if the per capita number of physicians is in a declining trend.

As of this date, 2,480 medical doctors (MD) and doctors of osteopathy (DO) hold active state licenses. According to Leslie Gallant, Executive Administrator, Alaska State Medical Board, however, there is no way to ascertain the exact number of physicians actively practicing in the state at any given time. Of the total number of actively licensed physicians, 1,696 (68%) have Alaska addresses. Ms. Gallant believes that the majority of those practice full time within the state, but notes that some retired doctors maintain active licenses in order, for example, to continue writing prescriptions or to have the option of quickly returning to practice to supplement their incomes.<sup>1</sup>

In regard to the number of actively licensed physicians with addresses outside of Alaska, Ms. Gallant notes that, in addition to retired doctors, this group includes physicians who travel to the state to provide medical care during the absence of resident physicians, physicians who consult with resident doctors, and those who offer specialty clinics or provide periodic medical services within the state.

Table 1 shows the number of active, state-licensed physicians per fiscal year since 1985, as well as the Alaska population and the number of active physicians per 1,000 residents for each year of

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<sup>1</sup> Physicians renew their licenses biennially. The fee for an active license is \$590; the fee for an inactive license is \$250.

that time period. As this table shows, the number of physicians per 1,000 residents has, overall, increased steadily.<sup>2</sup>

**Table 1: Active State Licensed Physicians and Alaska Population, 1985-2004**

Fiscal Year	Population	State Licensed Physicians	State-Licensed Physicians per 1,000 Residents
1985	543,900	815	1.50
1986	550,700	934	1.70
1987	541,300	1,027	1.90
1988	535,000	1,089	2.04
1989	538,900	925	1.72
1990	553,171	1,038	1.88
1991	569,054	1,004	1.76
1992	586,722	1,152	1.96
1993	596,906	1,183	1.98
1994	600,622	1,417	2.36
1995	601,581	1,419	2.36
1996	605,212	1,593	2.63
1997	609,655	1,603	2.63
1998	617,082	1,826	2.96
1999	622,000	1,810	2.91
2000	627,576	2,034	3.24
2001	632,674	1,850	2.92
2002	641,482	2,080	3.24
2003	648,818	2,099	3.24
2004	655,435	2,321	3.54

**Notes:** Numbers of physicians reflect active state-licensed medical doctors and doctors of osteopathy only; doctors of podiatric medicine are not included because their numbers include both active and inactive practitioners; federal physicians are not included because they are not licensed by the State Medical Board.

According to the American Medical Association, as reported in "Federal Physicians in 2001," Health Care State Rankings, 2003 (Morgan Quitno Press, 2003, p. 430), in 2001, Alaska had 147 federal physicians.

Population figures for 2003 and 2004 are provisional.

**Sources:** Alaska State Medical Board, and Alaska Department of Labor and Workforce Development.

<sup>2</sup> These numbers reflect active, state-licensed medical doctors and doctors of osteopathy only. Doctors of podiatric medicine are not included because the numbers of active and inactive practitioners are not separated. We do not include federal physicians; because they are not licensed by the State Medical Board, their annual numbers are far less readily available.

Although only physicians with active licenses are authorized to practice, Ms. Gallant notes that the procedure for activating an inactive license is fairly simple and can be completed quickly. Therefore, in her view, both active and inactive licenses should be considered when stating the total number of state-licensed physicians. To that end, we attach a figure prepared by Ms. Gallant that shows the total number of active and inactive physicians as a component of the total number of primary health care providers in the state for fiscal years 1985-2004.

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I hope you find this information to be useful. Please do not hesitate to contact us if you have questions or need additional information.

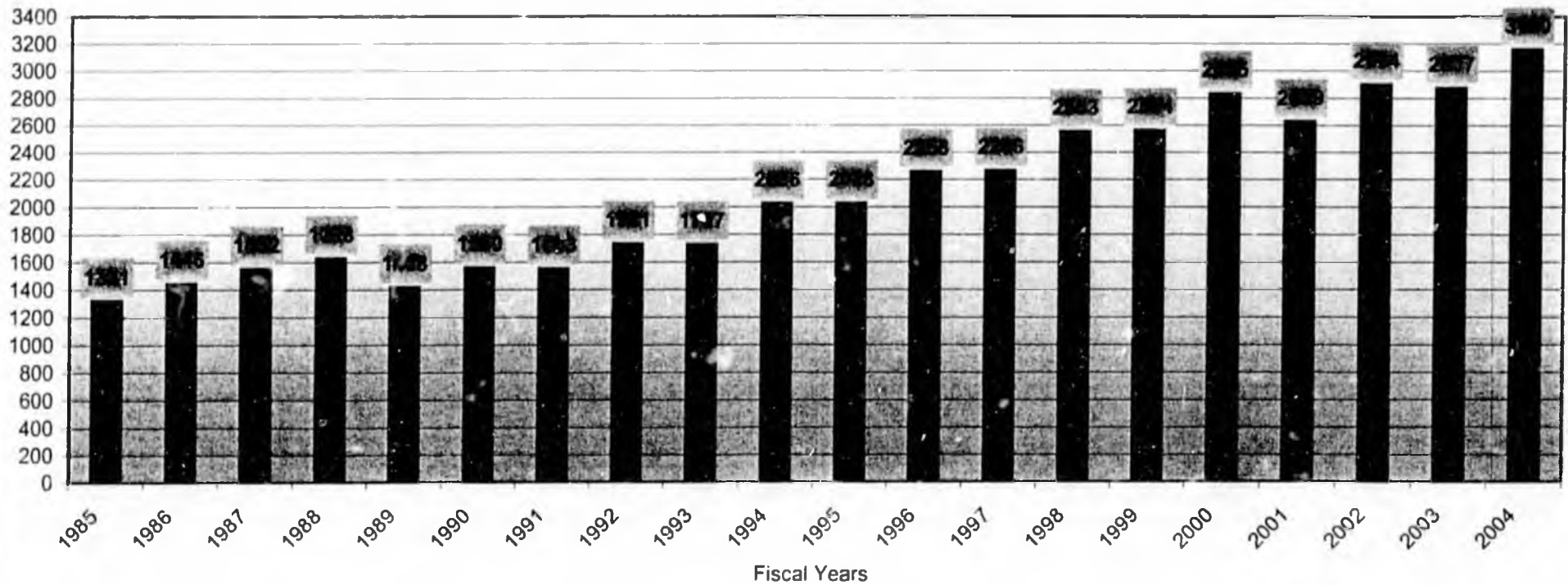
## TOTAL PHYSICIANS, PHYSICIAN ASSISTANTS, AND PARAMEDICS BY FISCAL YEAR

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03	FY 04
MD/DO Active	815	934	1027	1089	925	1038	1004	1152	1183	1417	1419	1593	1603	1826	1810	2034	1850	2080	2099	2321
MD/DO Inactive	317	305	279	322	255	254	273	263	243	243	262	262	277	266	300	289	285	268	249	242
DPM-Ac/Inact	0	11	11	0	0	0	9	11	12	15	13	14	14	15	15	16	16	17	18	17
PA-C-Ac/Inact	111	111	134	126	138	157	159	186	177	216	200	231	221	255	244	266	245	284	266	297
MICP-Active	78	85	101	91	100	111	108	119	112	135	134	158	151	191	195	230	233	255	245	283
<b>TOTAL</b>	<b>1321</b>	<b>1446</b>	<b>1552</b>	<b>1628</b>	<b>1418</b>	<b>1560</b>	<b>1553</b>	<b>1731</b>	<b>1727</b>	<b>2026</b>	<b>2028</b>	<b>2258</b>	<b>2266</b>	<b>2553</b>	<b>2564</b>	<b>2835</b>	<b>2629</b>	<b>2904</b>	<b>2877</b>	<b>3160</b>

% Variance from  
Previous Year

--   +9.4   +7.3   +4.8   -12.9   +10   -.05   +11.4   -.02   +17.3   -   +11.3   .03   +12.6   +.04   +11   -7.8   +10.4   -.09   +9.8

### TOTAL MEDICAL BOARD LICENSEES BY FISCAL YEAR



MD - Medical Doctor (allopathic)

DO - Doctor of Osteopathy

DPM - Doctor of Podiatric Medicine

PA-C - Physician Assistant-Certified

MICP - Mobile Intensive Care  
Paramedic

Source: Leslie Gallant, Alaska State Medical Board



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**DIVISION OF INSURANCE**

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*Frank H. Murkowski, Governor*

**Impact of Tort Reform  
on Availability and Cost of Insurance in Alaska**

Alaska Statute 21.06.087 requires the Alaska Division of Insurance (Division) to evaluate the effects of tort reform legislation that became effective in 1997 on the availability and cost of insurance in Alaska.

In November 2003, the Division updated the survey results from those gathered in 2002. The Division mailed 950 surveys to insurers transacting casualty business in the state requesting information related to the effects of tort reform on the costs and availability of insurance in Alaska. The Division received 159 responses. These responses represent 58% of the 2001 property/casualty Alaska earned premium. The Division requested information related to changes in insurance costs and availability already experienced by insurers, as well as how costs and availability will be affected in the future. A copy of the survey may be found on the Division of Insurance website at <http://www.commerce.state.ak.us/insurance/bulletins/B03-09survey.pdf>

The responses to the survey indicated overwhelmingly that: 1) there has been no change or 2) the insurer has been unable to assess the effect of tort reform on the costs and availability of insurance in Alaska. While most insurers indicated that there has been no change or that they have been unable to assess the effect of tort reform, a few insurers indicated that they have written more business and that rates have gone down or that they anticipate seeing increased availability and lower rates in the future. The following reasons were provided as general comments regarding the responses to the survey.

- Low premium volume makes it difficult to assess the impact
- Some respondents do not currently do business in Alaska
- Some respondents do not offer liability insurance in Alaska
- Still early to accurately judge, but it appears that claim amounts and resulting liability rates have improved

A summary of the answers provided by insurers to the survey follows. The total responses may not add up to the total number of insurers who responded to the survey. Some insurers did not answer all the questions and others gave multiple responses to one question.

Seventy-six respondents did not answer any of the individual questions. The reasons provided were that the insurer is not currently writing business in Alaska, the insurer does not write liability insurance, the insurer is a surplus lines insurer or a reinsurer, or the insurer's book of business is too small to evaluate the impact.

For questions related to the availability of insurance, the survey allowed insurers to select from options that indicated a change in availability, no change in availability, or that the insurer is unable to evaluate how tort reform affects the availability of insurance. If the availability of insurance is affected by tort reform, the effect could be demonstrated by changes in the number of policies an insurer is willing to write or by changes in the amount of premium collected by the