Workgroup on Presumptive Sentencing
ALASKA CRIMINAL JUSTICE COMMISSION
May 13, 2016, 1-4:00 PM at the Brady Building with Teleconference
Atwood Building, 550 W. 7th Avenue, Rooms 102 and 104

Commissioners Present: Greg Razo, Alex Bryner, Quinlan Steiner, Trevor Stephens,
Commissioners Absent: Brenda Stanfill
Participants: Rob Henderson, Taylor Winston, Mike Schwaiger
Staff: Mary Geddes, Susie Dosik, Teri Carns, Giulia Kaufman, Susanne DiPietro, Brian Brossmer

Meeting materials provided in advance of the meeting:

Notes for Three Judge Panel Discussion
Teri Carns- Historical background of presumptive sentencing in Alaska; current questions
Susie Dosik - Presumptive Sentencing and Criminal Laws in Alaska
Background for Presumptive Sentencing Workgroup (Sentencing Topics and Comments)
AJC Executive Summary for Felony Sentencing Study

Dates set: This group will next meet on June 9 from 9-11 AM, and June 24, from 9-11 AM in the AG's offices.

AGREEMENTS FROM THIS MEETING

Keeping in mind that this group has only two 2-hour more meetings in which to finish its work, the Workgroup resolved to review any proposals :

- To reform the three judge panel statutes:
  - Trevor Stephens committed himself to drafting specific proposals to 'clean up' the statutory language.
  - Other members who had concerns and ideas (see below) should do the same and provide them ASAP for circulation:
    - E.g., changing 12.55.155, so that the list of aggravators and mitigators is a non-exclusive list of factors, which would eliminate the need for a three judge panel and additional hearing
    - E.g. streamlining the process to avoid unnecessary delays and hearings
    - E.g. broadening the role of the 3JP, e.g. to include relief from mand.-minimums and statutory exclusions from SIS
    - E.g. if sentencing judges could assume what has been 3JP's function, how to provide for appellate review of those functions
    -
- For new mitigators
  - Rob Henderson volunteered to draft on an acceptance of responsibility mitigator
  - Quinlan Steiner suggested that a broader treatment related mitigator Is needed.

Introduction: The meeting began at 1:00 PM. Mary Geddes reviewed the concept for the 2016 ACJC workgroups: ideally, a two-month intensive effort on a specific subject, culminating in a report to the full Commission with any pertinent recommendations. The plan for this workgroup is to fulfill the legislative mandate to review Alaska's sentencing laws and practices, including presumptive sentencing.

Teri Carns identified the materials provided for the meeting. She summarized her own memo, which provided the background on the development of Alaska's felony sentencing structure. Called a "presumptive sentencing" structure, Alaska has a unique structure, one that is actually a hybrid of: presumptive sentencing ranges for most felonies; minimum-mandatories for murder and kidnapping; and felony status for recidivist or repeat misdemeanor conduct. Originally the structure included more indeterminate sentencing, e.g. for B and C felony offenders; this feature went away because judicial discretion fell into disfavor. It was perceived that some disparities were attributed to looser sentencing structures; that and a 'tough on crime' climate led to more rigid sentencing structures. Beginning in the 00's, and as a result of the Supreme Court decisions in Blakely/Booker cases, there has been interest in doing away with minimum-mandatories (as they have been associated with racial disparities) and a reversion back to more advisory structures with guidelines used to provide boundaries for the exercise of discretion.

Susanne DiPietro explained that the various papers circulated by staff were intended to get the proverbial ball rolling in terms of identifying presumptive and other sentencing issues. Three ideas are suggested for purposes of today's discussion. Idea #1 Just as the federal system has done, convert the statutorily-mandated sentencing range(s) to an advisory sentencing range(s). This change would make the three-panel unnecessary. #2 Make changes to the language of the three judge panel statute, so as to eliminate the confusion of when it is necessary. #3 Consider adding a mitigating factor for acceptance of responsibility, perhaps a tiered one depending on when a plea was entered.

Advisory Systems: There were questions about how such a system might work, and for the sake of contrast how the federal system works. [i]

- What would be the quantum of evidence for going outside ranges?
- Would written findings be required?
- What type of appellate review would be allowed? [ii]
- Would an advisory sentencing structure make the three-judge panel unnecessary? (Likely yes)
- Would there be a spike in trials or appeals as a result of making such a change?

Teri Carns noted that in the past structural changes often lead to a 'spike' in the numbers but it seems only temporary. Local trial policies and personalities are often more important that statewide policy.

Commissioner Bryner noted that Alaska is the only state that provides for the review of sentences for excessiveness.

Mike Schwaiger asked if it isn't better to have a system that gives judges more discretion because those decisions are public and reviewable, compared to prosecutor's discretionary calls in the plea bargaining process?

Taylor Winston stated that, with respect to a proposal to increase judicial discretion, she would disagree with an increased amount of judicial discretion because there is very little information about judges out there. There is no public review of judges because there is no serious courtwatch program. On the other

hand there is a lot of public review of prosecutors' discretion. DiPietro said she disagreed: police officers, jurors, social workers, attorneys and court personnel are all surveyed and weigh in on retention in anonymous polling by the Judicial Council. It is the most substantive public review process of judges in the country; there is no comparable process for prosecutors.

Commissioner Razo stated, that given the very profound changes just made through SB91, recommending a structural shift from a statutory to advisory sentencing model seems untimely. He would be unwilling to recommend a fundamental shift in the sentencing system until he sees how the planned changes under SB91 are working. Commissioners Bryner also agreed it would be premature. Razo also stated that this would not preclude taking action with respect to the immediate three-judge panel question. Winston and Rob Henderson agreed with both observations. Commissioner Steiner also agreed, but only because he felt there was not enough time for the Commission to fully vet a change like that (from statutory to advisory sentencing ranges) before November. Steiner also expressed interest in having the group discuss other possible mitigators.

Three-Judge Panel: It was noted that the three-judge panel has a light load, only three cases a year. Commissioner Stephens said he thinks lawyers and judges fail to identify the panel as a resource.

Bryner stated that the lack of business for the three judge panel means that the lawyers find that that part of the system is too cumbersome and that they (their clients) would rather plea bargain. Mike Schwaiger indicated that that he thinks the low usage is due to sentencing bargaining being the prevailing practice. Steiner wondered if the low use is probably more attributable to the plea/trial split, and asked if all panel cases are trial cases. BTW, there are only 300 felony trial cases a year in Alaska.

Henderson asked how many times is the panel requested? How often is the panel referral denied? What would be its appropriate use? Bryner asked how much does the three judge panel cost? How much would we save if we got rid of it? Stephens said the court system doesn't currently have information as to how many times referral to the three judge panel is denied. According to Stephens, Susan Faulk is trying to capture the number of denials. He would estimate that the panel currently costs the court system approximately $15,000 a year. He doesn't know the attorney costs involved. Geddes noted that the more significant 'cost' may be nontangible, in terms of the delays involved.

Henderson stated that the low caseload (3 a year) could arguably reflect that the panel does serve the intended purpose, i.e. being only a safety valve for the extraordinary case. If the problem is a failing on the part of lawyers and judges to identify the panel as a resource, why isn't this simply a training issue?

Stephens agreed it is a training issue, that some training is in the works, but that the statute needs to be cleaned up. He thinks the three-judge panel really should have been developing (and publishing) a body of law, and that the panel really dropped the ball on this. The panel is starting to do this again. Nevertheless, at a minimum, the statutory language needs to be cleaned up.

Geddes asked if all parties were well served by a system that involves three sentencing hearings, and the delays attendant to that.

Stephens noted that the statute could be re-written so as to more effectively avoid delay. Stephens noted that he would be happy if the three-judge panel not merely weighed in on a mitigating or aggravating circumstance but proceeded to sentencing, in the interest of reducing the number of sentencing-related hearings. Participants pointed out that there could be instances where a trial judge would have superior

knowledge of the case, and changing the decision-maker would not be desirable. Henderson suggested that the law could be changed so as to allow the panel to sentence, if the parties agreed. Stephens was asked whether the panel's decision on whether to accept a case referral was a hearing on the record or just involved a document review. He explained that the decision to accept or not accept involves a full hearing by the panel.

Schwaiger wonders whether the use of the three judge panel could be statutorily broadened to include other contexts where there is manifest injustice, e.g. the use of mandatory minimums and SIS ineligibility. He also noted that the three-judge panel does serve an important function because there is no other route for clemency and the rate of appellate review doesn't always afford meaningful relief. DiPietro asked if there was opportunity to expand or change the role of the three-judge panel. Henderson suggested that the state might be going more often to the three-judge panel in the near future to ask for limitation of the new varieties of parole for a defendant, as permitted in SB91.

Winston noted that, as delays are hard on victims, a change which results in a greater usage of the three judge panel means more delays and costs. It also reduces truth in sentencing. Carns noted that all systems that tried truth in sentencing are reverting to greater use of judicial discretion.

Bryner asked whether the statute (12.55.155) couldn't be changed to a non-exclusive list of mitigating factors, which would eliminate the need for a three judge panel and additional hearings. The sentencing court should be allowed to consider the totality of circumstances. The standard of review for mitigating and aggravating factors could require clear and convincing evidence.

DiPietro asked why shouldn't the sentencing judge make the critical call, e.g. whether circumstances exist such that imposing a presumptive sentence would result in manifest injustice. Henderson noted that under state law the State could petition for review of the three judge panel decision as an interlocutory matter. The problem with cutting out the three judge panel is that the statute as presently written governing appeals does not allow the State a right of appeal for a sentence after the sentence is imposed, only to seek disapproval. Steiner suggested that there could be statutory fixes for this, such as allowing an appeal if the sentence is below a floor.

On the to-do list: Commissioner Steiner was asked to forward any ideas for reform of the three-judge panel. Stephens stated that he will also draft statutory language.

The group reviewed the list of other statutory changes which had been suggested.

Acceptance of responsibility mitigator: Henderson said that he was struck by the AJC sentencing study finding that there were so many sentences below the presumptive sentencing ranges. Rather than recommending any further changes to the ranges, he suggested there could be a new mitigator for acceptance of responsibility, especially in the Rule 11 context, when there are no other statutory mitigators. This could also be of use for open sentencing. It could allow the parties to reach a fair result on the charge, rather than resort to a charge bargain, e.g. using an attempt or lesser included offense. It could help resolve case/trial backlog if, as the feds do it, the mitigator was tied to the "timeliness" of plea.

Bryner asked if the mitigator would be available for a Cooksey(/Alford) plea,[iii] a circumstance in which the defendant seeks to plead no contest, rather than guilty. Steiner also wondered about those defendants who might agree that they committed an offense without agreeing that they deserve the presumptive sentence.

Geddes noted that the federal guidelines require a guilty plea, not a no contest plea, for the downwards adjustment of "acceptance of responsibility." The Guideline application notes identify ways that acceptance is manifested, including cooperation with the presentence investigation/report. The maximum three level benefit requires the government's agreement that the plea was timely so as to avoid preparation for trial. As there are rarely Alford pleas in the federal system, a defendant's statements concerning the offense are 'curated' by the attorney and often offered in writing so that the statement is sure to satisfy the criteria for "acceptance." Mitigation of the sentence can be denied if the admission of guilt is at equivocal. The federal system has a two-level tier, allowing for the maximum benefit ("super-acceptance') if the case resolution is early enough to avoid preparation for trial.

Geddes noted that the federal guidelines require a guilty plea, not a no contest plea, for the downwards adjustment of "acceptance of responsibility." The Guideline application notes identify ways that acceptance is manifested, including cooperation with the presentence investigation/report. As there are rarely Alford pleas in the federal system, a defendant's statements concerning the offense may be 'curated' by the attorney and offered in writing so that the statement is sure to satisfy the criteria for "acceptance." Mitigation of the sentence can be denied if the admission of guilt is at equivocal. The federal system has a two-level tier, allowing for the maximum benefit ("super-acceptance') if the case resolution is early enough to avoid preparation for trial. The maximum three level benefit requires the government's agreement. [iv]

Bryner suggested that such a sentence adjustment could be coercive, as it might be a trial penalty. Steiner indicated that when trial delays are due to late discovery, its not fair to penalize a defendant, and its difficult to tell your client to plead before trial when you continue to receive discovery right up to the time of trial.

DiPietro asked the group is there was interest in crafting a mitigator: perhaps one in the Rule 11 context and one outside of it. Winston agrees with the idea of allowing a mitigator for early or timely pleas. Henderson will draft a proposed mitigator for group review.

Other Ideas:

Treatment mitigator: It was also suggested that the group should review the current mitigator that potentially credits the defendant's participation in the limited Title 28 therapeutic court context. Steiner noted that this mitigator covers a really small number of people who are making gains in treatment and how only persons approved by the State can participate in therapeutic court. Steiner suggested using some of the SB91 language found in Claman's amendment for "evidence based" treatment to draft a broader mitigator.

Motions to Modify: Steiner indicated he is also interested in expanding motions to modify as a way to reduce the number of PCRs. This arises when people are directed to do treatment but accomplish it outside of the 6 months allowed for a motion to modify. Henderson asked if we could wait and see how the changes in SB91 (requiring shorter probation terms, early release) impacts caseload first.

Restitution: Winston asked about the payment of restitution. SB91 directs the Commission to work on this issue. DiPietro said the Commission will undertake this as a discrete effort. She also noted that if the victims have opted out of state collection then we don't have the data on whether they have gotten relief. Winston noted that we could at least look at that data (DOL Collections). She perceives that there is no

enforcement of non-payment of restitution. Henderson noted how restitution is incentivized in white collar cases. Steiner asked if the courts can compel defendants to give financial information. It was noted that they have to do that for indigent counsel appointment. Geddes noted that SB91 requires probation officers to themselves create and institute a restitution payment schedule for any defendant who has a restitution obligation.

Flat-timers: There was a brief discussion of flat-timers. Teri and Giulia are in the process of clarifying how many people get flat time sentences, with no suspended time and therefore no probation. Many of these offenders are higher level offenders; why is that? Henderson explained that, in the view of the prosecutors, when defendants who have previously failed on supervision, there is no reason to impose it again. Geddes noted that the research indicates it is exactly those individuals who need intensive supervision and that probation does reduce recidivism. Geddes also noted that the "probation as a contract" idea originates only in caselaw, and that premise could be rejected by the legislature. Probation is a type of sentence which can be more effective than incarceration. Defendants should not be able to opt out and choose a different sentence. At the next meeting, Teri and Giulia will report on their findings.

Public Comment: As It was the close of the meeting, a call for public comment was made. None was offered at this time.

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[i] In United States v. Booker, 543 U.S. 220 (2005), the Supreme Court ruled that its sentencing guidelines were advisory not mandatory. The Guidelines "should be the starting point and the initial benchmark," but a district court may impose a sentence within statutory limits based on appropriate consideration of all of the § 3553(a) factors. The sentence should be "sufficient, but not greater than necessary" to satisfy statutory sentencing purposes. Sentences are subject to appellate review for "reasonableness," Gall v. United States, 552 U.S. 38, 49–51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). "Reasonableness" review simply asks if whether the trial court abused its discretion. See Booker, 543 U.S., at 260–262. Procedural error is another basis for sentence review. For example, a failure to calculate the correct Guidelines range constitutes procedural error, as does treating the Guidelines as mandatory. Gall, 552 U.S., at 51, 128 S.Ct. 586.

[ii] Alaska Statute § 12.55.120 ("Appeal of sentence") provides that, with respect to felony sentences,

> (a) A sentence of imprisonment lawfully imposed by the superior court for a term or for aggregate terms exceeding two years of unsuspended incarceration for a felony offense or exceeding 120 days for a misdemeanor offense may be appealed to the court of appeals by the defendant on the ground that the sentence is excessive, unless the sentence was imposed in accordance with a plea agreement….
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> (b) A sentence of imprisonment lawfully imposed by the superior court may be appealed to the court of appeals by the state on the ground that the sentence is too lenient; however, when a sentence is appealed by the state and the defendant has not appealed the sentence, the court is not authorized to increase the sentence but may express its approval or disapproval of the sentence and its reasons in a written opinion.
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> …
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> (f) The victim of the crime for which a defendant has been convicted and sentenced may file a petition for review in an appellate court of a sentence that is below the sentencing range for the crime.

The comparable federal provision, Section 3742 of Title 18 of the United States Code, for review of a sentence states:

> (a) Appeal by a defendant.--A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--
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> (1) was imposed in violation of law;
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> (2) was imposed as a result of an incorrect application of the sentencing guidelines; or
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> (3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) Appeal by the Government.--The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

[iii] The term "*Cooksey* plea" refers to the circumstance in which a defendant pleads no contest, rather than guilty. This is a very frequent plea in Alaska state courts (and very rare now in the federal courts). In *North Carolina v. Alford*, 400 U.S. 25, 35 n.8, 91 S.Ct. 160, 166, 27 L.Ed.2d 162, 170 n.8 (1970), the United States Supreme Court stated: "The plea of nolo contendere has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency." *Miller v. State*, 617 P.2d 516 (Alaska 1080)(holding that ot iwas error to require defendant to show that there was a reasonable basis for his plea of no contest).

[iv] United States Sentencing Guideline § 3E1.1 Acceptance of Responsibility reads:

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level.

Application Notes:

1. In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:

(A) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility;

(B) voluntary termination or withdrawal from criminal conduct or associations;

(C) voluntary payment of restitution prior to adjudication of guilt;

(D) voluntary surrender to authorities promptly after commission of the offense;

(E) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;

(F) voluntary resignation from the office or position held during the commission of the offense;

(G) post-offense rehabilitative efforts (e.g., counseling or drug treatment); and

(H) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

2. This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the

applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.

3. Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (see Application Note 1(A)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.

4. Conduct resulting in an enhancement under §3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply.

5. The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.

6. Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease in offense level for a defendant at offense level 16 or greater prior to the operation of subsection (a) who both qualifies for a decrease under subsection (a) and who has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps set forth in subsection (b). The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under subsection (b) will occur particularly early in the case. For example, to qualify under subsection (b), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.

Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing. See section 401(g)(2)(B) of Public Law 108–21. The government should not withhold such a motion based on interests not identified in §3E1.1, such as whether the defendant agrees to waive his or her right to appeal.

If the government files such a motion, and the court in deciding whether to grant the motion also determines that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, the court should grant the motion.

M E M O R A N D U M

TO: Presumptive Sentencing Subcommittee, ACJC

FROM: Teri Carns

DATE: May 6, 2016

RE: Historical background of presumptive sentencing in Alaska; current questions

- Until the late eighteenth century in the United States, there was no separate sentencing phase for felonies.[1] Sentencing was essentially a ministerial act for the trial judge who imposed the sentence of fines, corporal punishment, or death prescribed by statutes or common law. Points of discretion included:

- "Juries could factor sentencing consequences into their verdicts;
- Judges could recommend that the executive grant clemency (from the fixed sentences prescribed by statute);
- Judges could impose alternative punishments such as banishment to a penal colony or branding;
- Judges had wide discretion in misdemeanor cases."

Another source[2] notes that juries in the 1700s had almost prosecutorial powers, in the sense that they could choose to convict on a lesser charge, even if that charge had not been alleged. They could, for example, decide that a charge that carried the death penalty (and many did) was too harsh, and convict the defendant of a lesser offense that called for corporal

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[1] Berman, et al, "Making Sentencing Sensible," *Ohio State Journal of Criminal Law*, Vol 4:37, 2006, pp. 60-61.

[2] Gertner, Nancy, "A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right?" *The Journal of Criminal Law & Criminology*, Vol. 100, No. 3, 2010, pp. 693 - 694. Gertner notes that not all sources agree about the role of juries, but the general parameters are well documented.

punishment or other penalties. The punishments specified by law for each offense included death, corporal punishment such as whipping or dunking, the stocks, or banishment.

In this context, prison was an institution reserved for political or religious transgressions, pretrial detention, or debt, and was never routinely used as punishment for or response to crime. Change began in the late 1700s, partly as a result of European influences on Pennsylvania Quaker law and practices,[3] and the widening influence of French thought throughout the new country. The primary components of the reforms focused on the rehabilitation of the offender. In practical terms, this included a classification system to separate more serious offenders from less serious offenders,[4] hard labor for those who could do it, and isolation in cells at night or (for some) at all times. Most communities already had jails for pre-trial detention and these were used, or modified as needed to hold people serving post-conviction sentences.[5]

From the early 19th century, to the mid-20th century, judges had broad discretion to decide the sentence of rehabilitation, with the role of the jury becoming limited to fact-finding.[6] There was little to no concern about the offenders' due process rights at the sentencing stage.[7] The new system of indeterminate sentencing with ranges set by legislatures, with very limited sentencing review, meant that judges' discretion operated with few boundaries or challenges. In a sense, though, the judges' choices were more limited, because they now involved mainly a choice of incarceration or no incarceration. Once the offender was incarcerated, the prisons and parole boards exercised even more discretion than the judges had. Judges were given very little training or guidance in how to decide what would be most therapeutic for an individual offender, nor did they have many options for treatments or alternative sanctions.[8]

Alaska's sentencing system in 1975

In 1975 when Alaska's Legislature began work on a new criminal code and sentencing structure, the state's sentencing system followed the model of most other states.[9] The presumption, in all sentencing systems in the United States for the past 200 years, has been that incarceration was the measure by which sentences were calculated. In Alaska, offenses were

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[3] "Historical Origin of the Prison System in America," Harry Elmer Barnes, 1921, *Journal of Criminal Law and Criminology*,
Vol 2, Issue 1. http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1772&context=jclc

[4] Similar to the classification systems used for offenders today, in Alaska and elsewhere.

[5] *Id*., page 20. The solitary confinement part of the program was expensive, and not implemented in most places, which made the classification part of the plan also ineffective. To the extent that the solitary confinement part of the project was carried out, it was considered a "hopeless failure [that] led to a marked prevalence of sickness and insanity on the part of the convicts in solitary confinement." The solitary confinement was replaced, for a while, by a system that required solitary confinement every night, and complete silence 24 hours a day.

[6] Barnes, *supra*, note 4.

[7] Barnes, *supra*, note 4.

[8] Barnes, *supra*, note 4.

[9] B. Cutler, *Sentencing in Alaska*. This was the first report about Alaska's sentencing practices. http://www.ajc.state.ak.us/sites/default/files/imported/reports/sent275.pdf

associated with sentence ranges measured in years of incarceration that provided very broad limits to judicial discretion.[10] Alaskan judges sentenced an offender to a specific term of years, or to no incarceration. Once an Alaskan offender was sentenced to incarceration, the state's parole board had wide discretion in deciding release from incarceration.[11]

In 1975, some offenses did have mandatory minimum sentences, especially heroin sales.[12] Except for the offenses with mandatory minimums, judges were allowed to suspend any portion of the sentences imposed.[13] Judges were allowed to suspend imposition or execution of sentences, and deferred prosecution was an option at the prosecutor's discretion and with judicial concurrence.

In the Judicial Council's 1975 report, *Sentencing in Alaska*, the system was characterized as in need of reform.[14] At that time, the legislature had begun to consider changes to reduce the inconsistencies in sentencing that resulted from:

- "The breadth and length of sentences authorized to the discretion of judges (many offenses carried a range of one to ten, fifteen, or twenty years); and

- Overlapping categories of crimes that could allow prosecutors to choose crimes with different sentence ranges despite similar circumstances (one example was that the penalty for concealing stolen property greatly exceeded the penalty for stealing the same property)."[15]

The legislature asked the Judicial Council to review sentences imposed between 1974 and 1976,[16] and to recommend a sentencing system to replace indeterminate sentencing. The

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[10] The sentence range for 1st degree murder was 20 years to life (although the 20 years was not a mandatory minimum), the same as it is in 2016. Manslaughter and negligent homicide were categorized together at 1- 20 years. Robbery was 1 - 15, and Larceny from a Person was 1 - 5. Burglary 1 was 1 - 15 or 1 - 20, depending on the circumstances, and Burglary 2 was 1 - 5. Larceny, Embezzlement, and various fraud sentences mostly ranged from 1 - 10 years. *See also*, S. DiPietro, "The Development of Appellate Sentencing Law in Alaska, *Alaska Law Review*, 1991."Trial judges had discretion to choose both the type of sentence and, within extremely broad statutory minimums and maximums, the length of the sentence; but the statutes were silent as to what factors the judge should consider in pronouncing sentence." p. 268.

[11] *Sentencing in Alaska*, *supra* note 9, p. 27. A 1974 law required that the offender serve at least one-third of the sentence before begin considered for parole.

[12] Heroin sale had a minimum of 2 years for the first offense, 10 years for the second offense, and 20 years for the third offense. Sale to a minor (under 21) had a ten-year minimum for the first offense, 15 years for the second, and life for the third.

[13] Clarke, et al, *Alaska Felony Sentencing Patterns, 1977,* p.1, note 1.

[14] *Sentencing in Alaska*, *supra* note 9, http://www.ajc.state.ak.us/sites/default/files/imported/reports/sent275.pdf, page 20.

[15] *Id.*, *Sentencing in Alaska*.

[16] *Alaska Felony Sentencing Patterns: 1977*, *supra*, note 13, page v - vi. In this study, no disparities were found for Alaska Native offenders. The disparities shown were for African American offenders in property and drug offenses.

Council's sentencing study found that the identity of the sentencing judge was the single most important factor in predicting the sentence imposed. The Council also found that an offender's ethnicity was associated with longer sentences for some types of crime, all other factors being equal. After considering sentencing systems in use or proposed at the time – indeterminate sentencing, flat-time, mandatory minimums, and presumptive sentencing – the Council recommended that the legislature adopt a mix of presumptive sentencing for more serious offenders and offenses, and retain indeterminate sentencing for first felony offenders in less serious felony cases.[17]

The Alaska Criminal Code Commission's reasoning for adopting the Judicial Council proposal of presumptive sentencing was that "guided discretion was divided between the legislature, the judiciary, and the parole board."[18] The "presumptive" sentences for offenders were set to the amount that "the average defendant convicted of an offense should be sentenced to, absent the presence of legislatively prescribed factors in aggravation or mitigation or extraordinary circumstances."[19] The indeterminate sentences for first offenders convicted of Class B or Class C felonies were chosen by judges and fit within broad sentencing ranges, similar to those used in the past.

In the years between about 1970 and 2000, many other states considered changes to their indeterminate sentencing systems. A 1995 report described the sentencing systems in place in all fifty states and the District of Columbia.[20] At that time, twenty states used determinate sentencing systems,[21] twenty-nine states used indeterminate sentencing,[22] and sixteen states used sentencing guidelines for some or all of their sentencing decisions. All of the states had mandatory minimums for some offenses.

In other Council sentencing studies during the 1970s, disparities were also found for Native offenders in some types of crime. *Interim Report of the Alaska Judicial Council on Findings of Apparent Racial Disparity in Sentencing,* 1979, http://www.ajc.state.ak.us/reports/sent79.pdf, page 1.

[17] Alaska Sentencing Commission, *1990 Annual Report to the Governor and the Alaska Legislature*, p. 11. Mandatory minimums for certain very serious offenses such as Kidnapping and Murders were part of the final sentencing structure chosen.

[18] *Id.*, page 11.

[19] Barry Stern, "Presumptive Sentencing in Alaska," *Alaska Law Review*, 1985. Vol 2:227, page 232, quoting from the *Alaska Senate Commentary . . .on the Alaska Revised Criminal Code*, 1978.

[20] https://www.ncjrs.gov/pdffiles/strsent.pdf, *National Assessment of Structured Sentencing*, pp. 20 - 21.

[21] Judges imposed a specific term of years that could be reduced only by good time or earned credits; no parole, and guidelines or other structures for guidance.

[22] Judges imposed a sentence of a range of years, with parole boards deciding how much time an offender actually served. Alaska and other states were classified as indeterminate sentencing states under these definitions despite the presence of presumptive sentencing for a variety of offenders because some sentences remained indeterminate, and parole boards still played role for some offenders.

Alaska sentencing from 1980 to 2016

The history of presumptive sentencing in Alaska has been summarized most recently in the Judicial Council's report, Alaska Felony Sentencing, 2012 - 2013.[23] In brief, the presumptive sentencing scheme that took effect in 1980 applied to all Unclassified Sexual felonies, all Class A convictions, and all repeat felony Class B and C offenders.[24] The unclassified offenses of Murder 1, Murder 2, Kidnapping, and Misconduct Involving a Controlled Substance 1 had mandatory minimums; the presumptive scheme did not apply. First felony B and C offenders were sentenced to a specific term within a minimum-maximum range set by statute, and were eligible for discretionary parole after serving at least one-third of their sentences. Within a few years, the Court of Appeals developed a body of law establishing benchmarks for sentencing the first felony B and C offenders.[25]

Following the *Blakely v. Washington* decision by the U. S. Supreme Court in 2004, Alaska's legislature adopted a system of presumptive ranges rather than a fixed presumptive term.[26] The ranges typically started at the earlier fixed term and were extended to a few years more than that. Aggravators that would take the sentence imposed beyond the top end of the new ranges were governed by *Blakely* requirements, meaning a jury decision on the aggravating factor(s) in many cases. The legislature also extended the presumptive ranges to all first B and C felony offenders, bringing all but a handful of Unclassified offenses into the presumptive sentencing structure. The decision to make almost all felony sentences presumptive greatly limited the use of discretionary parole. In 2006, the legislature revisited the Sexual offense charging and sentencing structure, and substantially increased penalties for all Sexual offenses.[27]

In 2016, Alaska operates under this system of presumptive ranges for all but the most serious felonies, with some mandatory minimums for specific offenses, and parole available under certain circumstances. About seventeen other states and the federal government use sentencing guidelines systems – many of which closely resemble Alaska's presumptive sentencing system but are more advisory or voluntary. The remaining states rely on combinations of mandatory minimum sentences, determinate sentences, and indeterminate sentences.

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[23] *Alaska Felony Sentencing Patterns: 2012 – 2013*, available from the Judicial Council, Part 2 of the report, and Appendix B describe sentencing statutes, as well as offense descriptions that are tied to the implementation of the sentencing scheme. Available from Judicial Council.

[24] Drug offenses were sentenced under guidelines established by a Supreme Court Committee between 1980 and 1982; effective January 1, 1982, they also had presumptive sentences for all Class A offenses and for repeat felony offender Class B and C offenses. In 1983, the legislature re-classified most sexual offenses, and raised penalties for them substantially.

[25] S. DiPietro, "The Development of Appellate Sentencing Law in Alaska, *Alaska Law Review*, 1991, *supra* note 10, pp. 280, *et seq.*

[26] T. W. Carns, "Alaska's Responses to the Blakely Case," *Alaska Law Review*, 2007, Vol 24:1, pp. 7 – 9.

[27] *Alaska Felony Sentencing Patterns: 2012 – 2013*, *supra* note 23, page 17.

In considering whether Alaska's present system is the best one for Alaska, and in reviewing the other options available, the Presumptive Sentencing Subcommittee may wish to consider several factors:

- **Sentencing Goals (*Chaney* Criteria).** Alaska sentencing is structured by factors historically known as the *Chaney* criteria– rehabilitation, deterrence, isolation, community condemnation, and reaffirmation of societal norms,[28] which were incorporated into law with the 1978 changes to the criminal code.[29] Should these criteria continue to be considered by judges in sentencing? For example, deterrence of others (as opposed to deterrence of individuals) is now viewed in the scientific literature as largely ineffective as a correctional principle. If yes, is the present sentencing structure the best way to ensure that judges consider these criteria, and sentence in accordance with them?

- **Uniformity in Sentencing.** One of the main purposes of the adoption of presumptive sentencing by the legislature was to achieve uniformity in sentencing that would "eliminate unjustified disparity in sentences imposed on defendants convicted of similar offenses – disparity which is not related to legally relevant sentencing criteria."[30] Studies conducted over the years by the Alaska Judicial Council suggest that for the most part, the present sentencing system has provided the uniformity sought by the legislature, at least with respect to the ethnicity of offenders – an important consideration in light of the earlier findings of ethnic disparities. Could or should the current system be modified in any way to further encourage uniformity, given that some disparities still exist?[31]

- **Aggravators and Mitigators.** The present sentencing system permits some amount of discretion on the part of decision-makers to take into account aggravating and mitigating circumstances, and exceptional cases. One commentator described the role of discretion in sentencing systems as ". . . many discretionary choices affect sentencing well before the formal sentencing process begins. . . . Sentencing structures and rules should focus on making the exercise of discretion reasoned, transparent, and subject to review. Sentencing mechanisms should reveal and channel the inevitable exercise of discretion by various decision-makers," including prosecutors, attorneys, and judges.[32] Does Alaska's present system permit sufficient discretion combined with transparency and the opportunity for review? Does the present combination of aggravators, mitigators, and required sentencing ranges allow enough opportunities for sentences to differ in ways justified by the facts of each individual case?

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[28] DiPietro, *supra*, note 10.
[29] Now codified at 12.55.005.
[30] Stern, *supra* note 19, page 228.
[31] See *Alaska Felony Sentencing Patterns: 2012 – 2013*, *supra* note 23, for a discussion of the limited disparities based on gender and ethnicity that were present in felony sentences in those years.
[32] Berman, et al, *supra* note 1, pp. 43 - 44.

- **Use of Mandatory Minimums, Ranges, and Parole.** Alaska's hybrid system already includes elements of all of the sentencing systems in place in the rest of the United States: some mandatory minimums, some elements of indeterminate sentencing systems (e.g., parole), and some elements of guidelines systems (a range within which the judge assigns a particular sentence). Is there a reason to shift the balance among these approaches, to make the system fairer, more uniform, more discretionary, or more effective?

- **Protection of Victims' Rights.** Do Alaska's laws and sentencing procedures protect the constitutional rights of victims sufficiently, or should different procedures be instituted to take these into account?

- **Advisory vs. <u>Mandatory.</u>** Should presumptive ranges continue to be mandatory? Making the existing sentencing system advisory would increase judicial discretion and limit the need for the legislature to account for every possible contingency. All parties would continue to have the legislative parameters established by the present sentencing system – ranges, aggravators and mitigators -- as guidance and structure, but all parties would have more discretion to tailor sentences to suit individual cases. Victims and the public would have the transparency and clarity of the existing laws for guidance; there would not be a need for a three-judge panel; and it is possible that the number of sentence appeals would be reduced. Several other states have made their guidelines advisory in response to the *Blakely* case, and the federal system did the same in response to *Booker*.[33] If sentencing ranges were to become advisory in Alaska, the system would need to be monitored to assure the absence of unwarranted disparities by ethnicity, location in the state, and other factors.

- **Three-Judge Panel.** The three-judge panel was established by the legislature to allow consideration of a different sentence in cases in which the trial court found that imposing a presumptive sentence would result in "manifest injustice,"[34] either because the presumptive sentence was too high or too low. Is the three-judge panel effective? Is it necessary? Should its responsibilities be carried out in some other way?

- **Use of Suspended Time**. Is the ratio of imposed time to active time (net time to serve after suspended time is subtracted) appropriate, or should there be more guidance for attorneys and judges about the appropriate amount of time to be suspended?

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[33] Gertner, A Short History of American Sentencing, *supra* note 2. Page 707.

[34] Barry Stern, "Rethinking Manifest Injustice: Reflections upon the Decisions of the Three-Judge Sentencing Panel," *Alaska Law Review*, 1988, (Vol. 5:1) page 1.The Alaska Judicial Council has unpublished memos about the use of the three-judge panel, and other sources of information may also be available.

Part 2: Presumptive Sentencing and Criminal Laws in Alaska

A. Structure of Statutory Sentencing in 2012-2013

In Alaska, most sentences for felony offenses depended on two factors: the seriousness of the offense and any prior felony convictions of the offender. The seriousness of the offense is determined by the legislature's assignment of a "class" to the offense in the offense definition. Classes of felony crimes are, in order of seriousness, Class A, Class B, and Class C. The most serious felonies, such as Murder 1, Kidnapping, and Sexual Assault 1 remain "Unclassified." Classified offenses are subject to presumptive sentencing; most Unclassified offenses are not.[1]

Presumptive Sentences

In 2012-2013, under AS 12.55.125, the great majority of felony offenses were subject to presumptive sentencing. At the time the data were collected for this study, presumptive sentencing statutes set forth a "presumptive range" of incarceration for the typical offender who committed typical offenses for each class of offense and number of prior offenses of the offender.[2] The presumptive range fell within a much wider allowable statutory range. Presumptive ranges and statutory ranges were relatively narrow for less serious offenses and broader for more serious felonies. Most sex felonies were segregated out from other felonies and were given higher presumptive ranges. Table 2 provides the sentencing ranges in effect under AS 12.55.125 for this study, as well as other information.

Alaska judges had the authority to sentence a convicted offender to any term of incarceration within the presumptive range. To impose a sentence above the presumptive range, a jury (or in some circumstances a judge) must find a "factor in aggravation."[3] If an aggravator is found, a judge may impose any sentence upward to the maximum term allowed by statute. To impose a sentence below the presumptive range, a judge must find a "factor in mitigation." If a mitigator is found and the lower end of the presumptive sentencing range is up to 4 years, the judge may impose any sentence from the lower end of the presumptive range to zero. If a mitigator is found and the lower end of the sentencing range is greater than 4 years, the judge may depart downward from the lower end of the presumptive range by 50%. If both mitigating and aggravating circumstances are found, the judge may impose any term within both applicable boundaries.

[1] The exceptions are Sexual abuse of a minor 1, Sexual assault 1 and Sex trafficking 1 under AS 11.66.110(a)(2).
[2] Within Alaska's presumptive sentencing structure, prior felony conviction levels are: no prior felonies, one prior felony, or two or more prior felony convictions. See AS 12.55.125. To affect a sentence, in most cases the prior felony conviction had to have been within ten years of unconditional discharge from custody or probation on the prior offense. See 12.55.145.
[3] AS 12.55.155.

Additionally, the legislature designated certain circumstances that would subject an offender to enhanced presumptive ranges. These included, for example, enhanced penalties for a first felony offender convicted of a Class A felony who possessed a firearm, used a dangerous instrument, or caused serious physical injury or death.

Table 2: 2012-2013 Alaska Presumptive Sentencing Ranges Compared with Prior Terms

	First Felony	First Felony (special circumstances)	Second Felony	Sex Felony with a Prior Sex Felony	Third+ Felony	Sex Felony with Two Prior Sex Felonies	Max
Unclassified Sex Offense[i]	**20-30**[ii] (8)	**25-35**[iii] (10)	**30-40** (15)	**35-45** (20)	**40-60** (25)	**99** (30)	**99** (40)
Class A Sex[iv]	**15-30**[v] (5)	**25-35**[vi] (10)	**25-35** (10)	**30-40** (15)	**35-50** (15)	**99** (20)	**99** (30)
Class A	**5-8** (5)	**7-11**[vii] (7)	**10-14** (10)	n/a	**15-20** (15)	n/a	**20** (20)
Class B Sex[viii]	**5-15** (0)	n/a	**10-25** (5)	**15-30** (10)	**20-35** (10)	**99** (15)	**99** (20)
Class B	**1-3**[ix] (0)	**2-4**[x]	**4-7** (4)	n/a	**6-10** (6)	n/a	**10** (10)
Class C Sex[xi]	**2-12** (0)	n/a	**8-15** (2)	**12-20** (3)	**15-25** (3)	**99** (6)	**99** (10)
Class C	**0-2**[xii] (0)	**1-2**[xiii] (1)	**2-4** (2)	n/a	**3-5** (3)	n/a	**5** (5)

Alaska Felony Sentencing Patterns: 2012 – 2013 Alaska Judicial Council April 2016

Numbers in bold are presumptive ranges established in 2005 for non-sex offenses and 2006 for sex offenses and effective in 2012-2013.

Number in parentheses are presumptive terms prior to 2005.

In 2005-2006, different presumptive ranges initially were established for Sex Offenses. These may be found in Table B-2 in Appendix B.

[i] Although described here as Unclassified, Class A, Class B, Class C categories for simplicity, AS 12.55.155(i) does not follow strict "Class" categories for sex offense sentences. The specific offenses are thus delineated for each category of penalty. This category includes: Sexual assault 1, Sexual abuse of a minor 1, Sex trafficking 1 under AS 11.66.110(a)(2).

[ii] The range is 20-30 if the victim is less than 13 years old and 25-35 if the victim is 13 years old or more.

[iii] The enhanced sentence applies to crimes where the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense.

[iv] See note i, above. This category includes: Unlawful exploitation of a minor under AS 11.41.455(c)(2), Online enticement of a minor under AS 11.41.452(e), Attempt, Conspiracy, or Solicitation to commit Sexual assault 1, Sexual abuse of a minor 1, or Sex trafficking 1 under AS 11.66.110(a)(2).

[v] The range is 15-30 if the victim is less than 13 years old and 20-30 if the victim is 13 years old or more.

[vi] The enhanced sentence applies to crimes where the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense.

[vii] The enhanced sentence applies to crimes where the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury or death during the commission of the offense, or knowingly directed the conduct at a peace officer or first responder who was engaged in official duties; and to manufacturing of methamphetamine offenses if knowing within presence of children.

[viii] See note i, above. This category includes: Sexual assault 2, Sexual abuse of a minor 2, Online enticement of a minor under AS 11.41.452(d), Unlawful exploitation of a minor under AS 11.41.455(c)(1), and Distribution of child pornography under AS 11.61.125(e)(2).

[ix] A suspended imposition of sentence (SIS) is available if an active term of imprisonment is imposed as a condition.

[x] The enhanced sentence applies to violations of AS 11.41.130 (Criminally negligent homicide) and the victim was a child under 16, and to manufacturing of methamphetamine offenses if reckless within presence of children.

[xi] See note i, above. This category includes Sexual assault 3, Incest, Indecent exposure 1, Possession of child pornography, Distribution of child pornography under AS 11.61.125(e)(1), or Attempt, Conspiracy, or Solicitation to commit Sexual assault 2, Sexual abuse of a minor 2, Unlawful exploitation of a minor, or Distribution of child pornography. The following Sex offenses are sentenced under typical Class C ranges under AS 12.55.125(e): Failure to register as a sex offender; Indecent viewing or photography (if the person viewed was a minor); Distribution of indecent material to minors; Sexual abuse of a minor in the third degree.

[xii] An SIS is available.

[xiii] Felony crimes in AS 08.54.720(a)(15). (Second offense, Waste or Hunt same day in air.)

For example:

Table 2: Sentence Ranges with Aggravator/Mitigator					
Offense/Priors	**Maximum**	**Presumptive range**	**+Aggravator**	**+Mitigator**	**+Both**
Class C - First felony conviction	5 years	0-2 years	up to 5 years	down to 0	0-5 years
Class B - Fourth felony conviction	10 years	6-10 years	up to 10 years	down to 3 years	3-10 years

Alaska Felony Sentencing Patterns: 2012 – 2013 Alaska Judicial Council April 2016

If no mitigating factors were found, but the judge found imposition of a presumptive sentence would be manifestly unjust, the law allowed a judge to refer the case to a three-judge sentencing panel for consideration of an adjusted sentence.[4] Such a referral was exceptionally rare and did not affect any of the sentences in the 2012-13 dataset.

2. Non-Presumptive Sentences

Sentences for Unclassified offenses were not subject to presumptive sentencing.[5] These offenses instead were subject to statutory mandatory minimums and maximums. Within those boundaries, judges had broad sentencing discretion.

Table 3: Non-Presumptive Sentences (Mandatory Minimums)	
Offense	**Range**
Murder 1, Murder unborn child 11.41.150(a)(1)	20-99 years
Murder 1 (Attempt, Solicitation, Conspiracy), Kidnapping, Misconduct involving controlled substance 1 (MICS1)	5-99 years
Murder 2, Murder unborn child AS 11.41.150(a)(2)-(4)	10-99 years
Murder 2 if committed by a parent/guardian/authority figure who committed a crime in AS 11.41.200 – 11.41.530 against child under 16	20-99 years

Alaska Felony Sentencing Patterns: 2012 – 2013 Alaska Judicial Council April 2016

In addition, some Murder 1 crimes carried a mandatory 99-year sentence.[6] Also, Alaska's "three strikes" law provided that a person convicted of an Unclassified or Class A felony who previously had been convicted of two or more "most serious felonies" was also subject to a mandatory 99-year sentence.[7] Forty-seven Unclassified felony convictions appeared in the data

[4] AS 12.55.165.
[5] Non-presumptive felony sentences may be found in AS 12.55.125(a)-(b).
[6] AS 12.55.125(a)(1)-(5).
[7] AS 12.55.125(l). "Most serious felonies" is defined in AS 12.55.185(10) and included: Arson 1, Sex trafficking 1 under AS 11.66.110(a)(2), Online enticement of a minor under AS 11.41.452(e), any Unclassified or Class A felony

set for this study.

Other Factors

Suspended Time

Another important aspect of sentencing in Alaska is the use of "suspended" time under AS 12.55.080.[8] When a judge imposed a presumptive sentence that included a term of incarceration, he or she was likely to impose part of that term as "active" time of incarceration to be served immediately, and to "suspend" part of the term, which would be spent on probation. If the defendant did not fulfill his or her obligations of probation, the judge could then revoke the probation and impose any part of the remaining sentence to be served incarcerated. If only part of the suspended time was imposed, the remainder would then be spent on probation again, and so on until the probationary term was successfully satisfied or all the time was served. This study did not examine whether or how much of offenders' suspended time was actually served. It does report on "active," "suspended," and total "imposed" time ordered by the judge.

Rule 11 Agreements

No sentencing report could be complete without some discussion of plea agreements. In 2012 and 2013, more than 96% percent of all felony cases in Alaska were resolved without trial.[9] Most of those are resolved by a plea agreement negotiated under authority of Rule 11 of the Alaska Criminal Rules of Procedure. Plea agreements can resolve cases with charge agreements (usually reductions or consolidation of charges) or with sentence agreements (agreeing on a certain sentence, or cap for a sentence), a sentence recommendation, or any combination. The court may accept the parties' agreement or reject it, but may not insert itself into the negotiations. Thus, if a sentence agreement is included in the plea agreement and accepted by the court, a judge's discretion is limited by the agreement. Sentence agreements, however, are negotiated with the expectation they will fall within the boundaries of statutorily set sentencing minimums and maximums for the offense of conviction. The prevalence of Rule 11 agreements, and particularly sentencing agreements, should be kept in mind when considering the findings in this report.

proscribed under AS 11.41, or any Attempt, Conspiracy to commit, or Criminal solicitation of an Unclassified felony proscribed under AS 11.41.

[8] Imprisonment may not be suspended under AS 12.55.080 below the low end of the presumptive range. AS 12.55.125(g)(1). Judges may not suspend time for non-presumptive sentences in AS 12.55.125 (a) or (b). AS 12.55.125(f).

[9] *Alaska Court System Annual Report FY 12* at 89 (3.5% for Superior Court Trial sites); *Alaska Court System Annual Report FY 13* at 91 (3.6%). Some cases had all charges dismissed or acquitted.

B. Historical Changes in Sentencing Law from 2000-2014

1. Presumptive Sentencing Ranges, Non-Sex Felonies

When the Alaska Legislature enacted presumptive sentencing in 1978, it set forth specific presumptive terms for classes of offenses and offenders, which could be increased by the finding of aggravators by a judge.[10] In 2004, the United States Supreme Court issued its opinion in *Blakely v. Washington*.[11] The court held because of the defendant's right to a jury trial, factors, which had the effect of increasing an offender's sentence, must be tried to a jury and found beyond a reasonable doubt.[12] As explained in the introduction to this report, *Blakely* had the effect of calling into doubt the legality of Alaska's presumptive sentencing scheme because Alaska law allowed a judge, not a jury, to make findings of aggravators that could increase a sentence.

The Alaska Legislature responded in 2005 by passing a bill amending the presumptive sentencing scheme to conform to the concerns presented by *Blakely*.[13]

The 2005 bill eliminated specific presumptive terms and established presumptive "ranges," instead allowing judges more upwards discretion without the finding of an aggravator by a jury.[14] The ranges typically started at the previous presumptive term (if there was one) and maxed out several years above that. Nevertheless, the legislature's stated intent was not to increase sentence lengths but to give judges greater discretion in sentencing while forestalling the need for jury findings in cases with aggravating circumstances.[15]

In addition to establishing the ranges, another significant effect of the bill was to bring Class B and Class C first felony offenses within the realm of presumptive sentencing. Before 2005, those offenders were sentenced non-presumptively but with consideration for presumptive sentencing terms, as established by case law.[16]

[10] Ch. 166, § 12, SLA 1978. For example, a presumptive "term" was 5 years for a first felony conviction on a Class A non-sex felony or 8 years on an Unclassified Sex felony.
[11] 542 U.S. 296 (2004).
[12] See id.at 304-305.
[13] Ch. 2 SLA 2005.
[14] For example, a presumptive "range" was now 5-8 years for a first felony conviction on a Class A felony.
[15] The bill stated directly "it is not the intent of this Act . . . to bring about an overall increase in the amount of active imprisonment for felony sentences. Rather this Act is intended to give judges the authority to impose an appropriate sentence, with an appropriate amount of probation supervision, by taking into account the considerations set out in AS 12.55.005 and 12.55.015." Ch. 2, § 1, SLA 2005.
[16] See, e.g., *State v. Brinkley*, 681 P.2d 351, 357 (Alaska App. 1984).

Presumptive Sentencing Ranges: Sex Felonies

The 2005 bill established presumptive sentencing ranges for Sex felonies, but they were short-lived. In 2006, the legislature revisited felony Sex offense penalties and significantly increased them. As Table 2 indicates, from 2205-2006, the legislature doubled sentences for Sex felonies in some categories and increased them even more in others.

C. Changes in Statutory Crime Definitions and Classifications

Between 2000 and 2013, the legislature made a series of incremental changes to offense definitions and classifications in Title 11 of the Alaska Statutes. A comprehensive review of these changes, along with citations to the changes, is included in this report in Appendix B. Below is a brief summary of the types of changes the legislature enacted. Cumulatively, the changes reflect trends that increased both the scope and severity of felony liability. It should be noted the legislature significantly reduced the scope of liability significantly for only one offense: Misconduct involving weapons 3, a Class C offense, when it changed some affirmative defenses to restrict application of the offense. In contrast, the legislature acted more than eighty times in Title 11, and in Title 28 and Title 4, in ways that increased the scope and/or severity of felony liability.

1. New Offenses

The legislature created twenty new felony offenses in Title 11 between 2000 and 2013. These offenses included: Murder of an unborn child (Unclassified), Manslaughter of an unborn child (Class A), Criminally negligent homicide of an unborn child (Class B), Assault of an unborn child 1 (Class A), Assault of an unborn child 2 (Class B), Human trafficking 1 (Class A), Human trafficking 2 (Class B), Online enticement of a minor (enacted as Class C, later reclassified as Class A/B), Arson 3 (Class C), Criminally negligent burning 1 (Class C), Criminal mischief 3 (Class C), Criminal impersonation 1 (Class B), Aiding non-payment of support 1 (Class C), Unsworn falsification 1 (Class C), Failure to appear (Class C), Unlawful use of DNA samples (Class C), Terroristic threatening 1 (Class B), Terroristic threatening 2 (Class C), Impersonating a public servant 1 (Class C), and Distribution of indecent material to minors (Class C).

As indicated in Appendix A, these added offenses may not have had a big effect on the numbers of convicted felons. The most common of the new offenses in the dataset was Criminal mischief 3 with 59 convictions, which represented about 2% of all felony convictions in the dataset. The second most common was felony Failure to appear, with nine convictions, and the third most common was Unlawful evasion, with eight convictions. Many of the new offenses either were not represented in the 2012-13 data set, or had only one conviction. Although not often

represented in the dataset as convicted offenses, it is unknown what effect on prosecutorial charging and negotiation, or on convictions of misdemeanor offenses, these new felony offenses may have had.

Reclassification of Offenses

The legislature increased the severity of some felony conduct by straightforwardly reclassifying some offenses upwards. Examples included: Online enticement of a minor (reclassifying from Class C to Class B/A in 2001); Obtaining an access device or identification document by fraudulent means (reclassifying from Class A misdemeanor to Class C felony in 2000); Violating an order to submit to DNA testing (reclassifying from Class A misdemeanor to Class C felony in 2003); Sex trafficking 2 (reclassifying from Class C to Class B in 2007); and Sex trafficking 3 (reclassifying from Class A misdemeanor to Class C felony in 2007).

Again, these changes may not have had a large effect. Appendix A indicates only one of these offenses, Online enticement of a minor, appearing in the dataset as the single most serious charge of conviction and it appeared only once.

Reclassifying Conduct

The legislature also increased both the scope and the severity of felony liability by reclassifying the conduct including some in offenses. For example, in 2004, the legislature removed some types of conduct from Sexual abuse of a minor 4 (a Class A misdemeanor) and inserted it into the definition of Sexual abuse of a minor 3 (a Class C felony). It similarly removed the Theft of an access device from Theft 3 (a Class A misdemeanor) and inserted it into Theft 2 (a Class C felony). In some cases, the legislature created a new degree or subset of an offense and classified it above the previous range, and removed conduct previously classified at a lower level. For example, the legislature reclassified all intentional conduct into Criminal mischief 1 as a Class A felony, and renumbered the less serious conduct degrees accordingly. Similarly, when amending the definition of Deceptive business practices, the legislature reclassified all conduct constituting the offense that used the internet or a computer network as a Class C felony, leaving all other conduct classified as a Class A misdemeanor.

Expanding the Range of Prohibited Conduct

Perhaps the most common way the legislature added to the range of prohibited conduct was simply to add provisions to an existing offense definition. For example, the legislature added conduct of knowingly manufacturing or delivering a controlled substance, if person died as a result of its ingestion, to the definition of Manslaughter in 2006. Similarly, in 2001, it expanded the

definition of Vehicle theft by adding a provision that included the loss of use of the vehicle for seven days or more. It expanded the definition of Criminal use of a computer by adding the conduct of installing or using a keystroke logger or similar device or program in 2011. In 2012, it expanded the definition of Endangering the welfare of a child 1 by adding a provision extending Class C felony liability to a person who "recklessly fails to provide an adequate quantity of food or liquids to a child, causing protracted impairment of the child's health."

The legislature also increased the scope of felony liability by expanding the range of victims that trigger felony offenses. In some cases, it increased the number of possible victims by changing the age limits. For instance, the legislature changed the age of a child victim from under 10 to under 12 to trigger felony liability for Assault 3. Another example came in 2007 when the legislature amended Sex trafficking 1 to include causing persons to engage in prostitution if the person was under 18 (previously it had been under 16).

In one instance, the legislature acted to decrease the scope of liability for an offense when it amended Misconduct involving weapons 3. In 2010, the legislature repealed several sections and eliminated some affirmative defenses in favor of restricting the application of the offense, a Class C felony, to former felons who carried firearms and who had been pardoned, had their convictions set aside, or whose convictions were over 10 years in the past. Previously, the law provided they were subject to criminal liability until the person proved "affirmatively" they were not guilty due to the pardon, set-aside, or passage of time.

These examples are by no means exhaustive but serve to provide a sense of legislative action in this area.

Repeat Offender Provisions

Another way the legislature increased the scope and severity of felony liability was to enact repeat offender provisions. For some offenses, it imposed felony liability for conduct by repeat misdemeanants that would otherwise have been misdemeanor conduct. Perhaps the most well-known example of this came in 2008, when the legislature imposed Class C felony liability on offenders who committed the crime of Assault 4 (otherwise a Class A misdemeanor) and who had been convicted within the preceding ten years of other assaultive conduct that included physical contact or stalking. Another example came in 2005, when the legislature imposed felony liability for Indecent exposure 1 if the person had committed the offense of Indecent exposure 2 (a Class A misdemeanor) and had previously been convicted of Indecent exposure 1 or 2 and the present offense was committed in the presence of a person under 16. Another example came in 2008 for the new offense of Criminally negligent burning 1, when the legislature imposed Class C felony liability for the conduct of Criminally negligent burning 2 (otherwise a Class A misdemeanor) if

the person had previously been convicted two or more times within the preceding ten years for Arson or Criminally negligent burning. Also in 2008, the legislature provided for Class C felony liability for repeat offenders of Animal cruelty, otherwise a Class A misdemeanor.

Other ways the legislature used repeat offender provisions was to increase the severity of a classification of a felony offense if it was committed by a person who previously had been convicted. One example came in 2004, when the legislature created a Class A felony level for Distribution of child pornography for repeat offenders. Another example was when the legislature broadened date ranges to include more repeat offenses, such as in 2001 when the legislature made a significant change to felony DUI and Refusal to submit to a chemical test by changing the "look-back" for prior offenses that triggered felony liability. Previously, felony DUI/Refusal was triggered with two prior offenses in five years; it was lengthened to two prior offenses in ten years.

Limiting Defenses to Felony Offenses

In a few statutes, the legislature acted to increase the scope of liability by limiting affirmative defenses available to defendants. Examples included: limiting an affirmative defense to Custodial interference 2; eliminating the statute of limitations defenses for Sexual assault and Sexual abuse of a minor when the victim was under 21 at the time of the offense; and restricting the "mistake of age" defense in AS 11.41.445 for some Sex offenses that had an element of an age of the victim (such as Sexual abuse of a minor 3) by requiring the offender to have taken reasonable measures to verify the victim's age.

D. Summary

Some of the changes described here and in Appendix B to criminal definitions and classifications would have had the effect of "widening the net" and including more offenders into felony offense classifications. Those changes would have had no direct effect on this study's analysis and reporting on sentence lengths but could have affected how many offenders were convicted of felony offenses overall. Other changes that reclassified offenses from one felony class upwards to another, or that reclassified or redefined conduct, had the potential to impact sentence length for those offenders. Any comparison of sentence lengths reported in this study to those from previous studies should be considered in light of these legal changes.

BACKGROUND FOR PRESUMPTIVE SENTENCING WORKGROUP	
TOPICS	QUESTIONS AND COMMENTS

Presumptive Sentencing	• Reasons to keep presumptive sentencing
	  o Keeps disparity in check
	  o Keeps judges' unfettered discretion from being problematic
	• Revisit the Commission's recommendations to see what was enacted and what wasn't, e.g. readjustments of presumptive sentencing ranges. Look again at Majority Rec. 3.
	• Lets look at the costs to keep this system in place
	• Alternative: make presumptive sentencing structure advisory rather than mandatory
	• Criminal History: do lookbacks square with recidivism
	• Alternative: remove statutory floors for effect of mitigation
	• Consider statutory mitigator for acceptance of responsibility: reduction could be tiered and tied to timing of plea, could promote speedier resolution of cases
	• Rewrite existing statutory mitigator for participation in rehab program as existing language limits consideration to therapeutic court participation AS 12.55.155(d)(17)

Three Judge Panel	• Need to substantially overhaul
	• Options: Keep or kill? Expand or contract?
	  o 'Important to maintain to exceptional cases, as a safety valve'
	  o 'Downside is if panels act as super-legislators'
	• How often utilized: 1x in 2016; about 3 times a year
	• Recommendations: change statutory language because of the confusion sowed by Luckett II
	• Verbiage could be cleaned up: e.g. refer to 3 judge panel, if under the totality of the circumstances, a sentence even if adjusted for statutory aggravating and mitigating factors would result in manifest injustice
	• Lawyers may not understand law; panel is infrequently requested
	• There is unknown number of denials of requested referrals to 3JP
	• How often utilized ? 1x in 2016; about 3 times a year
	• Are there delays? 3JP 60-90 days after sentencing hearing

Non-presumptive/ Sentencing benchmarks	• What do we think about caselaw benchmarks relating to non-presumptive sentencing? (mention of Phelps, Page and Wentz)
Probation and Parole	• Should Presentence Report Investigators/writers be within court system, rather than DOC? Would judges get a better product? • How do we get defense attorneys and defendants to cooperate with the PSI/R process? • Does dual supervision (parole and probation) undermine effectiveness?
Motions to Modify	• When are they allowed? When are they appropriate?
Appellate Courts	• Delays are too great • Should there be more judges or a second panel of judges added to COA? • Sentencing appeals: what is the standard of review? Is it comparable to other courts' standards? • How about the ability to city to MOAs? • Should the court adopt a more summary form of decision, like orders for resolution of cases?
Trial Court Delay	• 'Culture of continuances' - need to incentivize to move cases along o Judges: '6 month rule for all but unclassifieds'; PJ could approve payment for exceptions outside of that rule o Allow credit/reduced sentence for early or timely pleas, with less credit for eve of trial pleas
Post-Conviction Relief	• 'Need to incentivize judges' to move cases along o '6 month rule for all but unclassifieds' and require PJ to review continuances beyond that time o 'Require written findings for continuances' • Should defendants be advised at sentencing of 1 year PCR window • This docket is out of control

NOTES FOR THREE JUDGE PANEL DISCUSSION

The Statute:

§ 12.55.165. Extraordinary circumstances

(a) If the defendant is subject to sentencing under AS 12.55.125, (d), (e), or (i) and the [sentencing] court finds by clear and convincing evidence that manifest injustice would result from failure to consider relevant aggravating or mitigating factors not specifically included in AS 12.55.155 or from imposition of a sentence within the presumptive range, whether or not adjusted for aggravating or mitigating factors, the court shall enter findings and conclusions and cause a record of the proceedings to be transmitted to a three-judge panel for sentencing under AS 12.55.175.

(b) In making a determination under (a) of this section, the court may not refer a case to a three-judge panel based on the defendant's potential for rehabilitation if the court finds that a factor in aggravation set out in AS 12.55.155 is present.

(c) A court may not refer a case to a three-judge panel under (a) of this section if the defendant is being sentenced for a sexual felony under AS 12.55.125 and the request for the referral is based solely on the claim that the defendant, either singly or in combination, has

(1) prospects for rehabilitation that are less than extraordinary; or

(2) a history free of unprosecuted, undocumented, or undetected sexual offenses.

(d) A court may not refer a case to a three-judge panel under (a) of this section if the request for referral is based, in whole or in part, on the claim that a sentence within the presumptive range may result in the classification of the defendant as deportable under federal immigration law.

Problems

- Practitioners and judges don't understand the statute(s) or caselaw interpreting it
- 2nd Luckart decision sowed confusion about what 3 judge panel is authorized to do
- It's a reviewing court but its decisions aren't published
- Elongated and bifurcated sentencing process deprives defendants and victims of speedy proceedings
    - Where referral to 3JP is made and is accepted, there will be at least two sentencing hearings
    - When referral is made but case is not accepted, there will be at least two sentencing hearings
    - Majority of times, case does goes back to trial court for third hearing (imposition of sentence)
- Also inefficient: While case is in process (incl appeal), legislature can and has undone judicial determinations

Recommendations or Comments:

- Keep three-judge panel as a needed safety valve
- Any changes should minimize judges acting as super-legislatures
- The safety valve function of the 3JP has been so curtailed by statute (AS 12.55.175(e)) that no real value in maintaining 3JP
- Get rid of three-judge panel and let trial judges determine the question of manifest injustice, subject to appellate review
- Make changes which will promote a better understanding of the process and its availability: defense attorneys seem unaware; process is arguably underutilized with only three hearings held last year
- Determine what can be done to speed up the process – gaps in months between scheduling of IOS and three judge panel

Current members of the 3-Judge Panel recommend:

Option which allows the trial bench to refer a case to the Panel on 2 nonexclusive grounds, not requiring a finding of a non-statutory factor

1. That it would be manifestly unjust for that defendant to not be eligible for discretionary parole; or
2. That it would be manifestly unjust to sentence that defendant within the range required by the applicable presumptive sentencing statute, whether or not adjusted for any aggravators and mitigators that have been found.
    - The finding would presumably be based on the totality of the circumstances analysis, which could include circumstances that presently would prove a non-statutory factor.

From memo written by attorney Doug Miller (excerpted and summarized by MG):

Option 2 if Alaska still wants sentencing judge to determine discrete non-statutory factors, as opposed to utilizing a totality of circumstances analysis:

1. Allow sentencing courts to (1) determine new non-statutory factors and to find manifest injustice exists, thus allowing them to adjust the sentence, but also require
    - When sentencing courts recognize 'new' non-statutory factors, the factors should be identified by the court "in a particular form of words," since this is a quasi-legislative process.
    - Sentencing courts should also determine those findings of fact which are necessary in their view for the application of the non-statutory factor, just as they do for application of statutory factors.

    These requirements allow for appropriate appellate review.

2. Replace the three-judge panel with a new body whose sole function is to determine whether to recommend whether to recommend direct legislative recognition of discrete new factors in aggravation or mitigation.
    - Create a fast-track mechanism for the recommendations of the body to be referred immediately or at least very promptly to the appropriate legislative committees.
    - If the legislature adopts a new mitigating factor, the adoption be at least partially retroactive, so that those who have been recently sentenced may have an opportunity to make the appropriate arguments to the sentencing court, i.e., to prove by clear and convincing evidence the factual predicates identified as part of the new factor.

Right now the statute is not functional as a safety valve. The main thrust of the statute was to create a safety-valve for a relatively rigid system that removes much of the discretion that had traditionally been granted to sentencing courts. The safety valve is to open when a particular offender would, by normal operation of the system (regardless of whether this operation includes application of the statutory mitigating and aggravating factors set forth in AS 12.55.155(c) and (d)), receive a sentence that is manifestly unjust

*The existing three-judge-panel statute creates confusion, and requires courts to assume a quasi-legislative function to which they are not well-suited***.** It says, in part, that a case should be referred to the three judge panel if "manifest injustice would result from failure to consider relevant aggravating or mitigating factors not specifically included in AS 12.55.155." But this requires a sentencing court to make a quasi-legislative finding, i.e. to identify a non-statutory aggravating or mitigating factor which is "relevant." This requires courts to articulate factors that might be good to have in the law, an uncomfortable thing for courts to have to do, and many of them are loath to do it absent guidance from the appellate courts which have not yet considered it.

The delays and inefficiencies in this process are unjust. Hypothetical Defendant 1 is being sentenced on a date certain. Counsel for Defendant 1 argues to the sentencing court that (1) this factor should be recognized, (2) the factual predicate for the factor, and (3) the lowest sentence that could legally be given without referral to the three-judge panel would be manifestly unjust, because of the presence of this factor in this case. If the hurdles described above are overcome and the sentencing court agrees to refer the case to the three-judge panel, there will be a delay of months before the panel itself rules on the case, and additional hearings may be required before the three-judge panel and the sentencing court. Even then, the matter is far from over, because the state is likely to appeal the panel's decision on a non-statutory factor. Resolution of that direct appeal (and the petition for hearing that would probably follow) will take years if current practices in the appellate courts are any guide. And, while there is a petition for hearing pending, the case may be stayed. And even if Defendant 1's lower sentence survives an appeal and a petition for hearing, by this time resistance may have manifested itself in the actual legislative body normally responsible for the recognition of factors in aggravation of mitigation at sentencing -- the Alaska Legislature. If the legislature rejects the premises that led to the recognition of the factor through the quasi-legislative process created by AS 12.55.165 and .175, it can enact language preventing the use of such a factor. Indeed, it did has done this very thing. And the legislature can do this retroactively, which will preclude relief even for Defendant 1.

OTHER RELEVANT STATUTES

§ 12.55.175. Three-judge sentencing panel

(a) There is created within the superior court a panel of five superior court judges to be appointed by the chief justice in accordance with rules and for terms as may be prescribed by the supreme court. Three judges of the panel shall be designated by the chief justice as members. The remaining two judges shall be designated by the chief justice as first and second alternates to sit as members in the event of disqualification or disability in accordance with rules as may be prescribed by the supreme court.

(b) Upon receipt of a record of proceedings under AS 12.55.165, the three-judge panel shall consider all pertinent files, records, and transcripts, including the findings and conclusions of the judge who originally heard the matter. The panel may hear oral testimony to supplement the record before it. If the panel supplements the record, the panel shall permit the victim to testify before the panel. If the panel finds that manifest injustice would result from failure to consider relevant aggravating or mitigating factors not specifically included in AS 12.55.155 or from imposition of a sentence within the presumptive range, whether or not adjusted for aggravating or mitigating factors, it shall sentence the defendant in accordance with this section. If the panel does not find that manifest injustice would result, it shall remand the case to the sentencing court, with a written statement of its findings and conclusions, for sentencing under AS 12.55.125.

(c) The three-judge panel may in the interest of justice sentence the defendant to any definite term of imprisonment up to the maximum term provided for the offense or to any sentence authorized under AS 12.55.015.

(d) Sentencing of a defendant or remanding of a case under this section shall be by a majority of the three-judge panel.

(e) If the three-judge panel determines under (b) of this section that manifest injustice would result from imposition of a sentence within the presumptive range and the panel also finds that the defendant has an exceptional potential for rehabilitation and that a sentence of less than the presumptive range should be imposed because of the defendant's exceptional potential for rehabilitation, the panel

> (1) shall sentence the defendant within the presumptive range required under AS 12.55.125 or as permitted under AS 12.55.155;

(2) shall order the defendant under AS 12.55.015 to engage in appropriate programs of rehabilitation; and

(3) may provide that the defendant is eligible for discretionary parole under AS 33.16.090 during the second half of the sentence imposed under this subsection if the defendant successfully completes all rehabilitation programs ordered under (2) of this subsection.

(f) A defendant being sentenced for a sexual felony under AS 12.55.125(i) may not establish, nor may the three-judge panel find under (b) of this section or any other provision of law, that manifest injustice would result from imposition of a sentence within the presumptive range based solely on the claim that the defendant, either singly or in combination, has

(1) prospects for rehabilitation that are less than extraordinary; or

(2) a history free of unprosecuted, undocumented, or undetected sexual offenses.

(g) A defendant being sentenced under AS 12.55.125(c), (d), (e), or (i) may not establish, nor may a three-judge panel find under (b) of this section or any other provision of law, that manifest injustice would result from imposing a sentence within the presumptive range based, in whole or in part, on the claim that the sentence may result in the classification of the defendant as deportable under federal immigration law.

§ 33.16.090. Eligibility for discretionary parole and minimum terms to be served

(a) A prisoner sentenced to an active term of imprisonment of at least 181 days may, in the discretion of the board, be released on discretionary parole if the prisoner has served the amount of time specified under (b) of this section, except that

(1) a prisoner sentenced to one or more mandatory 99-year terms under AS 12.55.125(a) or one or more definite terms under AS 12.55.125(*l*) is not eligible for consideration for discretionary parole;

(2) a prisoner is not eligible for consideration of discretionary parole if made ineligible by order of a court under AS 12.55.115;

(3) a prisoner imprisoned under AS 12.55.086 is not eligible for discretionary parole unless the actual term of imprisonment is more than one year.

(b) A prisoner eligible under (a) of this section who is sentenced

(1) to a single sentence under AS 12.55.125(a) or (b) may not be released on discretionary parole until the prisoner has served the mandatory minimum term under AS 12.55.125(a) or (b), one-third of the active term of imprisonment imposed, or any term set under AS 12.55.115, whichever is greatest;

(2) to a single sentence within or below a presumptive range set out in AS 12.55.125(c), (d)(2)--(4), (e)(3) and (4), or (i), and has not been allowed by the three-judge panel under AS 12.55.175 to be considered for discretionary parole release, may not be released on discretionary parole until the prisoner has served the term imposed, less good time earned under AS 33.20.010;

(3) to a single sentence under AS 12.55.125(c), (d)(2)--(4), (e)(3) and (4), or (i), and has been allowed by the three-judge panel under AS 12.55.175 to be considered for discretionary parole release during the second half of the sentence, may not be released on discretionary parole until

(A) the prisoner has served that portion of the active term of imprisonment required by the three-judge panel; and

(B) in addition to the factors set out in AS 33.16.100(a), the board determines that

(i) the prisoner has successfully completed all rehabilitation programs ordered by the three-judge panel that were made available to the prisoner; and

(ii) the prisoner would not constitute a danger to the public if released on parole;

(4) to a single enhanced sentence under AS 12.55.155(a) that is above the applicable presumptive range may not be released on discretionary parole until the prisoner has served the greater of the following:

(A) an amount of time, less good time earned under AS 33.20.010, equal to the upper end of the presumptive range plus one-fourth of the amount of time above the presumptive range; or

(B) any term set under AS 12.55.115;

(5) to a single sentence under any other provision of law may not be released on discretionary parole until the prisoner has served at least one-fourth of the active term of imprisonment, any mandatory minimum sentence imposed under any provision of law, or any term set under AS 12.55.115, whichever is greatest;

(6) to concurrent sentences may not be released on discretionary parole until the prisoner has served the greatest of

(A) any mandatory minimum sentence or sentences imposed under any provision of law;

(B) any term set under AS 12.55.115; or

(C) the amount of time that is required to be served under (1)--(5) of this subsection for the sentence imposed for the primary crime, had that been the only sentence imposed;

(7) to consecutive or partially consecutive sentences may not be released on discretionary parole until the prisoner has served the greatest of

(A) the composite total of any mandatory minimum sentence or sentences imposed under any provision of law, including AS 12.55.127;

(B) any term set under AS 12.55.115; or

(C) the amount of time that is required to be served under (1)--(5) of this subsection for the sentence imposed for the primary crime, had that been the only sentence imposed, plus one-quarter of the composite total of the active term of imprisonment imposed as consecutive or partially consecutive sentences imposed for all crimes other than the primary crime.

(c) As used in this section,

(1) “active term of imprisonment” has the meaning given in AS 12.55.127;

(2) “primary crime” has the meaning given in AS 12.55.127.

§ 12.55.155. Factors in aggravation and mitigation

(a) Except as provided in (e) of this section, if a defendant is convicted of an offense and is subject to sentencing under AS 12.55.125(c),(d), (e), or (i) and

(1) the low end of the presumptive range is four years or less, the court may impose any sentence below the presumptive range for factors in mitigation or may increase the active term of imprisonment up to the maximum term of imprisonment for factors in aggravation;

(2) the low end of the presumptive range is more than four years, the court may impose a sentence below the presumptive range as long as the active term of imprisonment is not less than 50 percent of the low end of the presumptive range for factors in mitigation or may increase the active term of imprisonment up to the maximum term of imprisonment for factors in aggravation.

(b) Sentences under this section that are outside of the presumptive ranges set out in AS 12.55.125 shall be based on the totality of the aggravating and mitigating factors set out in (c) and (d) of this section.

(c) The following factors shall be considered by the sentencing court if proven in accordance with this section, and may allow imposition of a sentence above the presumptive range set out in AS 12.55.125:

(1) a person, other than an accomplice, sustained physical injury as a direct result of the defendant's conduct;

(2) the defendant's conduct during the commission of the offense manifested deliberate cruelty to another person;
(3) the defendant was the leader of a group of three or more persons who participated in the offense;
(4) the defendant employed a dangerous instrument in furtherance of the offense;
(5) the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, disability, ill health, homelessness, consumption of alcohol or drugs, or extreme youth or was for any other reason substantially incapable of exercising normal physical or mental powers of resistance;
(6) the defendant's conduct created a risk of imminent physical injury to three or more persons, other than accomplices;
(7) a prior felony conviction considered for the purpose of invoking a presumptive range under this chapter was of a more serious class of offense than the present offense;
(8) the defendant's prior criminal history includes conduct involving aggravated assaultive behavior, repeated instances of assaultive behavior, repeated instances of cruelty to animals proscribed under AS 11.61.140(a)(1) and (3)--(5), or a combination of assaultive behavior and cruelty to animals proscribed under AS 11.61.140(a)(1) and (3)--(5); in this paragraph, "aggravated assaultive behavior" means assault that is a felony under AS 11.41, or a similar provision in another jurisdiction;
(9) the defendant knew that the offense involved more than one victim;
(10) the conduct constituting the offense was among the most serious conduct included in the definition of the offense;
(11) the defendant committed the offense under an agreement that the defendant either pay or be paid for the commission of the offense, and the pecuniary incentive was beyond that inherent in the offense itself;
(12) the defendant was on release under AS 12.30 for another felony charge or conviction or for a misdemeanor charge or conviction having assault as a necessary element;
(13) the defendant knowingly directed the conduct constituting the offense at an active officer of the court or at an active or former judicial officer, prosecuting attorney, law enforcement officer, correctional employee, firefighter, emergency medical technician, paramedic, ambulance attendant, or other emergency responder during or because of the exercise of official duties;
(14) the defendant was a member of an organized group of five or more persons, and the offense was committed to further the criminal objectives of the group;
(15) the defendant has three or more prior felony convictions;
(16) the defendant's criminal conduct was designed to obtain substantial pecuniary gain and the risk of prosecution and punishment for the conduct is slight;
(17) the offense was one of a continuing series of criminal offenses committed in furtherance of illegal business activities from which the defendant derives a major portion of the defendant's income;
(18) the offense was a felony

(A) specified in AS 11.41 and was committed against a spouse, a former spouse, or a member of the social unit made up of those living together in the same dwelling as the defendant;

(B) specified in AS 11.41.410--11.41.458 and the defendant has engaged in the same or other conduct prohibited by a provision of AS 11.41.410--11.41.460 involving the same or another victim;

(C) specified in AS 11.41 that is a crime involving domestic violence and was committed in the physical presence or hearing of a child under 16 years of age who was, at the time

of the offense, living within the residence of the victim, the residence of the perpetrator, or the residence where the crime involving domestic violence occurred;

(D) specified in AS 11.41 and was committed against a person with whom the defendant has a dating relationship or with whom the defendant has engaged in a sexual relationship; or

(E) specified in AS 11.41.434--11.41.458 or AS 11.61.128 and the defendant was 10 or more years older than the victim;

(19) the defendant's prior criminal history includes an adjudication as a delinquent for conduct that would have been a felony if committed by an adult;

(20) the defendant was on furlough under AS 33.30 or on parole or probation for another felony charge or conviction that would be considered a prior felony conviction under AS 12.55.145(a)(1)(B);

(21) the defendant has a criminal history of repeated instances of conduct violative of criminal laws, whether punishable as felonies or misdemeanors, similar in nature to the offense for which the defendant is being sentenced under this section;

(22) the defendant knowingly directed the conduct constituting the offense at a victim because of that person's race, sex, color, creed, physical or mental disability, ancestry, or national origin;

(23) the defendant is convicted of an offense specified in AS 11.71 and

(A) the offense involved the delivery of a controlled substance under circumstances manifesting an intent to distribute the substance as part of a commercial enterprise; or

(B) at the time of the conduct resulting in the conviction, the defendant was caring for or assisting in the care of a child under 10 years of age;

(24) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the transportation of controlled substances into the state;

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

(26) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the distribution of a controlled substance that had been adulterated with a toxic substance;

(27) the defendant, being 18 years of age or older,

(A) is legally accountable under AS 11.16.110(2) for the conduct of a person who, at the time the offense was committed, was under 18 years of age and at least three years younger than the defendant; or

(B) is aided or abetted in planning or committing the offense by a person who, at the time the offense was committed, was under 18 years of age and at least three years younger than the defendant;

(28) the victim of the offense is a person who provided testimony or evidence related to a prior offense committed by the defendant;

(29) the defendant committed the offense for the benefit of, at the direction of, or in association with a criminal street gang;

(30) the defendant is convicted of an offense specified in AS 11.41.410--11.41.455, and the defendant knowingly supplied alcohol or a controlled substance to the victim in furtherance of the offense with the intent to make the victim incapacitated; in this paragraph, “incapacitated” has the meaning given in AS 11.41.470;

(31) the defendant's prior criminal history includes convictions for five or more crimes in this or another jurisdiction that are class A misdemeanors under the law of this state, or having elements similar to a class A misdemeanor; two or more convictions arising out of a single continuous episode are considered a single conviction; however, an offense is not a part of a continuous episode if committed while attempting to escape or resist arrest or if it is an assault on a

uniformed or otherwise clearly identified peace officer or correctional employee; notice and denial of convictions are governed by AS 12.55.145(b), (c), and (d);

(32) the offense is a violation of AS 11.41 or AS 11.46.400 and the offense occurred on school grounds, on a school bus, at a school-sponsored event, or in the administrative offices of a school district if students are educated at that office; in this paragraph,

(A) "school bus" has the meaning given in AS 11.71.900;

(B) "school district" has the meaning given in AS 47.07.063;

(C) "school grounds" has the meaning given in AS 11.71.900;

(33) the offense was a felony specified in AS 11.41.410--11.41.455, the defendant had been previously diagnosed as having or having tested positive for HIV or AIDS, and the offense either (A) involved penetration, or (B) exposed the victim to a risk or a fear that the offense could result in the transmission of HIV or AIDS; in this paragraph, "HIV" and "AIDS" have the meanings given in AS 18.15.310;

(34) the defendant committed the offense on, or to affect persons or property on, the premises of a recognized shelter or facility providing services to victims of domestic violence or sexual assault;

(35) the defendant knowingly directed the conduct constituting the offense at a victim because that person was 65 years of age or older.

(d) The following factors shall be considered by the sentencing court if proven in accordance with this section, and may allow imposition of a sentence below the presumptive range set out in AS 12.55.125:

(1) the offense was principally accomplished by another person, and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim;

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

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

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

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

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

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

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

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

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

(11) after commission of the offense for which the defendant is being sentenced, the defendant assisted authorities to detect, apprehend, or prosecute other persons who committed an offense;

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

(13) the defendant is convicted of an offense specified in AS 11.71 and the offense involved small quantities of a controlled substance;
(14) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the distribution of a controlled substance, other than a schedule IA controlled substance, to a personal acquaintance who is 19 years of age or older for no profit;
(15) the defendant is convicted of an offense specified in AS 11.71 and the offense involved the possession of a small amount of a controlled substance for personal use in the defendant's home;
(16) in a conviction for assault or attempted assault or for homicide or attempted homicide, the defendant acted in response to domestic violence perpetrated by the victim against the defendant and the domestic violence consisted of aggravated or repeated instances of assaultive behavior;
(17) except in the case of an offense defined by AS 11.41 or AS 11.46.400, the defendant has been convicted of a class B or C felony, and, at the time of sentencing, has successfully completed a court-ordered treatment program as defined in AS 28.35.028 that was begun after the offense was committed;
(18) except in the case of an offense defined under AS 11.41 or AS 11.46.400 or a defendant who has previously been convicted of a felony, the defendant committed the offense while suffering from a mental disease or defect as defined in AS 12.47.130 that was insufficient to constitute a complete defense but that significantly affected the defendant's conduct;
(19) the defendant is convicted of an offense under AS 11.71, and the defendant sought medical assistance for another person who was experiencing a drug overdose contemporaneously with the commission of the offense;
(20) except in the case of an offense defined under AS 11.41 or AS 11.46.400, the defendant committed the offense while suffering from a condition diagnosed

(A) as a fetal alcohol spectrum disorder, the fetal alcohol spectrum disorder substantially impaired the defendant's judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life, and the fetal alcohol spectrum disorder, though insufficient to constitute a complete defense, significantly affected the defendant's conduct; in this subparagraph, “fetal alcohol spectrum disorder” means a condition of impaired brain function in the range of permanent birth defects caused by maternal consumption of alcohol during pregnancy; or

(B) as combat-related post-traumatic stress disorder or combat-related traumatic brain injury, the combat-related post-traumatic stress disorder or combat-related traumatic brain injury substantially impaired the defendant's judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life, and the combat-related post-traumatic stress disorder or combat-related traumatic brain injury, though insufficient to constitute a complete defense, significantly affected the defendant's conduct; in this subparagraph, “combat-related post-traumatic stress disorder or combat-related traumatic brain injury” means post-traumatic stress disorder or traumatic brain injury resulting from combat with an enemy of the United States in the line of duty while on active duty as a member of the armed forces of the United States; nothing in this subparagraph is intended to limit the application of (18) of this subsection;

(21) the defendant, as a condition of release ordered by the court, successfully completed an alcohol and substance abuse monitoring program established under AS 47.38.020.

(e) If a factor in aggravation is a necessary element of the present offense, or requires the imposition of a sentence within the presumptive range under AS 12.55.125(c)(2), that factor may not be used to impose a sentence above the high end of the presumptive range. If a factor in mitigation is raised at trial as a

defense reducing the offense charged to a lesser included offense, that factor may not be used to impose a sentence below the low end of the presumptive range.

(f) If the state seeks to establish a factor in aggravation at sentencing

(1) under (c)(7), (8), (12), (15), (18)(B), (19), (20), (21), or (31) of this section, or if the defendant seeks to establish a factor in mitigation at sentencing, written notice must be served on the opposing party and filed with the court not later than 10 days before the date set for imposition of sentence; the factors in aggravation listed in this paragraph and factors in mitigation must be established by clear and convincing evidence before the court sitting without a jury; all findings must be set out with specificity;

(2) other than one listed in (1) of this subsection, the factor shall be presented to a trial jury under procedures set by the court, unless the defendant waives trial by jury, stipulates to the existence of the factor, or consents to have the factor proven under procedures set out in (1) of this subsection; a factor in aggravation presented to a jury is established if proved beyond a reasonable doubt; written notice of the intent to establish a factor in aggravation must be served on the defendant and filed with the court

(A) 20 days before trial, or at another time specified by the court;

(B) within 48 hours, or at a time specified by the court, if the court instructs the jury about the option to return a verdict for a lesser included offense; or

(C) five days before entering a plea that results in a finding of guilt, or at another time specified by the court.

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

(h) If one of the aggravating factors in (c) of this section is established as provided in (f)(1) and (2) of this section, the court may increase the term of imprisonment up to the maximum term of imprisonment. Any additional aggravating factor may then be established by clear and convincing evidence by the court sitting without a jury, including an aggravating factor that the jury has found not to have been established beyond a reasonable doubt.

(i) In this section, “serious provocation” has the meaning given in AS 11.41.115(f).