



# alaska judicial council

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## MEMORANDUM

**TO:** Judicial Council  
**FROM:** Staff  
**DATE:** August 7, 2020  
**RE:** Appellate Evaluation of Judges Eligible for Retention in 2020

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### **I. Introduction**

The Judicial Council staff has several ways of evaluating judges' performance. One way is to compare how each judge's decisions withstand appellate review.

The review process begins with a staff member, usually the staff attorney, reading every published appellate decision and every memorandum opinion and judgment released by the appellate courts. Staff first determines how many issues were on appeal and then decides whether the appellate court "affirmed" each of the trial judge's decisions on appeal. Decisions requiring reversal, remand or vacating of the trial court judge's ruling or judgment are not classified as "affirmed." Mooted issues and issues arising only upon appeal, which were not ruled on by the trial judge, are not taken into account. When the Alaska Supreme Court or Alaska Court of Appeals *clearly* overrules a prior statement of law upon which the trial court reasonably relied to decide an issue, that issue is not considered. These cases are very rare.

After deciding how many issues in a case were affirmed, the case is given a score. For instance, if two of ten issues are affirmed, the case is given a score of “20% affirmed.” This scoring system is different than the court system’s methodology, which notes only whether the case was affirmed, partly affirmed, reversed, remanded, vacated, or dismissed. Also, the court system tends to attribute the appeal to the last judge of record rather than determine which judge’s decisions were appealed. In this analysis, if a case includes more than one judge’s decisions, an attempt is made to determine which judge made which rulings and to assign affirmance scores appropriate with those decisions. If it is not possible to make that determination from the text of the case, the overall affirmance score for that case is assigned to each judge of record.

After the case has been scored, another staff member enters information about the case into a database. The data fields include case type,<sup>1</sup> judge, affirmance score, date of publication or release, opinion number, and trial case number.

Before a retention election, staff cross-checks the cases in its database to make sure the database is as complete as possible. Staff then analyzes each retention judge’s “civil,” “criminal,”<sup>2</sup> and overall (combined) affirmance rates. Staff also calculates civil, criminal, and overall affirmance rates for all the judges in the database for the retention period. Staff then compares affirmance rates for that year against affirmance rates for prior years. Cases that are included in the calculation of these rates are only those cases that have been decided in the current retention term, which is a six-year span for superior court judges and a four-year span for district court judges.

Several problems are inherent in this process. First, the division of an opinion into separate “issues” is sometimes highly subjective. Some opinions have only one or two clearly defined issues and are easy to categorize. Other opinions present many main issues and even more sub-issues. Deciding whether a topic should be treated as a “sub-issue” or an “issue” deserving separate analysis can be problematic and varies depending on the complexity of a given case. Generally, the analysis follows the court’s outlining of the case; if the court has given a sub-issue its own heading, the sub-issue will likely have its own affirmed/not affirmed decision.

Second, each issue is weighted equally, regardless of its effect on the case outcome, its legal importance, or the applicable standard of review. For instance, a critical constitutional law

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<sup>1</sup> Cases are classified as general civil, tort, child in need of aid (“CINA”), family law/domestic relations, administrative appeal, criminal, and juvenile delinquency. If a case has issues relating to more than one category, staff decides which category predominates.

<sup>2</sup> “Criminal” includes criminal, post-conviction relief, and juvenile delinquency cases. All other cases are classified as “civil.” Because the supreme court reviews administrative appeals independently of the superior court’s rulings, administrative appeals are not analyzed as part of the judge’s civil affirmance rate, although they are included in the database.

issue is weighted equally with a legally less important issue of whether a trial judge properly awarded attorney's fees. Issues that the appellate court reviews independently of the trial court's decision (*de novo* review) are weighted equally with issues that are reviewed under standards of review that defer to the trial court's discretion. The Judicial Council staff has considered ways to weigh each issue to reflect its significance but has decided not to implement a weighted analysis.

Third, appellate courts tend to affirm some types of cases more often than others. For example, criminal cases are affirmed at a higher rate than civil cases. Many criminal appeals involve excessive sentence claims that are reviewed under a "clearly mistaken" standard of review that is very deferential to the trial court's action. Criminal appeals are more likely to include issues that have less merit than issues raised in civil appeals because, unlike most civil appeals, most criminal appeals are brought at public expense. The cost of raising an issue on appeal is therefore more of a factor in determining whether an issue is raised in a civil appeal than it is in a criminal appeal. Also, court-appointed counsel in a criminal appeal must abide by a defendant's constitutional right to appeal his or her conviction and sentence unless counsel files a brief in the appellate court explaining reasons why the appeal would be frivolous. This circumstance can result in the pursuit of issues in criminal cases that have a low probability of reversal on appeal. Accordingly, a judge's affirmance rate in criminal cases is almost always higher than that judge's affirmance rate in civil cases. Judges who hear a higher percentage of criminal cases tend to have higher overall affirmance rates than those who hear mostly civil cases. For this reason, staff breaks out each judge's criminal and civil appellate rates.

Fourth, the analysis of appellate affirmance rates does not include any cases appealed from the district court to the superior court. Those decisions are not published or otherwise easily reviewable. Staff has reviewed all published decisions from the Alaska Supreme Court and Alaska Court of Appeals and unpublished Memorandum Opinion and Judgments (MO&Js) from the Alaska Supreme Court and the Alaska Court of Appeals since 2002. These decisions are published on the Alaska Court System's website and elsewhere and are easily reviewable.

Fifth, administrative appeals pose a problem. Administrative decisions are appealed first to the superior court, which acts as an intermediate appellate court.<sup>3</sup> Those cases may then be appealed to the supreme court, which gives no deference to the superior court's decision and takes up the case *de novo*. Because the supreme court evaluates only the agency decision, and not the superior court judge's decision, there is little value to these cases as an indicator of a judge's performance and they can be misleading. We have excluded administrative appeals from this analysis for the past several retention cycles.

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<sup>3</sup> The Alaska Workers Compensation Appeals Commission hears appeals from Alaska Workers' Compensation Board decisions that were decided after November 7, 2005. Those cases may then be appealed to the Alaska Supreme Court. Because workers' compensation appeals are no longer reviewed by the superior court as an intermediate court of appeal, the supreme court decisions are no longer included in this database and are not included in the "administrative appeals" category.

Sixth, the present analysis involves only a relatively small number of cases for some judges. The fewer the number of cases in a sample, the less reliable the analysis is as an indicator of a judge's performance. Affirmance rates for judges having fewer than ten cases reviewed on appeal can be more misleading than helpful. For descriptive purposes, appellate review records are included for all judges, regardless of the number of cases reviewed. Affirmance rates based on fewer than ten cases, however, are not considered by staff as a reliable indicator of performance.

## **II. Analysis of Appellate Affirmance Rates**

### **A. Superior Court Judges, 2014 - 2019**

Generally, the trends of civil, criminal and overall affirmance rates have been stable since the Council began reviewing them in 1994. Criminal affirmance rates have ranged within eight percentage points, from 78% - 85%, over the past twenty-six years and have stayed around 81% - 82% most of that time. Civil affirmance rates mostly ranged within six percentage points, from 67% - 72%, until the 2010 - 2015 retention period, with one period (1996 - 2001) lower, at 61%. Over the past three retention cycles, the civil affirmance rate rose to 76%. Overall, the affirmance rate of all cases was stable at about 75% until the 2006 - 2011 period, when the rate began an upward climb to 78 - 79%, driven first by the rise in criminal affirmance rates, and then by the rise in civil affirmance rates.

<b>Affirmance Rates All Superior Court Judges</b>			
<b>Years</b>	<b>Criminal</b>	<b>Civil</b>	<b>Overall</b>
<b>1994-1999</b>	85%	67%	75%
<b>1996-2001</b>	81%	61%	75%
<b>1998-2003</b>	82%	67%	75%
<b>2000-2005</b>	80%	70%	76%
<b>2002-2007</b>	79%	70%	75%
<b>2004-2009</b>	78%	72%	75%
<b>2006-2011</b>	81%	72%	77%
<b>2008-2013</b>	82%	71%	77%
<b>2010-2015</b>	82%	75%	79%
<b>2012-2017</b>	81%	76%	79%
<b>2014-2019</b>	80%	76%	78%

Affirmance rates for superior court judges who are standing for retention in 2020 are summarized in the following table. The table shows the number of civil cases appealed during the judge's term, the percent of issues in those cases that were affirmed by the appellate court, the number of criminal cases appealed during the judge's term, the percent of issues in those

cases that were affirmed by the appellate court, and the combined civil and criminal appeals information. Comparisons of final column figures should be made carefully. As discussed above, judges with higher percentages of criminal appeals will generally have higher overall affirmance rates than those with a higher percentage of civil appeals. Comparisons between the first two columns are likely to be more meaningful. Also, judges having fewer than ten cases reviewed should not be compared with other judges. The figures for those judges are provided for descriptive purposes only.

To provide even more information for this evaluation, an overall affirmance rate has been calculated for all superior court judges, including judges not standing for retention, and retired or inactive judges, for the evaluation period. This comparison provides a better performance measure than comparing retention judges against each other.

<b>Judicial Affirmance Rates</b>						
<b>Superior Court Judges Eligible for Retention 2020</b>						
	Criminal Affirmance		Civil Affirmance		Overall	
	Number Reviewed	Rate	Number Reviewed	Rate	Number Reviewed	Rate
<b>Second Judicial District</b>						
DiBenedetto, Romano	1	0%	--	--	1	0%
Roetman, Paul A	7	64%	2	100%	9	72%
<b>Third Judicial District</b>						
Crosby, Dani	--	--	7	90%	7	90%
Guidi, Andrew	1	100%	31	77%	32	77%
Henderson, Jennifer	--	--	6	83%	6	83%
Lamoureux, Yvonne	--	--	1	100%	1	100%
Miller, Gregory	25	80%	23	86%	48	83%
Reigh, Christina	--	--	2	62%	2	62%
Wells, Jennifer	1	100%	3	83%	4	88%
Woodman, Jonathan	3	67%	7	62%	10	63%
<b>Fourth Judicial District</b>						
Peters, Nathaniel	1	100%	1	100%	2	100%
<b>Number and mean affirmance rates, superior court judges eligible for retention, 2014 - 2019</b>	<b>39</b>	<b>76%</b>	<b>83</b>	<b>81%</b>	<b>122</b>	<b>79%</b>
<b>Number and mean affirmance rates, all superior court judges 2014 - 2019</b>	<b>990</b>	<b>80%</b>	<b>692</b>	<b>76%</b>	<b>1,682</b>	<b>78%</b>

*Note: Data for judges having fewer than ten cases is provided for descriptive purposes only because too few cases are available for meaningful analysis.*

Statistically, the smaller the number of cases in a sample, the less reliable the conclusions drawn from that are likely to be. Samples of fewer than ten cases are likely to be misleading. Judges with fewer than ten cases are likely to be new judges without sufficient time for a case to go through all the steps of trial court and appeal court processes.

In the past, we have taken alternative steps to help the reader evaluate appellate court review of decisions by judges with fewer than ten cases. Most of the current cases were affirmed at 100%. To assist the reader, we describe individual cases that were not affirmed at 100%. Alaska Supreme Court cases are designated with simply a date: (2018); Alaska Court of Appeals cases are designated as a date and (Alaska App.).

For this retention cycle, eight of the eleven superior court judges eligible for retention had fewer than ten cases reviewed. With the exception of Judge Roetman, these judges were all newly appointed to the superior court. Some of these judges had previously been either magistrates or district court judges. Appeals concerning their work in those former positions was not considered in this aspect of the evaluation for their current position.

**Judge Romano DiBenedetto:** Judge DiBenedetto had one criminal case reviewed. It was affirmed at 0% (reversed):

*State of Alaska, Department of Public Safety v. Superior Court (Alaska App. 2018) (0%)* - In this case, Judge DiBenedetto ordered the Department of Public Safety to transport a defendant from one correctional facility to another for a psychological assessment by the defendant's expert. The Department petitioned for review, arguing that Judge DiBenedetto did not have authority to order the transport. The court of appeals agreed, explaining that while the court had authority to order transport to court proceedings, it did not generally have authority to order transport between two correctional facilities.

**Judge Paul Roetman:** Judge Roetman had nine appeals reviewed. Six were affirmed at 100%. One was affirmed at 50% and two were affirmed at 0% (reversed):

*State of Alaska v. Sheldon (Alaska App. 2018) (0%)* - The defendant, a convicted felon, was found in possession of a firearm and arrested. He also admitted to possessing child pornography. He entered a plea agreement to a misconduct involving weapons charge and judgment was entered. Seventeen months later, he was indicted on possession of child pornography charges. He moved to dismiss those charges, arguing that the state violated his right to a speedy trial. Judge Roetman agreed and dismissed the charges. The state appealed. The court of appeals agreed with the state that the two sets of charges did not arise from the same criminal episode and the time to trial on the pornography charges should be considered separately. It reinstated the charges and remanded for further proceedings.

*Olanna v. State of Alaska (Alaska App. 2019) (0%)* - In this case, the defendant was convicted of second-degree murder for strangling and killing his girlfriend. Judge Roetman imposed a sentence of 75 years with no suspended time. The defendant appealed. The court of appeals reviewed Judge Roetman's sentencing remarks and found that he had improperly considered the defendant's eligibility for discretionary parole when imposing sentence. It remanded the case for resentencing.

*Russell v. State of Alaska (2019) (50%)* - A jury convicted the defendant of manufacturing alcohol in a local option community. The defendant appealed, arguing that there was insufficient evidence. The court of appeals reviewed the record and concluded the evidence was sufficient to uphold the conviction based in eyewitness testimony of the manufacturing. The defendant also appealed his sentence. The court of appeals did not review his argument because it found the judge and parties made a

different error when they did not consider prior felonies that should have been taken into account when sentencing the defendant. It therefore remanded the case for resentencing.

**Judge Dani Crosby:** Judge Crosby had seven appeals. Six were affirmed at 100%. One family case was affirmed at 33%:

*Gray v. Gray (2019) (33%)* - This case involved a custody dispute. The father had successfully moved to modify a previous order allowing him only supervised visitation. The new order allowed increased visitation. He then moved to modify custody to shared physical custody. The mother cross-moved for an order requiring the father to pay unpaid childcare, tutoring, and healthcare expenses. Judge Crosby denied the father's motion for custody and ordered the father to pay the unpaid expenses. The judge also awarded the mother attorney's fees. The father appealed. The supreme court upheld the denial of the motion to modify custody but vacated the order to pay the expenses, remanding so Judge Crosby could interpret how a parenting agreement affected the payment of expenses. The court also vacated and remanded the attorney's fees order.

**Judge Jennifer Henderson:** Judge Henderson had six appeals considered. Five were affirmed at 100%. One, a family law case, was affirmed at 0% (reversed):

*Engeberg. Engeberg (2019) (0%)* - A father appealed a child support order, arguing that the judge should have imputed income to the mother because she was underemployed. The court reviewed the record and determined that the judge had not made factual findings on the record about the parties' incomes or the father's request for the judge to impute income. The supreme court therefore remanded the case back to the superior court for further proceedings.

**Judge Yvonne Lamoureux:** Judge Lamoureux had one case reviewed. It was affirmed at 100%.

**Judge Christina Reigh:** Judge Reigh had two cases reviewed. One was affirmed at 100%. The other, a family law case, was affirmed at 25%:

*Thompson v. Thompson (2019) (25%)* - In this case, Judge Reigh issued several orders regarding child custody, marital property division, child support, and attorney's fees. The ex-wife appealed. The supreme court upheld the custody order granting shared physical and legal custody. When it reviewed the child support order, however, it found that Judge Reigh had not made sufficient factual findings on the record that would allow it to review the order so it remanded that issue. The supreme court next reviewed the property division and concluded that Judge Reigh had abused her discretion when she considered the value of a fishing vessel separately and in the husband's favor, rather than together with the rest of the marital estate as marital property. The fishing vessel was acquired during the marriage and was not a gift or separate inheritance. The supreme court therefore reversed that aspect of the property division and remanded that issue. It also vacated the attorney's fees award stemming from the property division order.

**Judge Jennifer Wells:** Judge Wells had four cases reviewed. Three were affirmed at 100%. One was affirmed at 50%:

*In the Matter of the Estate of Alexina Rodman (2019) (50%)* - This case concerned an ex-husband's interest in his former spouse's estate. The parties had divorced but had maintained a

relationship and lived together until her death. The supreme court affirmed Judge Wells's ruling that the ex-husband had no property rights in the estate by virtue of their domestic relationship because Alaska Statutes do not provide for domestic partner intestate inheritance. However, the supreme court vacated Judge Wells's orders pertaining to some real property because Judge Wells had never issued final judgments on some of the petitioner's claims that the ex-wife had sold him some of the property.

**Judge Nathaniel Peters:** Judge Peters had two cases reviewed. Both were affirmed at 100%.

### **B. District Court Judges, 2016 - 2019**

The mean criminal affirmance rate for all district court judges from 2016 - 2019 was 74%, the lowest in the past twenty-two years. District court criminal case affirmance rates have ranged from 74% - 85%. Civil appellate affirmance rates for district court judges are not provided. They are not meaningful because no district court judge regularly has ten or more civil cases appealed to the supreme court.

<b>Criminal Affirmance Rates All District Court Judges</b>	
<b>Years</b>	<b>Mean</b>
<b>1998-2001</b>	81%
<b>2000-2003</b>	77%
<b>2002-2005</b>	77%
<b>2004-2007</b>	85%
<b>2006-2009</b>	84%
<b>2008-2011</b>	81%
<b>2010-2013</b>	79%
<b>2012-2015</b>	84%
<b>2014-2017</b>	79%
<b>2016-2019</b>	74%

District court judges' affirmance rates are summarized in the following table. The table shows the number of criminal cases appealed to the Alaska Court of Appeals and Alaska Supreme Court during the judge's term, and the percent of issues in those cases that were affirmed by the appellate court.

<b>Judicial Affirmance Rates District Court Judges Eligible for Retention 2020</b>		
	Criminal Affirmance	
	Number Reviewed	Rate
<b>Third Judicial District</b>		
Dickson, Leslie N	4	100%
Franciosi, Michael	--	--
Hanley, J Patrick	--	--
Logue, Michael	--	--
McCrea, Kari	--	--
Wallace, David	7	100%
Washington, Pamela S	5	40%
<b>Fourth Judicial District</b>		
Christian, Matthew	1	50%
Montgomery, Will	--	--
<b>Number and mean affirmance rates, district court judges eligible for retention, 2016 - 2019</b>	17	79%
<b>Number and mean affirmance rates, all district court judges, 2016 - 2019</b>	137	74%

*Note: Data is provided for descriptive purposes only because too few cases are available for meaningful analysis.*

As discussed above, judges having fewer than ten cases reviewed should not be compared with other judges. In the current retention period, no district court judge had more than ten cases. Five of the judges had no cases reviewed: Judge Michael Franciosi, Judge J. Patrick Hanley, Judge Michael Logue, Judge Kari McCrea, and Judge William Montgomery. To provide more context, the judges are discussed individually below.

**Judge Leslie Dickson:** Judge Dickson had four cases reviewed and was affirmed on all issues in every case.

**Judge David Wallace:** Judge Wallace had seven cases reviewed and was affirmed on all issues in every case, except for one minor correction to a judgment due to a clerical error.

**Judge Pamela Washington:** Judge Washington had five criminal cases reviewed. Two cases were affirmed at 100%. Three cases were affirmed at 0% (reversed):

*Prince v. State of Alaska, (Alaska App. 2016) (0%)* - The defendant was convicted of fourth degree assault. He appealed, arguing that the judge had prevented him from presenting a defense that his conduct involved “mutual combat” and thus qualified for the lesser offense of disorderly conduct. The court of appeals agreed, holding that the judge erred by not allowing testimony that the other person had touched the defendant’s granddaughter in a sexual manner several days before the day of the incident and had taunted the defendant to come over and do something about it.

*State of Alaska v. Borowski, (Alaska App. 2016) (0%)* - The defendant was convicted of second-degree harassment for posting a message on Assemblyman Dick Traini’s Facebook page that said, “Your going to get assassinated.”[sic] Judge Washington dismissed the charge, ruling that the defendant’s post was protected speech under the First Amendment. The court of appeals reversed, holding that the court

improperly made several findings of fact before it had heard evidence, and that the ruling was based on a mistaken legal premise that the defendant could not be prosecuted unless he seriously intended to harm Mr. Traini. The court of appeals explained that the correct standard was whether the communication would be viewed as a threat.

*State of Alaska v. Barber, (Alaska App. 2017) (0%)* - The defendant was convicted of possession of a controlled substance. He later applied for post-conviction relief, contending that the document charging him and the judgment contained the wrong statutory subsection for his crime. Judge Washington granted his application and the state appealed. The court of appeals reversed, holding that the factual basis of the crime (possession of two tablets of suboxone) was uncontested and the discrepancy was a clerical error that could be corrected as long as the defendant had not detrimentally relied on the error when making his plea. The court remanded for further proceedings.

**Judge Matthew Christian:** Judge Christian had one case reviewed since his appointment as a district court judge. It was affirmed at 50%:

*Kinmon v. State of Alaska (Alaska App. 2019) (50%)* - The defendant was a licensed game guide in Alaska and was licensed to sell big game tags in the field to nonresident hunters. He was convicted of five counts of tampering with a public record, five counts of committing or aiding the commission of a violation of a big game statute or regulation, and one count of failing to report a violation of a big game law. The defendant appealed. The court of appeals reversed four of the convictions and upheld the remaining seven. The court of appeals held that Judge Christian erred when he did not instruct the jury on a key element of the offense, leaving it for the jury to decide the definition of a legal term. The court then held that Judge Christian did not err when giving a jury instruction on the defendant's "mistake of law" defense. Although the instruction was not ideal, it was an accurate description of Alaska law and the defendant did not object or propose a different instruction.