Appellate Sentence Review in Alaska

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INTRODUCTION

Today, Alaska's appellate courts routinely review and modify criminal sentences under the authority of Alaska Statutes section 12.55.120(a), a statute that confers upon the appellate courts the power to modify sentences found to be overly severe.[1]

Before passage of that legislation in 1969, however, there was no statutory mechanism by which a convicted defendant could have a severe but lawfully-imposed sentence reduced on appeal.[2] Prior to enactment of the sentence review statute, Alaska's then-three supreme court justices struggled with the basic question of whether the court had any common law or constitutional authority to review and modify overly severe or lenient criminal sentences that fall within statutory limits.[3] After the sentence review statute was passed, the supreme court, and later the Alaska court of Appeals, struggled with the more complicated issue of the proper role for appellate courts in sentencing criminal defendants and in creating sentencing policy.

This article documents the development of sentence review case law in Alaska. It traces the evolution of appellate sentencing law and explains its relationship to presumptive sentencing and Alaska's ban on plea bargaining. The discussion concludes with a review of how Alaska's appellate courts, particularly the Alaska Court of Appeals, have supplemented and interpreted Alaska's presumptive sentencing statutes.

EARLY DEVELOPMENTS: 1966-1968

Three opinions published between 1966 and 1968 demonstrate how the justices differed in their approach to the issue: Justice Nesbett categorically opposed sentence review, Justice Rabinowitz favored it, and Justice Dimond vacillated between these two

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[1] ALASKA STAT. § 12.55.120(a) (1990).

[2] Nor was there any statutory mechanism by which the state could appeal an overly lenient sentence.

[3] It was generally accepted that appellate courts had jurisdiction to review and modify sentences that did not fall within the bounds established by statute for the offense in question. *See* Jefferson v. City of Anchorage, 374 P.2d 241 (Alaska 1962).

poles. The first of these cases was *State v. Pete.*[4] In *Pete,* the appellee had been found guilty of two counts of unlawful sale of intoxicating liquor, a misdemeanor punishable by a maximum of one year imprisonment.[5] The district court had sentenced the defendant to the maximum one year on each count, with the sentences to run consecutively.[6] On appeal, Pete argued that his sentence should be reduced because it was illegal or, in the alternative, that it was excessive.[7]

The supreme court rejected Pete's argument that his consecutive sentences were illegal.[8] Nevertheless, Chief Justice Nesbett and Justice Dimond voted to reduce his sentence to time served, stating that "the two offenses were really part of one general transaction involving the unlawful sale of liquor."[9] Justice Rabinowitz dissented from the majority's decision to reduce the sentence, arguing that "this important question relating to our appellate authority [to review sentences] has not been adequately briefed."[10]

Not until two years later was the court prepared to squarely address whether it had the authority to review and modify criminal sentences. In *Bear v. State,*[11] Justice Rabinowitz concluded that the supreme court had jurisdiction to review criminal sentences,[12] while Chief Justice Nesbett and Justice Dimond, distinguishing their earlier holding in *Pete,* concluded that the court did not have jurisdiction to review a criminal sentence for an abuse of discretion.[13]

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[4] 420 P.2d 338 (Alaska 1966).

[5] *Id.* at 341.

[6] *Id.*

[7] *Id.* at 339.

[8] *Id.* at 342.

[9] *Id.*

[10] *Id.* at 343 (Rabinowitz, J., concurring in part, dissenting in part).

[11] 439 P.2d 432 (Alaska 1968).

[12] *Id.* at 437-38.

[13] *Id.* at 435.

The majority reasoned that without a statutory provision specifically conferring upon the appellate court authority to review criminal sentences, the determination of the period of time that a convicted defendant should serve was best left to the discretion of the trial judge and to the State Board of Parole.[14] Justice Rabinowitz, dissenting, pointed out that the court had already modified a sentence in *Pete*, and argued that a logical construction of the constitutional grant of final appellate jurisdiction to the supreme court permitted sentence review.[15]

In *Faulkner v. State*,[16] Justice Dimond, who earlier that year had refused to review Bear's sentence for an abuse of discretion, voted with Justice Rabinowitz to vacate Faulkner's sentence, even though it was within the limits of a valid statute. Faulkner had been sentenced to 36 years in prison on his plea of guilty to eight counts involving bad checks.[17] Both Justice Dimond and Justice Rabinowitz agreed that this sentence was too severe and should be vacated; however, they could not agree on a legal theory for their result.

Justice Dimond voted to vacate Faulkner's sentence on the grounds that it was "so 'disproportionate to the offense committed'" that it amounted to a violation of the constitutional ban against cruel and unusual punishment.[18] Justice Rabinowitz, reiterating the views he had expressed in his dissent in *Bear*, voted to vacate on the grounds that the trial court had abused its discretion and had imposed an excessive sentence; however, he did not share Justice Dimond's view that the sentence violated the constitutional ban against cruel and unusual punishment.[19] Chief Justice Nesbett disagreed with both of his colleagues, arguing in dissent that the cruel and unusual punishment prohibition could not be used to vacate a sentence within the limits of a

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[14] *Id.* at 436.

[15] *Id.* at 439 (Rabinowitz, J., dissenting).

[16] 445 P.2d 815 (Alaska 1968).

[17] *Id.* at 817.

[18] *Id.* at 818 (citations omitted).

[19] *Id.* at 822, 830.

valid statute, and that the court did not have jurisdiction to review a criminal sentence for abuse of discretion.[20]

Clearly, the issue was a difficult one for the court. When faced with an unusually harsh sentence, two of the three justices felt compelled to act; yet only one of the three was willing to open the door to wholesale sentence review.

NATIONAL TRENDS: THE RISE OF APPELLATE SENTENCE REVIEW AS A GOAL OF SENTENCE REFORM

Alaska's appellate court was not alone in its reluctance to review criminal sentences. Nationwide, few appellate courts had accepted sentence review jurisdiction without specific statutory authorization.[21] There were several legal and policy arguments against sentence review. Some state courts, including the Alaska Supreme Court, held that reviewing sentences would improperly interfere, or seem to interfere, with the traditional power of the executive branch to modify sentences.[22] Other appellate courts felt that the trial judge was better able to fashion an appropriate sentence because the trial judge directly observes the behavior and demeanor of the offender.[23] Many judges simply feared that appellate sentence review would generate a flood of appeals that would render their caseloads unmanageable.[24]

Many sentencing laws in effect in the United States during the 1950s and the 1960s were indeterminate; they gave judges broad discretion to choose any sentence below the statutory maximum penalty for a given crime, and contained no articulated

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[20] *Id.* at 825-26 (Nesbett, C.J., dissenting).

[21] A. CAMPBELL, LAW OF SENTENCING § 126, at 386 (1978).

[22] *Id.* at 387; *Bear*, 439 P.2d at 434. In England at common law, "the chief variations in punishments lay more in the methods by which an offender was to be executed than in any other respect; the role of the judiciary being to determine the question of guilt and to enter judgment." *Id.* After judgment had been entered, the "penalties of the law were exacted as a matter of course, unless a royal pardon was forthcoming." *Id.*

[23] A. CAMPBELL, *supra* note 21, at 386.

[24] Ozanne, *Judicial Review: A Case for Sentencing Guidelines and Just Deserts*, in 17 SENTENCING REFORM: EXPERIMENTS IN REDUCING DISPARITY 177, 179 (M. Forst ed. 1982).

criteria for choosing the sentence or the release date.[25] For example, under former Alaska law, 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.[26] The broad judicial discretion and lack of articulated sentencing criteria -- typical of indeterminate statutes -- were justified by rehabilitative purposes: "to enable judges and parole officials familiar with the case to choose a disposition tailored to the offender's need for treatment."[27]

By the mid 1970s, however, commentators were beginning to criticize unregulated sentencing discretion.[28] Critics objected to the fact that unregulated authority to sentence allows judges to decide similar cases differently.[29] Other commentators were skeptical about the value of rehabilitation as a primary goal of sentencing theory.[30]

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[25] Tonry, *Sentencing Guidelines and Their Effects*, in THE SENTENCING COMMISSION AND ITS GUIDELINES 16, 17 (1987).

[26] *See* ALASKA STAT. §§ 11.05.010-.060, 11.75.110 (1962) (repealed 1978).

[27] Von Hirsch, *The Sentencing Commission's Functions*, in THE SENTENCING COMMISSION AND ITS GUIDELINES, *supra* note 25, at 3. *See also* Forst, *Sentencing Disparity: An Overview of Research and Issues*, in SENTENCING REFORM: EXPERIMENTS IN REDUCING DISPARITY, *supra* note 24, at 16.

[28] Von Hirsch, *supra* note 27, at 3.

[29] *Id.* at 4. Deciding cases differently results in sentence disparity. Sentence disparity is generally defined as "differences in dispositions that cannot be explained by relevant characteristics of the offense or the offender." Hanrahan & Greer, *Criminal Code Revision and the Issue of Disparity*, in 17 SENTENCING REFORM: EXPERIMENTS IN REDUCING DISPARITY, *supra* note 24, at 36. Hanrahan and Greer explain that sentence parity, "the idea that offenders convicted of similar crimes should receive roughly the same punishment" is universally appealing because "even philosophically or politically diverse groups can agree that deviations from some sentencing norm are undesirable." *Id.* Disagreement arises because such groups have different views on how to define that norm. *Id.*

[30] The rehabilitative model of punishment was criticized on two fronts. First, mounting evidence was beginning to show that rehabilitative programs did not have a measurable effect on recidivism. Some felt it was a waste of taxpayers' money to fund programs that did not reduce crime, and some thought it was unfair for prisoners to participate in intrusive therapeutic programs that had no practical effect. Second, people began to question the fairness of the rehabilitative model itself: is it fair to make the severity of the offender's penalty depend on the offender's perceived need for treatment, instead of on the seriousness of his offense? Von Hirsch, *supra* note 27, at 3-4; Forst, *supra* note 27, at 18-19.

With the decline of the rehabilitative model in the United States came the rise of other sentencing models.[31]

The two most prominent of these models are the "just deserts" and the "incapacitation" models. The just deserts model of sentencing philosophy requires that the offender's sentence "comport with the gravity of his criminal conduct."[32] The incapacitation model emphasizes imprisoning offenders whose "early criminal records and social histories suggest they are likely to return to crime."[33] In contrast to the rehabilitative model, which is suited to a system of indeterminate sentencing, both of these models lend themselves to a system of explicit standards for sentencing.[34]

Both disenchantment with the rehabilitative model and concern over unjustified sentence disparity resulted in a growing consensus in the late 1970s that regulating judges' sentencing discretion would be a necessary part of sentence reform.[35] Proponents of appellate review argued that appellate judges could regulate trial court discretion in two ways: they could review individual sentences, modifying those found to be excessive or too lenient, and they could in the process articulate standards and guidelines governing the imposition of criminal sanctions.[36]

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[31] Von Hirsch, *supra* note 27, at 4.

[32] *Id.*

[33] *Id.*

[34] *Id.* Von Hirsch has explained that if criminal sanctions are to be based on the seriousness of the offender's conduct, then uniform guidelines are needed to help judges gauge the conduct's gravity and the appropriate, deserved penalty. If penalties are to be based, instead, on the statistical probability of re-offending, then such probabilities and the appropriate incapacitating measures should be set forth in explicit standards. *Id.*

[35] *Id.* at 3-4.

[36] Ozanne, *supra* note 24, at 178 (citing AMERICAN BAR ASSOCIATION, PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES 28-29 (1968)).

THE LEGISLATIVE GRANT OF APPELLATE JURISDICTION TO REVIEW SENTENCES: 1967-1969

In response to concerns about sentence reform, and to the Alaska Supreme Court's decision in *Bear*, the Alaska Judicial Council called in 1967 for the creation of a special statewide commission to study sentencing.[37] The Sentencing Commission, composed of Judicial Council members, lawyers, judges, civic leaders, legislators and others, convened in Sitka, Alaska in December 1968.[38]

At the Sitka conference, committees were appointed to study probation, the Alaska Bar Association's model sentencing act, and appellate review of sentences.[39] In February 1969, the Judicial Council recommended that the Alaska Legislature enact a statute giving the Alaska Supreme Court jurisdiction to review sentences in serious criminal cases.[40]

In April 1969, the Alaska Legislature enacted the recommended sentence review statute. House Bill 281, as amended, passed unanimously, apparently with little discussion, in both the House and the Senate.[41] The new law gave both the defendant and the state the right to appeal a sentence to the supreme court. If the state appealed, however, the court could not increase the sentence, but could only approve or disapprove it.[42]

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[37] ALASKA JUDICIAL COUNCIL, FIFTH REPORT: 1967-1968, at 33 (1969).

[38] *Id.*

[39] *Id.* at 35.

[40] ALASKA JUDICIAL COUNCIL, SIXTH REPORT: 1969-1970, at 4-5 (1971).

[41] The vote was 33 "Yeas" and no "Nays" in the House, and 19 "Yeas" and no "Nays" in the Senate. H. JOURNAL, Sixth Leg., 1st Sess. 752 (Apr. 12, 1969); S. JOURNAL, Sixth Leg., 1st Sess. 930 (May 1, 1969). The statute was originally enacted as chapter 117, section 4 of the Alaska Session Laws of 1969. It was later codified at Alaska Statutes section 12.55.120.

[42] ALASKA STAT. § 12.55.120(b) (1990).

THE SUPREME COURT'S APPLICATION OF SENTENCING LEGISLATION: 1970-1975

Sentencing Goals and Standards

The court first exercised its statutory duty to review trial court sentences in *State v. Chaney*.[43] The court in *Chaney*, in an opinion written by Justice Rabinowitz, discussed the legislative intent of Alaska Statutes section 12.55.120, and concluded that the primary goal of the legislation was "to implement Alaska's constitutional mandate that '[p]enal administration shall be based on the principle of reformation and upon the need for protecting the public.'"[44]

The court then translated this principle into concrete standards to which the sentencing judge should refer when choosing a sanction. Those standards, known as the *Chaney* factors, are:

> rehabilitation of the offender into a noncriminal member of society, isolation of the offender from society to prevent criminal conduct during the period of confinement, deterrence of the offender himself after his release from confinement or other phenological treatment, as well as deterrence of other members of the community who might possess tendencies toward criminal conduct similar to that of the offender, and community condemnation of the individual offender, or in other words, reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves.[45]

The companion case of *Nicholas v. State*,[46] in an opinion by Justice Robert Erwin, is perhaps even more instructive than *Chaney* on the subject of the supreme court's philosophical approach to sentencing and appellate sentence review. Justice Erwin's

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[43] 477 P.2d 441 (Alaska 1970).

[44] *Id.* at 443 (quoting ALASKA CONST. art. I, § 12).

[45] *Id.* at 444.

[46] 477 P.2d 447 (Alaska 1970).

opinion in *Nicholas* embraced the notion that the trial judge should have broad discretion to choose an appropriate sanction. The court explicitly placed primary responsibility for sentencing in the hands of the trial judge.[47] It also stressed that sentencing should remain flexible in order to take into account the facts of each crime, as well as the record and character of each offender.[48] The court refused to rank the *Chaney* goals in order of importance, preferring instead to let the trial court "determine the priority and relationship of these objectives in any particular case."[49]

Nicholas clearly indicated that the supreme court did not consider uniformity to be a significant goal of sentencing or of sentence review. As Justice Erwin wrote, "reasonable disparity is necessary to achieve the purposes of sentencing . . . . [I]t is not the purpose of appellate review to enforce uniformity or to chill initiative on the part of the trial judge in attempting to arrive at a proper sentence."[50]

Consistent with Justice Erwin's mandate in *Nicholas,* the supreme court fashioned a deferential standard of review for evaluating sentences imposed by trial judges. In *McClain v. State,*[51] the court announced that it would conduct its own independent examination of the record, but that it would not modify a sentence unless "convinced that the sentencing court was clearly mistaken in imposing a particular sentence."[52] Over the next five years, the court used this "clearly mistaken" standard to correct only the most serious sentencing disparities on appeal.[53]

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[47] *Id.* at 449.

[48] *Id.* at 448.

[49] *Id.*

[50] *Id.* at 448-49.

[51] 519 P.2d 811 (Alaska 1974).

[52] *Id.* at 813 (citing *Chaney,* 477 P.2d at 443-44). Before deciding *McClain,* the court had also referred to its standard of review as the "zone of reasonableness" test. Under this test, the reviewing court was to "determine whether the lower court imposed a sentence within the range of alternatives which comport with the *Chaney* guidelines." *Id.* In *McClain,* the court concluded that the two tests were the same but abandoned the "zone of reasonableness" language in order to prevent future confusion. *Id.* at 813-14.

[53] Stern, *Presumptive Sentencing in Alaska,* 2 ALASKA L. REV. 227, 257 n.150 (1985).

The First Five Years of Sentence Review

In 1975, Alaska Supreme Court Justice Robert Erwin surveyed all sentence appeals the court had decided in its first five years of sentence review. His survey confirmed that the supreme court had interfered very little in the sentencing function. Justice Erwin reported that the supreme court affirmed the trial court's decision in approximately sixty-eight percent of the sixty sentence appeals it reviewed between 1970 and July 1, 1975.[54]

In only twenty percent of the sixty cases did the court actually overturn the trial judge's sentencing decision.[55] Of this twenty percent, the court disapproved five percent (three sentences) as too lenient, but lacked the power to increase those sentences.[56] Thus, in only 15 percent of the cases (nine cases) did the court actually modify the sentence or remand for resentencing.[57]

While unwilling to disturb many sentences, the supreme court did exercise its appellate review authority to develop and articulate sentencing criteria to guide trial judges. For example, in cases involving violent crimes against people (assault, rape and homicide), the court concluded that the nature of the offense should predominate over most mitigating circumstances, leaving judges free to put heavy emphasis on the *Chaney* goals of protecting society and reaffirming societal norms.[58] This was particularly true in the area of homicide, where the court affirmed substantial sentences for offenders with no prior criminal records.[59]

In cases involving drug offenders, the court developed four categories of offenses and explained that maximum terms of imprisonment ordinarily should be reserved for

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[54] Erwin, *Five Years of Sentence Review in Alaska*, 5 UCLA-ALASKA L. REV. 1, 3 (1975).

[55] *Id.* In an additional 12% of cases, the supreme court reversed the trial court's decision on grounds unrelated to the severity of the sentence. *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.* at 5, 7.

[59] *Id.* at 5.

the worst offenders.[60] The court further suggested that factors such as the personal history and age of the offender should play a larger role in drug cases than in violent cases.[61]

For crimes against property, the court agreed with the American Bar Association that sentences in excess of five years should be restricted to particularly serious offenses, dangerous offenders and professional criminals.[62] However, the court did recognize that robbery involved somewhat different considerations than other crimes against property because it posed a high risk of injury to the victim.[63] Thus, for those property crimes not involving risk of physical injury to the victim, the court felt that age, background and previous criminal history were important.[64] However, for those property crimes involving the risk of injury or death, the court affirmed substantial sentences where violence occurred, where life was endangered or where prior convictions indicated that the offender had not been deterred by lesser sentences.[65]

IMPACT OF THE PLEA BARGAINING BAN, THE COURT OF APPEALS, AND PRESUMPTIVE SENTENCING ON APPELLATE SENTENCE REVIEW: 1975-1980

The Plea Bargaining Ban and Sentence Appeal Filings

By 1975, filings of sentence appeals were on the rise. Although the supreme court had decided only sixty sentence appeals during the entire period from 1970 through June

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[60] *Id.* at 8-9.

[61] *Id.* at 9.

[62] Donlun v. State, 527 P.2d 472, 475 (Alaska 1974).

[63] Erwin, *supra* note 54, at 13.

[64] *Id.* at 12.

[65] *Id.* at 13.

of 1975, twenty-two sentence appeals were filed in 1975 alone.[66] Thirty-two sentence appeals were filed in 1976, a thirty-nine percent increase from the previous year.[67] In 1977, the number of sentence appeals jumped to sixty-three, a 103% increase from the previous year.[68]

This dramatic increase in sentence appeals can be largely explained by the effects of the 1975 ban on plea bargaining.[69] The ban greatly curtailed the frequency with which assistant district attorneys made specific sentence recommendations.[70] This documented decrease in sentence recommendations indicates that few post-ban defendants pled guilty or nolo contendere in exchange for specific sentence recommendations. Without specific sentence deals, post-ban defendants were free to appeal the sentences they did receive.[71] Thus, the ban effectively increased the number

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[66] ALASKA COURT SYSTEM, 1979 ANNUAL REPORT, at 2, Table I (1980). It is important to recognize that the Court System's count of sentence appeals is underinclusive: a case is considered a sentence appeal only if it does not also include a merit appeal; cases that contain both a merit appeal and a sentence appeal are counted only as merit appeals.

[67] *Id.*

[68] *Id.*

[69] On August 15, 1975 then-Attorney General Avrum Gross officially banned plea bargaining in Alaska. The Attorney General's policy prohibited all sentence recommendations by state prosecutors. Changing the charge or dismissing charges also was prohibited if done solely to obtain a plea of guilty. Exceptions to the policy were allowed in individual cases if approved by the Attorney General's office in advance. M. RUBINSTEIN, T. WHITE & S. CLARKE, THE EFFECT OF THE OFFICIAL PROHIBITION OF PLEA BARGAINING ON THE DISPOSITION OF FELONY CASES IN THE ALASKA CRIMINAL COURTS 17-22 (December 1978).

The Alaska Judicial Council's study of the immediate effects of the ban found that plea bargaining was substantially curtailed; although some "charge bargaining" persisted in rural areas, sentence recommendations were virtually eliminated. *Id.* at 28-31. Later data suggested that the ban, although still officially in effect, may not have been enforced quite as rigidly after mid-1978. *Id.* at 27-28; T. CARNS & J. KRUSE, A RE-EVALUATION OF ALASKA'S BAN ON PLEA BARGAINING (Draft I, October 1990) 38-40 (In Press).

The ban on plea bargaining was modified in 1980 by then-Attorney General Wilson Condon, and in 1986 it was significantly relaxed by then-Attorney General Harold Brown. The Council's latest study of the ban suggests that by mid to late 1986 the Attorney General's policy appeared to be "anemic at best in some attorneys' practices," although the prohibition did exist for many others. *Id.* at 38. Evidence shows that the prohibition applied most strongly to sentence bargaining, but that prosecutors "regularly" engaged in charge bargaining, *Id.* at 39.

[70] RUBINSTEIN, WHITE & CLARKE, *supra* note 69, at 111.

[71] As a general rule, a defendant who pleads nolo contendere or guilty may appeal his sentence. *See* ALASKA STAT. § 12.55.120(a) (1990) ("[a] sentence of imprisonment lawfully imposed by the superior court for a term or for aggregate terms of one year or more may be appealed to the court of appeals . . . .").

of defendants able to file sentence appeals by decreasing the number of defendants who had agreed to their sentences in exchange for a plea.

The ban also changed the severity of sentences themselves. An analysis of post-ban sentences shows that sentencing became more severe for certain kinds of cases immediately after imposition of the ban.[72] Harsher sentences most certainly increased the proportion of defendants likely to appeal. Thus, imposition of the ban on plea bargaining is probably a primary cause of the sentence appeal increases noted in 1976 and 1977.

The Alaska Court System's 1979 Annual Report further shows that criminal merit appeals also increased substantially after 1975, although not as much as sentence appeals. From 1975 to 1976, there was a 58 percent increase. From 1976 to 1977, there was an additional 30 percent increase.[73]

The 1975 to 1977 increase in criminal merit appeals might also be tied to the ban on plea bargaining. After the ban, the number of criminal trials increased, as did the number of trial convictions as a percentage of all convictions.[74] Of course, all

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However, it is unlikely that a defendant who had pled guilty in exchange for a specific sentence, and who in fact received the agreed-upon sentence, would be practically inclined to appeal his sentence.

[72] RUBINSTEIN, WHITE & CLARKE, *supra* note 69, at 111. Sentences became harsher in two ways. First, the percentage of defendants likely to receive a jail sentence increased significantly. This was true for all offenses taken as a group, and for drug offenses in particular. *Id.* at Table VII-2. Sentence lengths also increased significantly for "low-risk" property offenders, fraud offenders, and drug offenders. Each of these increases can be attributed to the ban.

Sentence lengths continued to increase substantially during the late 1970s for all offenses except drugs. The likelihood of a jail sentence increased across the board. These increases were probably due in part to the ban and in part to the nationwide emphasis on increased penalties for crime. Sentences began to drop slightly in 1978 and 1979. ALASKA JUDICIAL COUNCIL, ALASKA FELONY SENTENCES: 1976-1979, at 20, Table V (1980).

[73] In contrast, civil appellate filings increased only slightly during this same time. For example, from 1975 to 1976, civil appeals increased by 42%, compared to a 58% increase in criminal merit appeals. From 1976 to 1977, civil appeals increased only 17%, compared to the 103% increase in sentence appeals and the 30% increase in criminal merit appeals. ALASKA COURT SYSTEM, 1979 ANNUAL REPORT, *supra* note 66, at 2.

[74] Alaska first experienced an increase both in trial rates and in the absolute number of felony trials following adoption of the plea bargaining ban in 1975. Trial rates remained high over the next five years. Trial convictions as a percentage of all convictions also increased, from 8.5% before the ban to 15.3% in the year after the ban, peaking at 22.4% in 1977, and dropping only slightly, to 21.8%, in 1978 then to 21.2% in 1979. ALASKA JUDICIAL COUNCIL, ALASKA FELONY SENTENCES: 1984, at 64-65 (1987).

defendants convicted at trial were legally entitled to file merit appeals.[75] Assuming that the proportion of defendants with the resources to file merit appeals remained roughly constant from 1974 to 1976, the observed increase in criminal merit appeals could be related at least in part to the increase in trials caused by the ban.[76]

Addition of the Court of Appeals

For the remainder of the decade, filings of criminal sentence and merit appeals remained above 1976 levels, although they decreased slightly from 1977 to 1978 and from 1978 to 1979.[77] In 1979, the Alaska Court System published a special report showing that while Alaska had the second highest number of appellate judges per 100,000 population in the nation, it also had in 1977 the third highest ratio of appellate filings to size of population.[78]

The Court System's report also showed that the supreme court's backlog was increasing. On December 31, 1975, the court had 258 cases pending; one year later the number had risen to 391. By December 31, 1978, 624 cases were pending.[79] Although in 1978 the court was publishing almost twice as many opinions as it had been in 1975, filings still exceeded dispositions every year.[80]

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[75] A defendant convicted at trial may appeal his conviction. ALASKA STAT. § 22.07.020(d) (1988). A defendant who pleads nolo contendere may also appeal his conviction if his nolo plea was expressly conditioned upon the right to appeal one or more substantive issues. Cooksey v. State, 524 P.2d 1251, 1255-57 (Alaska 1974).

[76] This analysis assumes that a defendant convicted at trial after the ban was not significantly more likely to challenge the conviction than a defendant convicted in 1974. However, it is not necessarily clear that the proportion of defendants possessing the resources to file merit appeals did remain constant during this time period. For example, the growth of prepaid legal insurance plans for labor unions could have increased some defendants' ability to afford merit appeals. These plans were relatively common and influential in Alaska during the mid-to-late 1970s, mainly due to construction of the TransAlaska Pipeline.

[77] ALASKA COURT SYSTEM, 1979 ANNUAL REPORT, *supra* note 66, at Table I, at 2.

[78] ALASKA COURT SYSTEM, 1978 ANNUAL REPORT, SUPREME COURT WORKLOAD: ANALYSIS OF PROPOSED SOLUTIONS 56, 97-99 (1979). During 1977, one appeal was filed in Alaska for every 589 residents. *Id.* at 99.

[79] *Id.* at 60.

[80] *Id.*

By the end of 1978, the supreme court had concluded that its workload had exceeded its ability to decide cases in a reasoned and timely manner.[81] To solve its workload problem, the court proposed establishing an intermediate court of appeals in Alaska.

The supreme court recommended that the intermediate court have limited subject matter jurisdiction, because projected filing trends indicated that there would not be enough work for two courts of general subject matter jurisdiction.[82] The court of appeals' jurisdiction was limited to criminal appeals,[83] and the supreme court retained exclusive jurisdiction over all civil appeals, with discretionary appeals available from the court of appeals to the supreme court.[84]

There were three reasons to give the intermediate appellate court jurisdiction over all criminal appeals. First, the clear distinction between civil and criminal appeals would eliminate time-consuming jurisdictional disputes.[85] Second, Alaska's historical ratio of civil and criminal appellate filings suggested that the division of civil and criminal cases would give each court an equitable and reasonable workload.[86] Third, it was felt that "a criminal appeal is much more likely than a civil appeal to involve settled principles of law, with the only issue being whether the lower court misapplied the law to the facts

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[81] *Id.* at 56-57.

[82] *Id.* at 104.

[83] *Id.*

[84] *Id.* at 94. Allowing appeals as of right from the court of appeals to the supreme court would only have added to the supreme court's workload. *Id.*

[85] Memorandum from Susan Burke, Alaska Court System Deputy Administrative Director, to Arthur Snowden, II, Administrative Director, at 3 (April 6, 1979).

[86] *Id.* at 3-5. Ms. Burke based this conclusion on the observation that criminal merit appeals had maintained a fairly constant ratio to civil merit appeals from 1975-1978. *Id.* at 3. While she recognized that criminal sentence appeal filings had been increasing at a greater rate than merit appeals, she did not think that the high volume of sentence appeals would contribute significantly to the total caseload because "a sentence appeal takes an average of 25% less court time than a merit appeal." *Id.*

of the case."[87] This third rationale suggests that the court of appeals' function originally was to be limited to simple correction of errors and implies that the supreme court, by the exercise of its discretionary review, would develop the substantive criminal law.

In 1980, the Alaska Legislature passed House Bill 104 as amended. Codified at Alaska Statutes section 22.07, the law established a three-judge court of appeals and gave it mandatory jurisdiction in criminal and quasi-criminal matters,[88] including sentence appeals.[89] The supreme court retained discretionary jurisdiction to review final decisions of the court of appeals.[90]

In July of 1980, Governor Jay Hammond appointed Alexander Bryner, Robert Coats and James Singleton to serve on the newly-created court. Alexander Bryner, the U.S. Attorney for Alaska, had also been a district court judge and an assistant public defender. Robert Coats, an Assistant Attorney General, had served as an Assistant Public Defender. James Singleton, an Anchorage superior court judge, had served on the Sentencing Guidelines Committee, which was established in 1978 to explore the use of guidelines in areas not covered by presumptive sentencing and to provide a substantive framework for development of a common law of sentencing. These three judges, who served together on the court of appeals for the next decade, had a profound effect on the development of appellate sentencing law in Alaska.[91]

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[87] *Id.* at 6. It was recognized that "[i]f too many of the cases within the jurisdiction of the court of appeals involve areas of unsettled law, too many court of appeals decisions will require additional review by the supreme court . . . [resulting in] needless delay . . . and an extreme waste of judicial resources." *Id.* at 2.

[88] ALASKA STAT. § 22.07.010-.020 (1988).

[89] *Id.* § 22.07.020(b).

[90] *Id.* § 22.07.030.

[91] In May 1990, the U.S. Congress confirmed President George Bush's appointment of Judge James Singleton to the U.S. District Court for the District of Alaska. Judge Singleton left the Alaska Court of Appeals on August 1, 1990. On October 11, 1990, Governor Steve Cowper appointed David Mannheimer, the assistant attorney general in charge of the Office of Special Prosecutions and Appeals, to fill the vacancy created by Judge Singleton's departure.

Adoption of Presumptive Sentencing

Meanwhile, the Alaska Legislature in 1978 had substantially rewritten the Criminal Code, and for the first time adopted a system of presumptive sentencing.[92] Presumptive sentencing is a type of determinant sentencing based on the tenet that offenders who have similar prior criminal records and who are convicted of the same type of offense are presumed to deserve the same sanction.

The Legislature's stated purpose in adopting the presumptive sentencing scheme was to eliminate "unjustified disparity in sentences imposed on defendants convicted of similar offenses -- disparity which is not related to legally relevant sentencing criteria."[93] The Alaska Legislature's concern over disparate sentences was prompted by studies published by the Alaska Judicial Council describing sentencing practices in Alaska from 1974 to 1976. One study found that for all classes of offenses, the identity of the sentencing judge was more important than any other factor (including harm to the victim except in cases of death, and the offender's prior record) in determining sentence length.[94] The Council also found racial disparities in sentences for several types of offenses.[95] The fact that such unjustified disparities existed from 1974 to 1976 suggests that appellate sentence review, at least as it had been implemented by the Alaska Supreme Court, had not contributed significantly to the creation and enforcement of

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[92] Act of July 17, 1978, ch. 166, 1978 Alaska Sess. Laws 1, 120. The Criminal Code was passed by the Legislature in 1978, but did not take effect until January 1, 1980. *Id.*

[93] Stern, *supra* note 53, at 228 (quoting ALASKA SENATE COMM. ON THE JUDICIARY, COMMENTARY ON THE ALASKA REVISED CRIMINAL CODE, S. JOURNAL SUPP. NO. 47, at 148 (June 12, 1978)). This commentary was subsequently adopted by the Alaska House of Representatives. *See* ALASKA HOUSE COMM. ON THE JUDICIARY, COMMENTARY ON THE ALASKA REVISED CRIMINAL CODE, ALASKA HOUSE J. 1716 (June 16, 1978).

[94] ALASKA JUDICIAL COUNCIL, ALASKA FELONY SENTENCING PATTERNS: A MULTIVARIATE STATISTICAL ANALYSIS (1974-1976), at iii, 40-41 (1977) [hereinafter ALASKA FELONY SENTENCES].

[95] The Council reported that for some classes of offenses, taking into account the independent contribution of all other factors in the study, defendants who were members of racial minorities were more likely than Caucasians to receive harsher sentences, both in terms of the length of imprisonment and the likelihood of receiving a probationary sentence. ALASKA FELONY SENTENCES, *supra* note 94, at v-vi, 43; ALASKA JUDICIAL COUNCIL, SENTENCING IN ALASKA: A DESCRIPTION OF THE PROCESS AND SUMMARY OF STATISTICAL DATA FOR 1973, at 139, 175 (1975) (B. Cutler, Research Attorney).

uniform sentencing practices.[96] Thus, the Legislature was required to take broader measures in pursuit of uniform sentencing.

The legislative decision to change Alaska's largely indeterminate sentencing scheme to one of presumptive sentencing also might have been influenced by a national policy shift away from rehabilitative sentencing philosophy to a "just deserts" philosophy, under which offenders who have committed similar offenses are sentenced similarly. The new statutory focus on uniformity, which had been completely absent from Alaska's former sentencing statutes and which had not played a significant role in the supreme court's previous sentencing decisions, was now elevated to primary importance.

APPLICATION OF PRESUMPTIVE SENTENCING: 1980-1990

The changes in the Alaska Criminal Code and the presumptive sentencing scheme went into effect on January 1, 1980, eight months before the Alaska Court of Appeals began deciding cases. Thus, although the court of appeals may originally have been created to decide cases under settled principles of law, the court was faced from its inception with interpreting a virtually new criminal code and sentencing scheme.[97] It soon became apparent that the judges on the newly-created court of appeals were willing to enforce the legislative emphasis on uniformity.

In the decade since its creation, the court of appeals' most straightforward sentence review function has been to interpret the language and intent of the presumptive sentencing statutes. However, Alaska's presumptive sentencing statutes do

[96] This conclusion is not surprising, since the supreme court had made it clear from the outset that uniformity was not an important sentencing goal, and that it would not lightly substitute its sentencing judgment for that of the trial judge.

[97] For an excellent overview of Alaska's presumptive sentencing laws, see Stern, *supra* note 53, at 230-39. For the current presumptive sentencing structure, see Table 1, Appendix A.

not specify presumptive terms for all offenses or combinations of offenses.[98] For cases in which presumptive sentencing does not apply, the court of appeals has created a series of benchmark or typical sentences based primarily on the court's interpretation of the principles implicit in the presumptive sentencing scheme itself. For cases in which presumptive sentencing does apply, the court of appeals has developed an important body of case law prescribing the extent to which presumptive terms may be adjusted when statutory aggravators are found.[99] The court's most important decisions in these areas concern: (1) first felony offenders convicted of class B felonies, (2) first felony offenders convicted of aggravated class A felonies, (3) first felony offenders convicted of aggravated cases of sexual assault in the first degree and sexual abuse of a minor in the first degree, (4) offenders convicted of the unclassified felony of murder in the second degree, and (5) offenders convicted of two or more offenses before the judgment on either has been entered (offenders subject to consecutive sentencing). The remainder of this article focuses on the court of appeals' activity in these five areas.

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[98] For example, presumptive sentencing does not apply to first felony offenders convicted of class B or class C felonies unless the felony was knowingly directed at certain public officials or emergency responders engaged in the performance of their duties. ALASKA STAT. § 12.55.125(d)(3), (e)(3) (1990). Presumptive sentencing does not apply to the unclassified felonies of murder in the first and second degrees, attempted murder in the first degree, kidnapping, and misconduct involving a controlled substance in the first degree. *Id.* § 12.55.125(a)-(b). Those offenses have mandatory minimum sentences. Presumptive sentencing also does not specify total aggregate terms for offenders who are sentenced consecutively for multiple offenses, although it may specify a presumptive term for each separate offense. *See id.* § 12.55.125.

[99] As the court of appeals has said:

> unless a measured and restrained approach is taken in the adjustment of presumptive sentences for both aggravating and mitigating factors, then the prospect of attaining the statutory goal of uniform treatment for similarly situated offenders would quickly be eroded, the potential for irrational disparity in sentencing would threaten to become reality, and the revised code's carefully fashioned system of escalating penalties for repeat offenders would be rendered utterly ineffective.

Juneby v. State, 641 P.2d 823, 833 (Alaska Ct. App. 1982).

Thus, the court of appeals has held that mere proof of an aggravating or mitigating factor cannot be deemed sufficient, in and of itself, to justify an adjustment of a presumptive term. *Id.* at 838. In deciding to what extent, if at all, the totality of the aggravating and mitigating factors justify deviation from the presumptive term, courts should apply the *Chaney* criteria and focus specifically on the aggravating or mitigating conduct in the particular case. *Id.* at 835 n.21.

First Felony Offenders and the *Austin* Guideline

When the Alaska Legislature first passed the new presumptive sentencing scheme in 1978, it excluded from the law virtually all first felony offenders. Although all first felony offenders convicted of class A felonies are now subject to presumptive sentencing,[100] most class B and C first felony offenders still are not.

In 1981, the Alaska Court of Appeals extended presumptive sentencing principles to ensure that first felony offenders convicted of class B and C felonies would nevertheless be directly affected by the statutory scheme.[101] In *Austin v. State*,[102] the court of appeals observed: "Normally, a first offender should receive a more favorable sentence than the presumptive sentence for a second offender. It is clear that this rule should be violated only in an exceptional case."[103]

The court of appeals does not often violate the *Austin* guideline. To determine whether a first felony offender's conduct presents an "exceptional case" justifying an upward departure from the *Austin* guideline, the sentencing judge must find either aggravating factors or the kind of extraordinary circumstances which would justify referral of a presumptively-sentenced offender to the three-judge panel for

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[100] In 1982, the Legislature amended the presumptive sentencing statutes to include all first felony offenders convicted of class A felonies. Act of May 20, 1982, ch. 45, 1982 Alaska Sess. Laws 52 (amending ALASKA STAT. § 12.55.125 (1980)).

[101] Stern, *supra* note 53, at 259.

[102] 627 P.2d 657 (Alaska Ct. App. 1981) (per curiam).

[103] *Id.* at 657-58. This simple principle increased substantially the number of offenders affected by the presumptive sentencing scheme, since the majority of Alaska's convicted offenders are first felony offenders. In 1984, for example, 43.6% of all convicted offenders had no prior record, and 32.1% had only misdemeanor convictions, leaving only 10% with one or more prior felony convictions (14.5% of convicted offenders had unknown prior records). ALASKA JUDICIAL COUNCIL, ALASKA FELONY SENTENCES: 1984, at 22 (1987). Data collected in connection with the Judicial Council's most recent study of sentences from 1984 to 1987 indicate that of all convicted offenders, 70.3% (N=2754) were *not* subject to presumptive sentencing; persons without a prior felony record and those convicted of an unclassified offense except sexual abuse of a minor in the first degree are not subject to presumptive sentencing. The data is available from the Alaska Judicial Council library, 1029 W. Third Ave., Suite 201, Anchorage, Alaska 99501.

sentencing.[104] More recently, the court has concluded that the *Austin* rule could be undermined unless a first felony offender is given advance notice of proposed aggravating factors, and announced that it will henceforth require prior notice to the defendant before approving deviations from *Austin*.[105]

Benchmarks

Another device that the court of appeals uses to guide sentencing in non-presumptive cases is the benchmark. A benchmark is a judicially-created presumptive term; it is a sentencing range representing terms imposed on similar offenders convicted of similar offenses. The purpose of the benchmark is to "focus the attention of the trial court and the parties on individual cases and ensure that typical cases would receive a typical sentence and that those defendants receiving atypical sentences would be sentenced on the basis of objective aggravating factors, not factors idiosyncratic to a specific judge."[106] The Alaska Court of Appeals has articulated benchmarks for first felony offenders sentenced for class B felonies, aggravated class A felonies, serious sexual offenses, second degree murder and for consecutively-imposed sentences.[107]

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[104] Neakok v. State, 653 P.2d 658, 662 (Alaska Ct. App. 1982) (citation omitted); *see also* Sears v. State, 653 P.2d 349, 350 (Alaska Ct. App. 1982). To justify referral to a three judge panel, the sentencing judge must find by clear and convincing evidence that manifest injustice would result from imposing the term required by the presumptive sentencing statute. ALASKA STAT. § 12.55.165 (1990). Manifest injustice might result where the trial judge finds the existence of relevant non-statutory aggravating or mitigating factors. *Id.*; Dancer v. State, 715 P.2d 1174, 1177 (Alaska Ct. App. 1986). Manifest injustice also might be found if the term required by the presumptive sentencing statutes, whether or not adjusted for statutory aggravating or mitigating factors, is clearly inappropriate considering the totality of the circumstances. ALASKA STAT. § 12.55.165 (1990); *Dancer*, 715 P.2d at 1177.

[105] Wylie v. State, 797 P.2d 651, 662 (Alaska Ct. App. 1990).

[106] Page v. State, 657 P.2d 850, 855 (Alaska Ct. App. 1983).

[107] For an overview of benchmark terms, see Table 2, Appendix A.

First Offenders Convicted of Class B Felonies.

First offenders convicted of class B felonies are not subject to presumptive sentencing. Second offenders face a four year presumptive term.[108] Under the presumptive statute as limited by *Austin*, then, a first time offender convicted of a class B felony faces a sentence falling anywhere between zero and four years.

In *State v. Jackson*,[109] the court of appeals divided this four-year span for first offenders convicted of class B felonies into four distinct subcategories defined by the seriousness of the offense and the rehabilitative potential of the offender. *Jackson* prescribes the following benchmarks:

> a. less than ninety days is the benchmark sentence for a case involving significantly mitigated conduct AND an offender whose prospects for rehabilitation are significantly better than that of the typical first offender;
>
> b. between ninety days and one year is the benchmark for a case involving mitigated conduct OR an offender whose background indicates particularly favorable prospects for rehabilitation;
>
> c. one to four years to serve is the benchmark for a typical offender committing a typical or moderately aggravated offense (four years is the presumptive term for a second felony offender); and
>
> d. up to six years is the benchmark for an offense that is exceptionally aggravated, that is, an offense that involves significant statutory aggravators or other extraordinarily aggravated circumstances.[110]

In articulating these four benchmarks, the court made explicit the sentencing ranges that had been implicit in prior cases involving first felony offenders convicted of

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[108] ALASKA STAT. § 12.55.125(d)(1) (1990). The maximum term is ten years. *Id.* § 12.55.125(d).

[109] 776 P.2d 320 (Alaska Ct. App. 1989).

[110] *Id.* at 326-27.

class B felonies.[111] Although the court has said that these benchmarks are flexible,[112] sentences outside these ranges are likely to be scrutinized carefully.

First Offenders Convicted of Class C Felonies.

The potential range of sentences for first offenders convicted of class C felonies is narrower than the range for those convicted of class B felonies. Since there is no presumptive term, and since *Austin* would ordinarily restrict the upper limit to two years (the presumptive term for a second class C felony offender[113]), the potential range is only from zero to two years. Perhaps because the potential for disparity is not as significant with such a small sentencing range, the court of appeals has not set explicit benchmarks for sentencing class C felons, although it has elaborated on guidelines created by the supreme court.

On the low end, the Alaska Supreme Court has suggested that, in the absence of a substantial misdemeanor record or other aggravating factors, a first felony offender convicted of a class C felony involving a crime against property should receive a sentence of probation, coupled with restitution, without incarceration.[114] The court of appeals, however, has cautioned that a probationary sentence "will be appropriate only if mitigating circumstances exist and the offender is a promising candidate for rehabilitation through probationary supervision."[115]

At the upper end, the court of appeals has permitted a sentence as high as four years with three years suspended where the conduct constituting the offense was particularly serious, where, for example, the conduct actually amounted to a class B

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[111] *Id.* at 326.

[112] *Id.* at 327.

[113] ALASKA STAT. § 12.55.125(e)(1) (1990).

[114] Leuch v. State, 633 P.2d 1006, 1013-14 & n.22 (Alaska 1981). A probationary sentence is one of less than sixty days imprisonment. Sentences of less than sixty days are often referred to as "shock probation," since the defendant is incarcerated long enough to know what prison is like, but not long enough to be adversely affected by it. Langton v. State, 662 P.2d 954, 959 (Alaska Ct. App. 1983).

[115] State v. Coats, 669 P.2d 1329, 1334 (Alaska Ct. App. 1983).

felony.[116] It has also permitted a sentence equal to the presumptive term for a second felony offender (coupled with an additional one-year suspended sentence) where the trial court found aggravating factors that would have warranted referral to a three judge sentencing panel.[117] The Alaska Supreme Court has permitted a sentence of ten years with five years suspended where the magnitude and manner of the crime (embezzlement) were exceptional, and the crime had a "devastating effect" on the victim, the defendant's employer.[118]

First Offenders Convicted of Aggravated Class A Felonies.

First felony offenders convicted of class A felonies are subject to a five year presumptive term.[119] First offenders who commit the most aggravated class A offenses face terms ranging from the five year presumptive term to the twenty year maximum term.[120] Within this framework, the court of appeals has set a benchmark upper limit of ten years on the extent to which sentences for first offenders convicted of aggravated class A felonies may be increased.[121] Offenses may be aggravated by the offender's prior history, the circumstances of the offense, or by simultaneous convictions for more than one offense.[122] In establishing this benchmark, the court analyzed past sentencing

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[116] Long v. State, 772 P.2d 1099 (Alaska Ct. App. 1989).

[117] Hads v. State, 727 P.2d 11, 12-13 (Alaska Ct. App. 1986).

[118] Karr v. State, 686 P.2d 1192, 1195-96 (Alaska 1984).

[119] ALASKA STAT. § 12.55.125(c)(1) (1990). If the offense is other than manslaughter and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the offense, or knowingly directed the conduct constituting the offense at a uniformed officer or emergency responder engaged in the performance of official duties, the presumptive term is seven years. *Id.* § 12.55.125(c)(2).

[120] *Id.* § 12.55.125(c).

[121] DeGross v. State, 768 P.2d 134, 139-40 (Alaska Ct. App. 1989); Lawrence v. State, 764 P.2d 318, 321 (Alaska Ct. App. 1988); Townsel v. State, 763 P.2d 1353, 1356 (Alaska Ct. App. 1988); Williams v. State, 759 P.2d 575, 577-78 (Alaska Ct. App. 1988); Pruett v. State, 742 P.2d 257, 264-65 (Alaska Ct. App. 1987).

[122] Increasing the presumptive sentence requires two determinations. First, the trial judge must determine whether the aggravating factor has been established by clear and convincing evidence; second, the trial court must exercise its discretion to determine whether the factor justifies an increase in the presumptive term. Jones v. State, 771 P.2d 462, 467 (Alaska Ct. App. 1989); Juneby v. State, 665 P.2d 30, 32 (Alaska Ct. App. 1982) (modified opinion).

practices and looked to the standards of the American Bar Association, which recommended against periods of incarceration for more than ten years, except in exceptional cases.[123]

The court of appeals has acknowledged that lengthy terms of imprisonment should not be imposed for purposes of rehabilitating an offender and that they will seldom be necessary for deterrence or community condemnation.[124] The court of appeals is thus reluctant to approve sentences in excess of ten years even in cases involving convictions for multiple counts of robbery.[125] This ten year benchmark limit for first-time class A felons is also consistent with *Austin*, because the presumptive term for a second offender convicted of a class A felony is ten years.[126]

Sexual Assault I and Sexual Abuse of a Minor I.

Since 1982, all offenders convicted of sexual assault in the first degree[127] or sexual abuse of a minor in the first degree[128] have been subject to presumptive

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[123] Townsel v. State, 763 P.2d 1353, 1356 (Alaska Ct. App. 1988). The ABA Standards state that for most offenses, the maximum authorized prison term ought not to exceed ten years except in unusual cases, and normally should not exceed five years. ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES, Part II, § 2.1(d) (approved draft 1968). The ABA Standards suggest that confinement for the maximum period is appropriate when the court finds that such confinement is necessary to protect the public from further criminal conduct, and that the defendant previously has been convicted of two felonies committed on different occasions. *Id.* § 3.3(b), (b)(i).

The court of appeals' ten year benchmark is being challenged in a case now on appeal to the Alaska Supreme Court, Wentz v. State, 777 P.2d 213 (Alaska Ct. App. 1989), *petition for hearing granted*, No. S-3498 (Alaska Oct. 9, 1989). In this appeal, the state has argued in part that the Alaska Legislature implicitly rejected the ABA Standard when it enacted some presumptive terms greater than 10 years. Petitioner's Brief at 16.

[124] DeGross v. State, 768 P.2d 134, 140 (Alaska Ct. App. 1989) (discussing Pears v. State, 698 P.2d 1198 (Alaska 1985)).

[125] *Id.* (discussing Hale v. State, 764 P.2d 313 (Alaska Ct. App. 1988); *Townsel*, 763 P.2d 1353; Williams v. State, 759 P.2d 757 (Alaska Ct. App. 1988)). One exception to the 10 year benchmark applies to cases involving premeditated attempts to kill or seriously injure. Pruett v. State, 742 P.2d 257, 264 (Alaska Ct. App. 1987). *See, e.g.*, Marzak v. State, 796 P.2d 1374, 1377 (Alaska Ct. App. 1990); Burleson v. State, 543 P.2d 1195 (Alaska 1975).

[126] ALASKA STAT. § 12.55.125(c)(3) (1990).

[127] *See id.* § 11.41.410 (Supp. 1989) (defining sexual assault in the first degree).

[128] *See id.* § 11.41.434 (Supp. 1989) (defining sexual abuse of a minor in the first degree).

sentencing.[129] The presumptive term for a first felony offender is eight years[130]; a second felony offender faces fifteen years; and a third felony offender faces twenty-five years.[131]

The term of a first offender who has established a statutory mitigator could be reduced by as many as four years.[132] If the state establishes an aggravator, however, the statute permits a sentence ranging from the presumptive term to the maximum thirty years.[133]

Many cases involving sexual assault or sexual abuse of a minor in the first degree are aggravated in the sense that they involve either multiple assaults on the same victim occurring over a protracted period of time, or multiple victims or both. This is especially true in cases of sexual abuse of a minor, which almost invariably involve many separate incidents of penetration of one or more victims, whether or not there is actually a plea to multiple counts.[134]

The court of appeals has expressed concern that an offender who has engaged in a continuous course of sexual abuse but who is charged with and pleads to a single count of first degree sexual assault theoretically could be sentenced differently than an offender who has engaged in a similar course of conduct but who is convicted of multiple counts.[135] To ensure that offenders who have engaged in similar conduct are sentenced similarly, regardless of the prosecutor's decision of how many counts to

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[129] *Id.* § 12.55.125(i) (1990).

[130] The eight year term became effective on October 1, 1982; before then, the presumptive term was the five to seven years applicable to the other class A felonies. Act effective Oct. 1, 1982, ch. 143, § 30, 1982 Alaska Sess. Laws 451, 475 (amending ALASKA STAT. § 12.55.125 (1980)).

[131] ALASKA STAT. § 12.55.125(i)(1)-(4) (1990). If the offense is a first felony conviction and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the offense, the presumptive term is ten years. *Id.* § 12.55.125(i)(2).

[132] *Id.* § 12.55.155(a)(2). Where the presumptive term is greater than four years, factors in mitigation can reduce the sentence by as much as one half. *Id.*

[133] *Id.* §§ 12.55.155(a)(2), 12.55.125(i).

[134] State v. Andrews, 707 P.2d 900, 912-13 (Alaska Ct. App. 1985), *aff'd*, 723 P.2d 85 (Alaska 1986).

[135] *Id.* The offender who is convicted of multiple counts is subject to consecutive sentencing. For further explanation of the circumstances under which sentences may be imposed consecutively, see *infra* p. 29 and accompanying notes.

charge, the court of appeals has instructed the sentencing judge to consider the totality of the defendant's conduct to the extent that it is verified in the record.[136]

In addition, the court of appeals has articulated a benchmark upper limit of ten to fifteen years for first offenders convicted in aggravated cases of sexual assault and sexual abuse of a minor.[137] The court defines aggravated cases as those that involve multiple victims, multiple assaults on a single victim or serious injuries to one or more victims; such cases usually will be considered aggravated whether or not there is actually a plea to multiple counts.[138] Other factors that can aggravate cases of sexual assault or sexual abuse of a minor include the age of the victim[139] and conduct that continues for a long period of time.[140]

First offender sentences in excess of the ten to fifteen year benchmark are appropriate only in exceptional circumstances.[141] In order to exceed the benchmark, the trial judge must make an express finding that the defendant cannot be rehabilitated or deterred within a lesser period of time.[142] In this context, the court of appeals occasionally has approved sentences totalling as many as twenty-five years with five years suspended; but these have been exceptionally aggravated cases.[143] The court also once held that a "particularly serious offender" could receive as many as forty years.[144]

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[136] *Andrews*, 707 P.2d at 912-13.

[137] Boggess v. State, 783 P.2d 1173 (Alaska Ct. App. 1989); Covington v. State, 747 P.2d 550 (Alaska Ct. App. 1987); Mosier v. State, 747 P.2d 548 (Alaska Ct. App. 1987); Hancock v. State, 741 P.2d 1210 (Alaska Ct. App. 1987); Soper v. State, 731 P.2d 587 (Alaska Ct. App. 1987); State v. Andrews, 707 P.2d 900 (Alaska Ct. App. 1985), *aff'd*, 723 P.2d 85 (Alaska 1986).

[138] *Andrews*, 707 P.2d at 913.

[139] *See* Zackar v. State, 761 P.2d 1015, 1017 (Alaska Ct. App. 1988).

[140] *See* Lewis v. State, 706 P.2d 715, 717 (Alaska Ct. App. 1985).

[141] Boggess v. State, 783 P.2d 1173, 1182 (Alaska Ct. App. 1989); Hancock v. State, 741 P.2d 1210, 1214-15 (Alaska Ct. App. 1987).

[142] *Hancock*, 741 P.2d at 1213-14.

[143] *See, e.g.*, Howell v. State, 758 P.2d 103, 108 (Alaska Ct. App. 1988); *Lewis*, 706 P.2d at 717.

[144] *Hancock*, 741 P.2d at 1214-15.

Unclassified Felonies.

The unclassified felonies which are non-presumptive are murder in the first and second degrees, attempted murder in the first degree, kidnapping, and misconduct involving a controlled substance in the first degree. The statutory sentencing range for first degree murder is between twenty and ninety-nine years; the statutory range for the rest of these offenses is between five and ninety-nine years.[145]

Within the extremely broad statutory ranges for these serious offenses, the court of appeals has clearly articulated a benchmark for second degree murder: twenty to thirty years.[146] The court arrived at this range by surveying second-degree murder cases decided since 1970.[147] In approving such a significant term of imprisonment, the court acknowledges that deterrence of others and affirmation of community norms remain the primary sentencing criteria for intentional killings.[148]

Although the court has warned that any sentence substantially exceeding the second degree murder benchmark "would appear at least provisionally suspect,"[149] the court further explained in *State v. Krieger*[150] that a person who commits second degree murder under circumstances approximating first degree murder may receive an aggravated sentence, while one who commits second degree murder under circumstances approximating manslaughter may receive a mitigated sentence.[151] In typical cases, however, the twenty to thirty year benchmark still applies.[152]

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[145] ALASKA STAT. § 12.55.125(a)-(b) (1990).

[146] State v. Krieger, 731 P.2d 592, 595 (Alaska Ct. App. 1987); Page v. State, 657 P.2d 850, 855 (Alaska Ct. App. 1983). This 20 to 30 year benchmark is internally consistent with the court's 10 to 15 year benchmark for aggravated class A felonies and its 15 year benchmark for aggravated sexual assaults: the court regards crimes involving loss of life as the most serious offenses.

[147] *Page*, 657 P.2d at 855.

[148] *Krieger*, 731 P.2d at 595.

[149] *Page*, 657 P.2d at 855.

[150] 731 P.2d 592 (Alaska Ct. App. 1987).

[151] *Id.* at 596. *See also* Abruska v. State, 705 P.2d 1261, 1273-74 (Alaska Ct. App. 1985) (court upheld a 99 year sentence for second degree murder where defendant was a worst offender and exhibited a "pattern of cruel and violent behavior to others").

[152] *Krieger*, 731 P.2d at 596.

The court of appeals has not significantly limited sentencing discretion for the other unclassified felonies.[153] Like the supreme court, the court of appeals seems unwilling to interfere unduly with sentences for serious offenses characterized by extreme physical violence. For example, the court of appeals will approve the maximum penalty of ninety-nine years for first degree murder contract killings, even where the offender has no substantial prior record.[154] Moreover, the court has held that consecutive ninety-nine year sentences for first degree murder are not necessarily excessive.[155] In first degree murder cases, the "inherent seriousness of the offense will almost invariably require that the goals of isolation of the offender, general deterrence, and community condemnation be given a prominent role in sentencing."[156]

Consecutive and Concurrent Sentencing

Statutory Framework.

Before enactment of the Revised Criminal Code in 1980, Alaska's consecutive sentencing statute, Alaska Statutes section 11.05.050, gave judges unlimited discretion to impose consecutive sentences on defendants convicted of two or more crimes before

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[153] In 1988, Judge Singleton suggested that the court also adopt a 10 to 15 year benchmark for composite sentences imposed in cases involving convictions for kidnapping combined with other serious offenses. Garrison v. State, 762 P.2d 465, 471-74 (Alaska Ct. App. 1988) (Singleton, J., concurring). Judge Singleton further suggested that for policy reasons composite sentences in excess of 20 years be limited to cases involving obscured murder (cases in which the kidnapping obscured the circumstances of the killing), kidnapping for ransom, terrorist kidnapping for political or social advantage, and enslavement. *Id.* at 472. Judge Singleton reconciled these two suggested benchmarks with terms imposed in previous cases by explaining that offenders "convicted of offenses involving both rape and kidnapping who received sentences in excess of the ten- to fifteen-year benchmark for aggravated rape have usually been felony recidivists." *Id.* at 473 (citation omitted).

[154] Mathis v. State, 778 P.2d 1161, 1169 (Alaska Ct. App. 1989); Ridgely v. State, 739 P.2d 1299, 1302 (Alaska Ct. App. 1987); Lewis v. State, 731 P.2d 68, 72-73 (Alaska Ct. App. 1987); Riley v. State, 720 P.2d 951, 953 (Alaska Ct. App. 1986); Hoover v. State, 641 P.2d 1263, 1264 (Alaska Ct. App. 1982).

[155] Nukapigak v. State, 663 P.2d 943, 946 (Alaska 1983) (consecutive 99 year terms permissible in exceptional cases as long as sentence is otherwise in accordance with sentencing criteria), *questioned in* Collins v. State, 778 P.2d 1171, 1177 (Alaska Ct. App. 1989) (Singleton, J., concurring).

[156] Riley v. State, 720 P.2d 951, 952-53 (Alaska Ct. App. 1986).

judgment on either had been entered.[157] Case law interpreting this statute permitted consecutive sentences for distinct crimes.[158] However, neither the Alaska Legislature nor the Alaska Supreme Court established any guidelines concerning the imposition of consecutive rather than concurrent sentences.

In 1980, the Legislature replaced Alaska Statutes section 11.05.050 with a similar statute.[159] The new statute provided in part that before judgment was entered a defendant convicted of two or more crimes could be sentenced either consecutively or concurrently, as the court provided.[160] The court of appeals, noting the general similarity between the old and the new statute, concluded that the new law did not change the situations in which a sentencing court was permitted to impose consecutive sentences.[161]

The current versions of Alaska Statutes section 12.55.025(e) and (g) were adopted in 1982.[162] Under section 12.55.025(e), an offender who is convicted of two or more crimes before the judgment on either has been entered "shall" be sentenced consecutively, subject to the six exceptions listed in section 12.55.025(g).[163]

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[157] ALASKA STAT. § 11.05.050 (1962) (repealed 1978).

[158] Lacquement v. State, 644 P.2d 856, 859 (Alaska Ct. App. 1982) (dictum), *modified*, Jones v. State, 744 P.2d 410, 411-12 (Alaska Ct. App. 1987). For further discussion of *Jones*, see *infra* p. 33 and accompanying notes.

[159] ALASKA STAT. § 12.55.025 (1980).

[160] *Id.*

[161] *Lacquement*, 644 P.2d at 859.

[162] Act of July 3, 1982, ch. 143, §§ 24-25, 42, 1982 Alaska Sess. Laws 23, 30.

[163] ALASKA STAT. § 12.55.025(g), (e) (1990). The first three exceptions in section 12.55.025(g) concern situations in which multiple offenses grow out of the same or a connected transaction or are closely related in time. Thus, the trial judge may sentence concurrently if the crimes violate similar societal interests, the crimes are part of a single, continuous criminal episode, or there was not a substantial change in the objective of the criminal episode, including a change in the parties to the crime, the property or type of property right offended, or the persons offended. *Id.* § 12.55.025(g)(1)-(3). The last three exceptions in (g) provide that concurrent sentences may be given as long as the crimes were not committed while the defendant was trying to escape, or as long as the sentences are not for the crimes of homicide, assault, kidnapping, and sexual offenses, or are not for the crimes of robbery or extortion resulting in physical injury. *Id.* § 12.55.025(g)(4)-(6).

The court of appeals first interpreted these 1982 changes in *State v. Andrews*,[164] concluding that section 12.55.025(e) expresses a legislative preference for consecutive sentences, subject to the exceptions listed in section 12.55.025(g). While the *Andrews* court recognized the legislative preference for consecutive sentences, it nevertheless interpreted the exceptions to that preference to permit imposition of concurrent sentences in almost every case.[165] The court decided that the trial judge could reject the legislative preference and impose concurrent sentences if the conduct satisfied any one of the six subparagraphs in section 12.55.025(g).[166] In other words, each subparagraph is an independent basis for permitting concurrent sentences.[167]

Of course, a defendant who qualifies for concurrent sentences under section 12.55.025(g) is not necessarily entitled to them. In the court of appeals' interpretation of that section, the sentencing judge will seldom be required to impose sentences consecutively, but retains a certain amount of discretion to do so. The court of appeals has chosen to restrict the judge's consecutive sentencing discretion by formulating benchmarks that control the *extent* to which sentences may be imposed consecutively.[168]

Judicially-Imposed Limits on Consecutive Sentences.

One important test for evaluating the appropriateness of all consecutively-imposed sentences focuses not on the length of the individual consecutive increments, but on the

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[164] 707 P.2d 900, 902 (Alaska Ct. App. 1985), *aff'd per curiam* 723 P.2d 85 (Alaska 1986).

[165] 707 P.2d at 906.

[166] *Id.* at 908.

[167] *Id.* at 905. Thus, a defendant convicted of multiple sexual assaults against different victims during an eight month period cannot benefit from the subparagraph that makes concurrent sentences available to those who are not convicted of such offenses (subparagraph (g)(5)), but he can qualify for concurrent sentences because his crimes involved similar societal interests (subparagraph (g)(1)), were not committed while escaping (subparagraph (g)(4)), and did not involve the circumstances set forth in subparagraph (g)(6). *Id.* at 908.

[168] The court of appeals has criticized the 1980 version of section 12.55.025(e) as being a "major loophole in the presumptive sentencing scheme," because the unfettered discretion to impose concurrent or consecutive sentences severely undercuts the sentencing goals of uniformity and freedom from unwarranted disparity. Clifton v. State, 758 P.2d 1279, 1286 (Alaska Ct. App. 1988).

total aggregate term. The court of appeals requires that the total consecutive term be justified under the *Chaney* standards.[169]

In addition to the *Chaney* standards, the court uses benchmarks to evaluate the appropriateness of a defendant's total sentence. One important benchmark that limits the extent to which sentences may be imposed consecutively is whether the total sentence, including consecutive increments, exceeds the presumptive term for the single most serious offense.

In 1982, in *Lacquement v. State*,[170] the court of appeals announced that where the trial judge imposes consecutive presumptive terms, but the aggregate of the consecutive terms exceeds the presumptive term for the most serious single offense, the trial judge must make an affirmative finding that confining the defendant for the aggregate period of the consecutive term is necessary to protect the public.[171] Noting that the decision to impose consecutive rather than concurrent sentences clearly affects the total sentence imposed, the court required that such a consecutive term be justified by the *Chaney* goal of isolation.[172]

The court of appeals has recently developed an important exception to the *Lacquement* requirements of a special finding of public danger and the need for isolation. In cases where the total of the consecutive terms imposed does not exceed *ten years*, a total term exceeding the presumptive term for the most serious single offense can be based on sentencing goals other than isolation.[173]

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[169] Contreras v. State, 767 P.2d 1169, 1174 (Alaska Ct. App. 1989). For discussion of the *Chaney* standards, see *supra* note 43 and accompanying text.

[170] 644 P.2d 856 (Alaska Ct. App. 1982).

[171] *Id.* at 862. As Judge Coats noted in *Clifton v. State, Lacquement* essentially applied the reasoning of an earlier Alaska Supreme Court case, Mutschler v. State, 560 P.2d 377 (Alaska 1977), to the presumptive sentencing statutes. *Clifton*, 758 P.2d 1279, 1286 (Alaska Ct. App. 1988).

[172] Bolhouse v. State, 687 P.2d 1166, 1175 (Alaska Ct. App. 1984).

[173] *See* DeGross v. State, 768 P.2d 134, 140 n.1 (Alaska Ct. App. 1989).

The court of appeals introduced this exception in *Jones v. State,*[174] and reiterated it in *Farmer v. State.*[175] In *Jones,* the defendant was convicted of two counts of vehicular manslaughter and received consecutive presumptive sentences totalling twice the presumptive term for the single most serious count.[176] The trial judge had found that the harsh sentence was necessary to reflect the crime's seriousness and deter others.[177] Judge Coats believed that the sentencing goals cited by the trial judge were sufficient to justify a sentence exceeding the five year presumptive term, even where there was no finding of public danger.[178]

In *Farmer v. State,* Judge Bryner, this time writing for the court, cited *Jones* and explained that the court would no longer read *Lacquement* inflexibly.[179] Judge Bryner announced that "the appropriate focus is no longer on the narrow issue of public danger, but rather on whether a composite sentence exceeding the presumptive term is warranted under the totality of the circumstances."[180] Farmer had argued that his sentence, which exceeded the two year presumptive term by eleven months of

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[174] 744 P.2d 410 (Alaska Ct. App. 1987).

[175] 746 P.2d 1300 (Alaska Ct. App. 1987).

[176] *Jones,* 744 P.2d at 411.

[177] *Id.* at 412.

[178] *Id.* Although Judge Coats agreed with the trial judge's reasoning, he voted to reduce Jones' sentence by two years, from 10 years to 10 years with two years suspended. Judge Coats' opinion suggested that the 1982 amendments to section 12.55.025(e) (substituting a preference for consecutive sentences) legislatively superseded *Lacquement*'s requirement that the decision to sentence consecutively be based on the goal of isolation. *Id.* at 411.

Judge Singleton's concurring opinion resisted this suggestion, insisting that the questions of what total sentence is appropriate and whether that sentence should consist of consecutive increments or concurrent segments are independent of each other, and that "a sentence that would be inappropriate when viewed as a sentence for the most serious offense, does not automatically become appropriate simply because it is comprised of multiple sentences that were imposed consecutively." *Id.* at 415 (Singleton, J., concurring). Judge Singleton agreed with Judge Coats, however, that Jones' sentence should be reduced to 10 years with two years suspended. *Id.* at 414 (Singleton, J., concurring).

Judge Bryner objected in dissent to his colleagues' apparent conclusion that a first felony offender convicted of drunk driving and multiple manslaughter counts enjoys a sentence ceiling of eight years. *Id.* at 415 (Bryner, J., dissenting).

[179] *Farmer,* 746 P.2d at 1301. Apparently, the court had resolved the initial disagreement reflected in *Jones.*

[180] *Id.* at 1301-02.

unsuspended time, should have been based on an express finding of necessity. The court of appeals disagreed, holding that the sentence was justified by the seriousness of the offenses.[181]

In *Clifton v. State*,[182] the court further clarified the rule of *Jones* and *Farmer*, explaining that because the Legislature in 1982 had amended section 12.55.025(e) to express a preference for consecutive sentences, the court would henceforth require only "substantial reasons" to justify consecutive terms exceeding the presumptive term for the single most serious offense.[183] In *Clifton*, the court affirmed a composite sentence of twelve years with two years suspended, where the presumptive sentence for the most serious count, sexual abuse of a minor in the first degree, was eight years and the maximum was thirty years.[184]

Where the consecutive terms *exceed* ten years, however, the court of appeals will apparently continue to apply *Lacquement* more rigidly. Thus, where the composite term exceeds the presumptive for the single most serious count, or exceeds ten years of unsuspended time, the court continues to require a specific finding that there is an actual need to isolate the defendant for the protection of the community for the full period in question.[185]

A second benchmark limiting consecutive sentences is related to the supreme court's general rule that the maximum sentence generally should not be imposed unless the court determines that the offender is a "worst offender" for that class of crime.[186] The court of appeals has held that offenders who are characterized as "worst offenders" and "dangerous offenders" require sentences emphasizing the goals of deterrence,

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[181] *Id.* at 1302 (Farmer's convictions arose from a car crash in which one person was killed and two others were injured).

[182] 758 P.2d 1279 (Alaska Ct. App. 1988).

[183] *Id.* at 1286.

[184] *Id.* at 1285-86.

[185] *See, e.g.*, Castle v. State, 767 P.2d 219, 222 (Alaska Ct. App. 1989).

[186] *See* State v. Wortham, 537 P.2d 1117, 1120 (Alaska 1975); Galaktionoff v. State, 486 P.2d 919, 924 (Alaska 1971).

reaffirmation of societal norms, and isolation for the protection of the public.[187] A finding that a defendant is a "worst offender" can justify imposition of consecutive sentences equal to the maximum term for the single most serious count.[188]

To arrive at a finding of worst offender status, the trial court must look to the manner in which the crime was committed and to the character and background of the defendant.[189] Factors considered in the determination of the offender's character and background include the defendant's prior convictions, age, military records, employment history, substance addiction, presentence report, dangerous propensities and the possibility that the defendant has an antisocial personality.[190]

"Worst offender" status, however, does not automatically permit imposition of consecutive sentences exceeding the maximum for the single most serious crime.[191] The court of appeals has repeatedly held that in order to impose such a term, the trial court must specifically find, in addition to the "worst offender" designation, that the defendant will continue to pose a danger to the community during the extended term and that his continued isolation is actually necessary.[192] Such sentences "cannot be justified by considerations of rehabilitation, deterrence of self or others, or reaffirmation

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[187] Bumpus v. State, 776 P.2d 329, 333 (Alaska Ct. App. 1989), *petition for hearing granted*, No. S-3463 (Alaska Oct. 9, 1989).

[188] *Id.* at 334-335; DeGross v. State, 768 P.2d 134, 140 (Alaska Ct. App. 1989); Heacock v. State, 762 P.2d 503, 505 (Alaska Ct. App. 1988).

[189] Hintz v. State, 627 P.2d 207, 210 (Alaska 1981).

[190] State v. Wortham, 537 P.2d 1117, 1120 (Alaska 1975). Care must be taken to distinguish between the notion of "worst offender" and the statutory aggravator contained in section 12.55.155(c)(10). *See* ALASKA STAT. § 12.55.155(c)(10) (1990) ("the conduct constituting the offense was among the most serious conduct included in the definition of the offense"). "Worst offender" status can be established by the personal characteristics of the offender, or by the particular conduct involved in the offense, or by both. *Wortham*, 537 P.2d at 1120. This is distinct from the statutory aggravator, which is established only by the seriousness of the offender's conduct. The Legislature's enactment of statutory aggravators did not replace the concept of "worst offender."

[191] *Bumpus*, 776 P.2d at 335; *DeGross*, 768 P.2d at 140.

[192] *Bumpus*, 776 P.2d at 335; *DeGross*, 768 P.2d at 140; *Heacock*, 762 P.2d at 505; Hancock v. State, 741 P.2d 1210, 1214 n.2 (Alaska Ct. App. 1987). *See also* Mutschler v. State, 560 P.2d 377 (Alaska 1977) (Erwin, J., dissenting).

of community norms."[193] Thus, a first offender convicted of multiple class A felonies should not be given sentences exceeding the twenty year maximum unless the trial judge first determines that such a term is actually necessary for the protection of the community and that "the [defendant] can neither be rehabilitated nor deterred" by a shorter sentence.[194]

Finally, the court of appeals has formulated specific benchmark terms which the trial judge should not exceed when sentencing offenders convicted of multiple counts of certain types of serious crimes. For example, a thirty-year benchmark applies if the offender has a nonviolent record and is convicted of multiple counts of serious felonies involving substantial violence.[195] There is a forty-year benchmark for persons with felony records involving crimes of violence who commit multiple serious felonies involving substantial violence.[196] The court of appeals also has applied the forty-year benchmark to the case of a violent sexual offender who had a substantial nonviolent criminal record but also had a history of violent behavior.[197] The upper limit for criminal conduct short of murder is probably a composite sentence similar to the fifty-three years given in *Wortham v. State*.[198]

1988 Amendment to Alaska Statutes Section 12.55.025.

In 1988, the Legislature added subparagraph (h) to Alaska Statutes section 12.55.025.[199] That section requires judges to impose some consecutive period of

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[193] Newell v. State, 771 P.2d 873, 878 n.3 (Alaska Ct. App. 1989) (Singleton, J., dissenting on other grounds). *See also DeGross*, 768 P.2d at 140-41 n.1 (noting that composite sentences exceeding 10 years must be based on the need for isolation).

[194] *DeGross*, 768 P.2d at 141.

[195] *See* Hancock v. State, 741 P.2d 1210, 1212 (Alaska Ct. App. 1987); Tookak v. State, 648 P.2d 1018, 1023-24 (Alaska Ct. App. 1982).

[196] *See Hancock*, 741 P.2d at 1212; Wortham v. State, 689 P.2d 1133, 1145 n.7 (Alaska Ct. App. 1984); Larson v. State, 688 P.2d 595, 600 (Alaska Ct. App. 1984).

[197] *Hancock*, 741 P.2d at 1215.

[198] 689 P.2d 1133 (Alaska Ct. App. 1984); *see also* Murray v. State, 770 P.2d 1131, 1140-41 (Alaska Ct. App. 1989) (discussing limits upon composite sentences).

[199] Act effective May 28, 1988, ch. 66, §§ 5, 6, 1988 Alaska Sess. Laws 4.

incarceration for each sexual or physical assault against a child.[200] While it was not the Legislature's intent to restrict the court's discretion in determining the length of the consecutive terms, the Legislature did wish to express its preference for "judges to impose some consecutive period of time so as to reflect the community's abhorrence of these types of offenses, and to bring home to the offender that some additional penalty must be paid for each and every proven offense."[201]

It is not clear what effect, if any, the 1988 amendment has had or will have on sentencing practices. Since at least 1985 the court of appeals has endorsed the principle that a person who commits multiple sexual assaults should receive a more severe sentence than a person convicted of a single assault.[202]

Moreover, even assuming that the 1988 amendment would cause the trial court judges to impose consecutive sentences more frequently for sexual assaults against minors, the total term imposed, including consecutive increments, would continue to be limited by the court of appeals' benchmarks and by the requirement that total terms be justified under the *Chaney* standards. Thus it is not clear that the 1988 amendment has caused, or will cause total sentences to become appreciably longer.

CONCLUSION AND RECOMMENDATIONS

The court of appeals, which has decided well over 1,100 sentence appeals since its creation in 1980,[203] has adopted the role envisioned by the original proponents of appellate review. It routinely reduces excessive sentences to bring them in line with sentences given in comparable cases, and has created an extensive body of case law articulating appropriate sentencing principles, establishing benchmark terms for many classes of offenses, and establishing standards for the extent to which sentences can be

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[200] ALASKA STAT. § 12.55.025(h) (1990).

[201] House Letter of Intent, 1988 H. JOURNAL 2331 (February 24, 1988).

[202] *See* State v. Andrews, 707 P.2d 900, 910 (Alaska Ct. App. 1985), *aff'd per curiam*, 723 P.2d 85 (Alaska 1986).

[203] *See* ALASKA COURT SYSTEM, 1989 ANNUAL REPORT, at 5-9; *id.*, 1987 ANNUAL REPORT, at 5-9; *id.*, 1984 ANNUAL REPORT, at 5-9; *id.*, 1982 ANNUAL REPORT, at 5-9.

increased in aggravated cases. In addition, the court of appeals has moved to close a major loophole in the presumptive sentencing scheme by regulating the total aggregate terms that may be imposed for offenders who are sentenced consecutively. By virtue of the volume and completeness of the sentencing law that it has created, the Alaska Court of Appeals is probably one of the most active sentence review courts in the nation.[204]

There are drawbacks, however, to relying too heavily on appellate review to articulate sentencing principles and to fine-tune sentences. Appellate review by its very nature is backward-looking. The role of Alaska's appellate court has been to decide cases based on the factual record before them, after the record in that case has been completely developed. Thus, Alaska's appellate courts can examine what has occurred in a specific case and pass on the propriety of the result in that one case; but they cannot anticipate what other factual situations might arise in the future, nor can they fashion rules prospectively.

We have seen in the course of the previous analysis that the court of appeals, while willing to take its sentence reviewing function quite seriously, creates target benchmarks by looking back and reviewing sentences previously approved in similar cases. It then synthesizes all the cases in that area, often publishing a decision making explicit the reasoning implicit in its previous decisions. While this is entirely appropriate behavior for an appellate court, it means that the court of appeals cannot shape sentencing law prospectively, because it cannot choose the cases that come before it, and it cannot decide cases with an eye to what might happen in the future. In addition, the court's process of deciding numerous cases in an area and then publishing a decision distilling the general principle is often confusing to the practitioner, who is sometimes left with dozens of cases and no concrete rule.

It is the function of a legislature to shape law prospectively. Besides being able to look forward, a legislature can establish sentencing policy in the context of other

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[204] By way of comparison, Minnesota's appellate courts decided less than half as many sentence appeals during their first seven years of reviewing presumptive sentences than the Alaska Court of Appeals decided in its first seven years. Commenting in 1987 upon the number of sentence appeals decided by Minnesota's courts, Michael Tonry predicted that Minnesota would become "the first American jurisdiction to have a meaningful system of appellate sentence review." Tonry, *supra* note 25, at 42.

considerations, such as the overall allocation of the state's resources. This legislative function complements the appellate courts' review of individual cases and synthesis of the individual decisions into a comprehensive set of interpretations of the statutes and constitution.

However, legislatures face at least two difficulties when called upon to write specific punishments for crimes. First, legislatures seldom have the time needed to create the original law, nor do they have the time necessary to review the law and make appropriate changes once it has gone into effect.[205] Second, it has been said that "legislators have considerable incentives to adopt posturing stances of 'toughness' and few incentives for giving thought to the justice of proposed penalties . . . ."[206] One solution is to have legislatures delegate some of their rule-making authority to a sentencing commission that has both the time and the representation from a variety of interest groups necessary to generate responsible sentencing policies. Like the legislature, the sentencing commission's mission is prospective: to decide the future direction of sentencing policy.

A sentencing commission was established in Alaska during the 1989-90 legislative term.[207] Alaska's Sentencing Commission is composed of fourteen representatives from many different interest groups. Its purpose is to evaluate the effect of sentencing laws and practices on the criminal justice system, and to make recommendations for improving criminal sentencing practices.

As Andrew von Hirsch has explained, a useful first step in any sentencing commission's work is the study of past sentencing practices.[208] However, the task should not end there. The commission also should make a normative evaluation of those past practices. A normative evaluation is not limited to a decision about whether

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[205] Von Hirsch, *supra* note 27, at 6.

[206] *Id.*

[207] H.B. 491 (Judiciary), 16th Leg., 2d Sess. (1990). The Alaska Sentencing Commission had its first meeting in August of 1990. It published its first annual report to the Governor and the Legislature in December of 1990, and it is scheduled to make further recommendations to the Legislature over the next three years.

[208] Von Hirsch, *supra* note 27, at 7.

the existing presumptive terms are fair, although certainly that should be a part of the process. Alaska's Sentencing Commission must ask whether past sentencing practices have been based on coherent and articulated sentencing goals and philosophies, and if they have, it must clearly define the goals and rank them in order of importance. It also must decide what effects past practices have had on the criminal justice system in terms of prison overcrowding, and to what extent, if at all, prison overcrowding should be taken into account when formulating presumptive terms. Alaska's Sentencing Commission, and Alaska's Legislature, should take a comprehensive approach to sentence reform; they should do more than simply tinker with presumptive terms or make surface changes in existing statutes, such as bringing class B and C first felony offenders under presumptive sentencing.[209]

The Alaska Judicial Council has recommended that the Legislature, through the Alaska Sentencing Commission, examine the benchmarks established by the state's appellate courts to guide the discretion of judges.[210] The Council recommends that benchmarks be examined to determine whether there is sentencing law in those decisions that would be more effectively addressed by statutes and second, whether the benchmarks and sentencing criteria could be summarized in a way that would make them easily accessible to judges, attorneys and the public.

Appellate review of sentencing has profoundly changed sentencing policy in Alaska during the two decades since its inception. The *Chaney* guidelines set by the Alaska Supreme Court in the first decade are not only applied to every sentencing decision, but were incorporated by the Legislature into its statement of sentencing policy during the revision of the criminal code.[211] In the second decade of sentence review, the appellate courts' decision to determine the justice of non-presumptive sentences by referring to the presumptive sentencing structure has had far-reaching effects on the

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[209] In his 1985 article, Professor Barry Stern argues that excluding first-time B and C felony offenders from the presumptive sentencing scheme results in disparate amounts of time to serve, because offenders sentenced non-presumptively can be paroled, while offenders sentenced presumptively cannot. Stern, *supra* note 53, at 259-64.

[210] The Judicial Council studied sentencing data in connection with its re-evaluation of Alaska's ban on plea bargaining.

[211] Nell v. State, 642 P.2d 1361, 1369 (Alaska 1982). See ALASKA STAT. § 12.55.005 (1990).

entire criminal justice system.[212] The third decade of appellate review of sentencing should see the interaction of the decisions made over the past twenty years with new policies recommended by the Sentencing Commission to the Legislature and the courts. The past experience suggests that the appellate courts will continue to use their authority to participate actively in shaping Alaska's sentencing practices.

[212] The Alaska Judicial Council's most recent analysis of sentences imposed in Alaska between 1984 and 1987 indicates that the variable of judge identity no longer makes a significant contribution to the mean active sentence length. CARNS & KRUSE, *supra* note 69, at 121. The lack of importance of this variable probably reflects the combined contributions of presumptive sentencing and the appellate courts' guidelines and benchmarks. *Id.*

APPENDIX A

TABLE 1

STATUTORY FELONY SENTENCING AND EARLY RELEASE STRUCTURE IN ALASKA

Offense	Sentence Length (Years)				
	First Felony Conviction	Second Felony Conviction	Subsequent Conviction	Good Time	Discretionary Parole Eligibility
Murder I	20 - 99	20 - 99	20 - 99	.33	Greater of 20 yrs. or 1/3 of term
Other Unclassified Felonies[c]	5 - 99	5 - 99	5 - 99	.33	Greater of 5 yrs. or 1/3 of term
Unclassified Sexual Offenses[d]	4 [8] 30	7.5 [15] 30	12.5 [25] 30	.33	None on presumptive term
Unclassified Sexual Offenses[a,d]	5 [10] 30	7.5 [15] 30	12.5 [25] 30	.33	None on presumptive term
Class A[e]	2.5 [5] 20	5 [10] 20	7.5 [15] 20		None on presumptive term
Class A[a,b,e]	3.5 [7] 20	5 [10] 20	7.5 [15] 20	.33	
Class B[f]	0 - 10	0 [4] 10	3 [6] 10		1st offense only
Class B[b,f]	0 [2] 10	0 [4] 10	3 [6] 10	.33	None on presump. term
Class C[g]	0 - 5	0 [2] 5	0 [3] 5	.33	1st offense only
Class C[b,g]	0 [1] 5	0 [2] 5	0 [3] 5	.33	None on presump. term

NOTE: Mandatory minimum terms are underlined and presumptive terms are in brackets. Statutory minimums and maximums have no underline or bracket. Under certain circumstances, a three-judge panel may reduce a term below the statutory minimum.

[a] Applies when a defendant possessed a firearm, used a dangerous instrument or caused serious physical injury, except for manslaughter.

[b] Applies when a defendant knowingly directed the conduct (crime) at a peace officer, correctional officer, or emergency medical responder engaged in the performance of official duties at time of offense.

[c] Other unclassified felonies include second-degree murder, attempted first-degree murder, selling hard drugs to minors, and kidnapping where the victim is not released safely.

[d] Unclassified sexual offenses include first-degree sexual assault (forcible rape) and first-degree sexual abuse or assault of a minor (sexual penetration with anyone under 13, daughter or son under 18).

[e] Class A felonies include manslaughter, robbery using a deadly weapon, selling heroin to an adult, arson with risk of physical injury, kidnapping where the victim is released safely, and first-degree assault.

[f] Class B felonies include robbery not using a deadly weapon, theft over $25,000, selling cocaine or marijuana to minors, burglary in a dwelling, arson with no risk of injury, bribery or perjury, second-degree assault, sexual penetration with a person aged 13, 14 or 15, and sexual contact with anyone under 13, daughter or son under 18.

[g] Class C felonies include negligent homicide, burglary not in a dwelling, second-degree assault, theft over $500, check forgery, possessing heroin or cocaine, and bootlegging.

TABLE 2

BENCHMARK TERMS* AND STATUTORY FELONY SENTENCING IN ALASKA

	Sexual Abuse of Minor I, Sexual Assault I (Years)	Murder I (Years)	Att. Murder I, Kidnapping, Misc. Involv. Controlled Substance I, Murder II (Years)	Class A Felonies (Years)	Class B Felonies (Years)	Class C Felonies (Years)
FIRST FELONY OFFENDER:						
Minimum Term:	4	20	5	2-1/2	**90 days (most mitigated); 90 days - 1 year (mitigated)** ***Jackson***	**Probation** ***Leuch***
Presumptive/***Benchmark*** Term:	8 [10]**	____	**20-30 for Murder II** ***Page***	5 [7]***	**1-4** ***Jackson*** [2]****	[1]****
Benchmark aggravated term	**10-15** ***Andrews***	____	____	**10** ***Pruett***	**6** ***Jackson***	**2** ***Austin***
SECOND FELONY OFFENDER:						
Statutory minimum term.	7-1/2	20	5	5	0	0
Presumptive Term:	15	____	____	10	4	2
THIRD FELONY OFFENDER:						
Statutory minimum term:	12-1/2	20	5	7-1/2	3	1-1/2
Presumptive Term:	25	____	____	15	6	3
STATUTORY MAXIMUM:	30	99	99	20	10	5

* Benchmark terms and the cases from which they are drawn, are bold and italicized. {resumptive terms and statutory minimums and maximums appear in normal type.

** Applies if gun, dangerous instrument used; or serious physical injury caused. AS § 12.55.125(i)(2).

*** Applies to offense other than manslaughter if gun, dangerous instrument used; serous injury caused; or crime is against officer or emergency responder. As § 12.55.125(c)(2).

**** Presumptive sentence applies to first felony offender only if offense directed against public officer or emergency responder. As §§ 12.55.125(d)(3) and (e)(3).

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Andrews v. State, 707 P.2d 900 (Alaska Ct. App. 1985), aff'd 723 P.2d 85 (Alaska 1986);

Austin v. State, 627 P.2d 657 (Alaska Ct. App. 1981) (per curiam);

State v. Jackson, 776 P.2d 320 (Alaska Ct. App. 1989);

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Pruett v. State, 742 P.2d 257 (Alaska Ct. App. 1987);