PROBATION OFFICER TRAINING MATERIALS (PART ONE)

SENTENCING UNDER REVISED CRIMINAL CODE

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TERMS OF IMPRISONMENT AND AUTHORIZED FINES IN REVISED CRIMINAL CODE

	FIRST FELONY CONVICTION	SECOND FELONY CONVICTION	THIRD FELONY CONVICTION
"A" Felony	0-20 3-[6]*-20	5-[10]-20	71/2-[15]-20
"B" Felony	0-10	0-[4]-10	3-[6]-10
"C" Felony	0-5	0-[2]-5	0-[3]-5

MAXIMUM FINES - PERSONS

Murder or kidnapping - $75,000
A, B, or C Felony - $50,000
A misdemeanor - $ 5,000
B misdemeanor - $ 1,000
Violation - $ 300

MAXIMUM FINES - ORGANIZATIONS

All offenses - $100,000 or
3 X pecuniary gain
- whichever is greater

KEY

Number in bracket is presumptive sentence. Number to left is lowest mitigated sentence. Number to right is highest aggravated sentence.

* Six year presumptive term applies if first A felony conviction, other than manslaughter, and defendant used or possessed a firearm during the offense or caused serious physical injury.

MAXIMUM TERMS OF IMPRISONMENT FOR MISDEMEANORS

A misdemeanor - 1 year

B misdemeanor - 90 days

SENTENCING OUTLINE

I. Declaration of Purposes [Sec. 12.55.005]

A. To determine the "appropriate sentence," keeping in mind the following:

1. Elimination of "unjustified disparity."
2. Attainment of "reasonable uniformity."

B. In avoiding unjustifiable disparity and in achieving reasonable uniformity, the court "shall consider:"

1. Seriousness of present offense in relation to other offenses.
2. Prior criminal history of defendant.
3. Criteria set forth in State v. Chaney, 447 P.2d 441 (Alaska 1970).

IMPORTANT: Official Commentary to Code (Senate Journal 148-149) Cites statistical studies of sentencing by Alaska Judicial Council, indicating that empirical evidence of sentences received by other defendants should be admissible on issue of the "appropriate sentence" for this defendant, in order to eliminate unjustifiable disparity and to attain reasonable uniformity among sentences.

II. Authorized Sentences [Sec. 12.55.015]

A. Sec. 12.55.015(b)(1) says court "shall impose a sentence involving imprisonment," under certain circumstances

1. When "the defendant deserves to be imprisoned, considering the seriousness of his present offense and his prior criminal history" . . . "and imprisonment is equitable considering sentences imposed for other offenses and other defendants under similar circumstances."

NOTE: Code again stresses relationship between present sentence and sentences received by others under similar circumstances, suggesting relevancy of empirical sentencing data to determine what is equitable under circumstances.

Prepared by: ALASKA JUDICIAL COUNCIL
for the Continuing Legal
Education Program

OFFICIAL COMMENTARY: "§(b) is a guide to the court in deciding when to sentence a first-time felon . . . or a misdemeanant to imprisonment."

NOTE: Commentary doesn't go far enough, since this section would appear to apply not only to first offenders, but also to second Class B offenders, and second or third Class C offenders whose presumptive sentences are four years or shorter. In such cases judges, in their discretion, may "decrease the presumptive term by an amount as great as the presumptive term for factors in mitigation." [Sec. 12.55.155(1)] (i.e., the court may sentence the defendant to a term equal to zero).

QUESTION: If the court is allowed to reduce the presumptive sentence down to zero for second Class B and third Class C felony defendants, then what is the effect of the language in AS 12.55.015(b)(3) above, which provides that the court shall impose imprisonment when "a sentence of lesser severity has been imposed in the past and proven ineffective in deterring the defendant?"

III. Sentencing Procedures [Sec. 12.55.025]

A. Sentencing report required to be prepared in any sentence exceeding 180 days jail time. This report is prepared by the judge and must specifically include certain information in all cases. Two interesting items are the following:

* * *

(2) findings on "material issues of fact and on factual questions required to be determined as a prerequisite to the selection of the sentence imposed."

(4) recommendations regarding place of confinement and manner of treatment.

IV. Fines [Sec. 12.55.035]

A. "Financial resources of the defendant are required to be considered by the court along with the nature of the burden . . . payment will impose."

B. All offenses in code are punishable by fines, in addition to any other applicable sanctions. Fines range from $75,000 for murder and kidnapping down to $300 for violations. A special higher fine schedule applies to organizational defendants.

V. Restitution [Sec. 12.55.045]

A. In ordering restitution, as in fines, the court must take into account defendant's finances and "nature of the burden [restitution] will impose."

B. Victim must be given notice that restitution may be ordered by court.

OFFICIAL COMMENTARY: Requirement of notice to victim "implies that a victim may refuse restitution."

QUESTION: May the court in part base a decision to incarcerate the defendant on the fact that the victim of the crime has refused to accept restitution? Note that under 12.55.051, imprisonment for nonpayment of a restitution installment or fine may only be ordered if there is a finding of "intentional refusal or failure to make a good faith effort to pay. . . ."

VI. Community Work [Sec. 12.55.055(a)]

A. Work service may be condition of probation or of a suspended sentence, but not necessarily: "or in addition to any fine or restitution," seems to imply that even without a suspended jail sentence, a defendant who has been fined or ordered to pay restitution may also be given a sentence of work service.

VII. Modification of Sentence [Sec. 12.55.088]

A. Sentences may be modified by court "at any time during a term of imprisonment" on finding that "conditions or circumstances have changed" such that the "purpose of the original sentence is not being fulfilled."

OFFICIAL COMMENTARY: Provides that purpose of this section is to correct "demonstrable inequities resulting from breakdowns in the process of classifying prisoners." This ties in with the requirement in Sec. 12.55.025(a)(4) that the judge, as part of his sentencing report in all sentences over 180 days, must include recommendations as to the place of "confinement or the manner of treatment."

VIII. Prior Convictions [Sec. 12.55.145]

IMPORTANT: Prior convictions are central to the entire sentencing scheme under the new code. Prior convictions may place the defendant in one of the presumptive sentencing categories and may thus result in ineligibility for parole as well. Determining whether a person has a prior conviction for the purposes of presumptive sentencing will be a pivotal question and may very well involve certain legal niceties.

A. Time Limits on Prior Convictions. New code starts with date of commission of present offense (not day of conviction). A prior conviction will be "counted" for presumptive sentencing purposes unless the date of unconditional discharge from the prior was seven or more years before the date of commission of the present offense. Basically, "unconditional discharge" means that you begin counting not from the date of the prior judgment, but from the date the defendant was "released from all disability arising under the sentence, including probation and parole." (See Sec. 12.55.185(10)) Periods while the defendant was on probation or parole for the previous conviction are not counted as part of the seven year period. In effect, periods of probation and parole "toll the statute of limitations."

B. Convictions Outside Alaska. Out-of-state convictions count as felonies for presumptive sentencing if their elements are "substantially identical to those of a felony defined as such under Alaska law."

QUESTION: What if a certain kind of conduct, e.g. "lewd touching," is only a misdemeanor in Minnesota, but a "substantially identical" kind of conduct would be a felony under the new Alaska criminal code? Does this mean that a Minnesota misdemeanor becomes an Alaskan felony for presumptive sentencing purposes? (What if it was a felony in Minnesota but only a misdemeanor in Alaska?)

C. Multiple-count Convictions

Issue: If the defendant was previously convicted under a multiple-count indictment of several felonies at the same time, how many convictions does he have for purposes of presumptive sentencing?

Answer: The code provides that multiple convictions will be considered as a single conviction only if "arising out a single, continuous criminal episode during which there was no substantial change in the nature of the criminal objective," and the offenses were not committed "while attempting to escape or avoid detection or apprehension after the commission of another offense." (Sec. 12.55.145(a)(3)).

IMPORTANT: See examples cited in Official Commentary, Senate Journal at 156-159. If the defendant breaks into a building and steals and is convicted of burglary and larceny, those two convictions may only count as a single one. But if the defendant steals a car while attempting to avoid apprehension, he may be convicted separately for the theft of the car, and the car theft will count toward giving him two prior convictions for presumptive sentencing purposes.

PROBLEM: What about a defendant who forges four or five instruments in a single day and was convicted and sentenced on all simultaneously?

D. Proof of Prior Conviction/Authenticity, Hearings etc.

1. Unless defendant admits prior convictions, the State must introduce authenticated copies of court records and serve copies

of records on defendant or his counsel ten days prior to sentencing date.

2. Defendants Notice of Denial

(1) If defendant contests prior convictions he must give notice not later than five days prior to sentencing date.
(2) Grounds for challenging priors:
   a. Prior judgment of conviction inauthentic.
   b. Defendant not the same person named in judgment of conviction.
   c. Elements of out-of-state offense would not constitute a felony in Alaska.
   d. Prior offense too old.
   e. Multiple prior convictions should be treated as a single conviction for presumptive sentencing purposes.

3. Hearing on Priors

a. No jury.
b. Defendant must go forward with "substantial evidence" of his objections to prior convictions. If defendant meets burden of going forward by substantial evidence, then burden of proof to the contrary is on the state beyond a reasonable doubt.

IX. Factors and Aggravation in Mitigation [Sec. 12.55.155]

A. Effects on Presumptive Terms

1. If presumptive term is four years or less--court may sentence down to zero or up to maximum, depending on aggravating or mitigating factors.
2. If presumptive term more than four years--court may decrease sentence by 50% for mitigation, but may increase up to maximum for aggravation.
3. Sentence increments and decrements "shall be based on the totality of the aggravating and mitigating factors set out in (c) and (d) of this section."

B. Special Aggravating and Mitigating Factors Relating to Prior Record.

1. Aggravating factors relating to prior record.
   (7) The prior felony "considered for . . . invoking the presumptive terms of this chapter was of a more serious class than the present offense."
   (8) The defendant has a prior criminal history of "one or more convictions for misdemeanors, having assault as a necessary element."

QUESTION: What if the present offense is entirely unrelated to assault or violence, and the prior aggravating misdemeanors were remote in time? Also, various "classification" problems may arise with respect to convictions under old law or foreign jursidictions and whether the offense is of a "more serious class?"

2. Mitigating factors relating to prior record.
   (8) The prior felony "considered for . . . invoking the presumptive terms of this chapter was of a less serious class than the present offense."

C. Hearing on Aggravation and Mitigation [Sec. 12.55.155(f)].

1. Notice served on other party not later than ten days from date of sentencing, to establish aggravation or mitigation.
2. Hearing before judge without jury.
3. Proof by clear and convincing evidence.
4. "All findings must be set out with specificity."

X. Extraordinary Circumstances/Three-Judge Panel [Sec. 12.55.165, 175]

A. Three-judge panel has original sentencing jurisdiction in appropriate cases. It is not a reviewing court; panel actually imposes sentence, but only on special cases referred by original judge.

B. Hearing Before Three-Judge Panel

1. Panel considers all documents in file, including the findings and conclusions made by original, referring judge.
2. Panel may hear oral evidence to supplement record.
3. If panel does not find that "manifest injustice would result" from following normal presumptive sentencing procedures, "it shall remand the case . . . with a written statement of its findings and conclusions."

QUESTION: Is panel's order of remand reviewable?

XI. Parole [Sec. 33.15.080-180]

A. Who is eligible?

1. Adult prisoners.
2. Prisoners not serving presumptive sentences or mandatory minimum sentences for Murder I, Murder II or kidnapping (unless the mandatory portions have already been served).
3. Prisoners sentenced to at least 181 days of incarceration.

B. When Does a Prisoner Become Eligible? "Must have served at least one third of the period of confinement to which he has been sentenced."

XII. Good Time]Sec. 33.20.010]

A. Eligibility--all prisoners, including those subject to presumptive sentences of minimums.

B. Issue: Rules governing denial of good time will become very important.

INTRODUCTION: HISTORY OF THE ALASKA CRIMINAL CODE REVISION

Alaska's criminal law has for the most part been based on Oregon statutes as they existed at the close of the nineteenth century. Prior to 1899, the Alaska Government Act of 1884 had provided that "the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws in the United States." In 1899, Congress approved a criminal code for Alaska based primarily on Oregon law. Most of these century-old Oregon criminal statutes were still in effect in Alaska in 1975, even though Oregon itself enacted a revised criminal code in 1971.

Over the past seventy years, Alaska territorial and state legislatures have added new statutes and amended old ones according to the inspiration of individual legislators reacting to the atmospheres of different times. The result was inevitable. In 1975, Alaska's criminal law was filled with outdated statutes, imprecise and obsolete terminology, needless distinctions and overly specific and sometimes unconstitutional provisions. The criminal law seemed to deal more adequately with concerns of nineteenth century Oregon than it did with problems of twentieth century Alaska.

The necessity for a comprehensive revision of Alaska's criminal law was acknowledged in 1975, by the first session

of the Ninth Alaska Legislature when it requested the Legislative Council and the Attorney General to establish a "blue ribbon" panel to revise Alaska's criminal laws. The Legislative Council subsequently established the Criminal Code Revision Commission with an initial membership of nine.

The Commission was charged with the responsibility of presenting a revised criminal code to the second session of the Ninth Legislature. On February 1, 1976, the Commission presented the legislature with a Preliminary Report in which it recommended that it be continued or reconstituted and allowed to complete its work by early 1978. The legislature took no action on the drafts contained in the Preliminary Report but statutorily reestablished the Criminal Code Revision Commission as a Subcommission of the newly formed Code Commission. The Subcommission's mandate was clear; by December 1, 1977, it was to "prepare a comprehensive revision of the state's criminal laws."

The Subcommission's membership was set at 14, with a fifteenth member added during the 1977 legislative session. Several members of the Subcommission originally served on the Commission. The Subcommission included the Commissioner of Public Safety, the Attorney General, legislators, judges and members of the public.

The Subcommission prepared a six-part Tentative Draft of its proposed revisions accompanied by commentary. The Tentative Draft was distributed to all state judges and

justices, the state and local bar associations, the state district attorneys and the police chiefs of major cities.

On January 19, 1978, HB 661 "An Act revising the criminal laws of the state; and providing for an effective date" was introduced in the House by the House Judiciary Committee. This bill contained all the recommendations of the Subcommission and was referred to the House Judiciary Committee where daily hearings began immediately.

The House Judiciary Committee devoted nearly three months of public hearings to reviewing the Code. No other bills were considered during this period. Suggestions for amendments were primarily made by the following organizations: The Alaska Bar Assocation Criminal Law Committee, the Alaska Peace Officers Association, the Alaska Chiefs of Police Association and the criminal division of the Alaska Department of Law.

Numerous amendments to the version of the Code recommended by the Subcommission were made by the committee during the three months of hearings. These amendments were incorporated into a committee substitute for HB 661. On April 14, 1978, the House Committee Substitute passed the House by a 32-4-4 vote.

The House Committee Substitute then moved to the Senate where it was referred to the Senate Judiciary Committee. The Senate Judiciary Committee reviewed the House Committee Substitute during nearly two months of public hearings. As

was the case in the House, no other bills were considered by the Committee during this period. Public testimony was received primarily from the Alaska Peace Officers Association, Alaska Chiefs of Police Association and the criminal division of the Alaska Department of Law. As a result of the Senate review approximately 150 amendments were made to the House version of the Code.

The Senate Judiciary Committee incorporated its amendments to the Code into a Senate Committee Substitute - SCS CSHB 661. The Senate Committee Substitute, with the addition of three floor amendments adopted on June 13, passed the Senate by a 18-2 vote on June 14, 1978. On notice of reconsideration the amended Senate Committee Substitute, SCS CSHB 661 am S, passed the Senate the next day by a 17-1-2 vote.

The need for a free conference committee to resolve the differences between the House and Senate versions of the Code was avoided on June 16, 1978, when the house concurred in the Senate amendments by a 31-0-9 vote. The revised criminal code became law when it was signed by the governor on July 22, 1978, with an effective date of January 1, 1980.

While the Code was winding its way through the legislature, commentary explaining the Code and expressing legislative intent was also being drafted. On June 12, 1978, the Senate published this commentary as Senate Journal Supplement No. 47. The House subsequently adopted Senate Journal Supplement No. 47 as its letter of intent for the criminal code. An errata sheet to the commentary appears in Senate Journal Supplement No. 48.

The version of the Code that was signed by Governor Hammond in July differed in many respects from the bill that was originally introduced in the legislature in January. Nevertheless, the basic structure of the Code did not change during the five months of intensive legislative review. Four important features of the Code remained intact in all versions of the Code:

1. The revision was comprehensive. All of title 11 was revised and a new sentencing scheme was adopted in title 12 to accompany the substantive revisions.

2. All crimes, with the exception of murder and kidnapping were classified on the basis of their seriousness as Class A, B or C felonies or as Class A or B misdemeanors. Uniform penalty provisions apply to the five classes of crimes.

3. The sentencing provisions left judicial discretion intact in the sentencing of misdemeanants and most first time felony offenders. Judicial discretion, however, was substantially restricted by the specification of presumptive sentences for repeat felons.

4. Four culpable mental states - "intentionally", "knowingly", "recklessly" and "criminal negligence" - were defined and used throughout the Code.

A summary of some of the more important provisions of the Code, highlighting changes made by the legislature to the original proposals of the Subcommission, follows:

<u>Homicide</u>

The Subcommission recommended one degree of murder

punishable by 0-99 years imprisonment. The legislature provided for two degrees of murder. A person convicted of first-degree murder must be sentenced to at least 20 years imprisonment while a conviction for second degree murder will result in at least a 5 year sentence. The maximum sentence for both crimes is 99 years.

Manslaughter will cover all reckless killings, including deaths caused by drunk drivers, as well as killings committed in the "heat of passion" or under an honest, but unreasonable belief as to self-defense. Criminally negligent homicide covers all deaths occurring through criminal negligence, a degree of culpability that is stricter than ordinary civil negligence, but less than reckless.

Assault

The assault provisions were revised by the legislature in response to criticism that the Subcommission's proposal included too many degrees of assault. The legislature compressed five degrees of assault into three.

The original version of the Code distinguished between assaults accomplished by means of a deadly weapon (items that were inherently dangerous, such as a firearm or knife) and a dangerous instrument (items that become dangerous because of the manner in which they were used, such as a beer bottle or telephone). The bill that passed the legislature classifies all assaults that occur by means of a weapon identically. If injury occurs, the crime is assault in the first degree, a Class A felony. If a person is

placed in fear of imminent serious physical injury, the crime is assault in the second degree, a Class B felony. If the assault is accomplished by means of a firearm, it is not required that the firearm be operable or loaded. Conduct previously classified as assault and battery is assault in the third degree, a Class A misdemeanor.

Sexual Offenses

The legislature made only minor changes to the Subcommission's recommendations on sexual offenses. If force or the threat of force is used against the victim to accomplish sexual penetration, the crime is sexual assault in the first degree, a Class A felony. The victim is not required to resist the assault if force is used or threatened. The term "sexual penetration" is defined broadly to include sexual and anal intercourse as well as fellatio and cunnilingus.

Forcible acts of sexual contact are classified as sexual assault in the second degree, a Class B felony. As with the first-degree crime, there is no resistance requirement if force is used or threatened.

Property Offenses

The legislature made substantial revisions in the area of white collar crime, increasing penalties in a number of instances. Commercial bribery, commercial bribe receiving, offering a false instrument for recording, and falsifying business records were all reclassified from Class A misdemeanors to Class C felonies. A single degree of the crime of scheme to defraud was adopted. Any scheme to defraud one

person of $10,000 is a Class B felony.

Under the original version of the Code, issuing a bad check was classified as a Class A misdemeanor regardless of the value of the check. The legislature amended this provision and provided that the penalties for issuing a bad check parallel the penalties for theft. If the face value of the check is $500 or more, the crime is a Class C felony. If the face value is $25,000 or more, the crime is a Class B felony. If the face value is less than $500, the crime is a Class A misdemeanor. If the check is less than $50, the crime is a class B misdemeanor.

As was expected, the legislature gave substantial attention to the subject of "joyriding." The Subcommission classified the crime as a Class A misdemeanor. The House Judiciary Committee raised the penalty to a Class C felony. The bill that passed the legislature provides that joyriding is a form of criminal mischief. If the vehicle suffers $500 or more in damages, or the owner incurs out-of-pocket expenses in an amount of $500 or more, the crime is a Class C felony. All other instances of joyriding are Class A misdemeanors.

Weapon Offenses

Under the original version of the Code, only persons who had been convicted of "crimes involving violence" were prohibited from possessing firearms capable of being concealed on their person. The bill that passed the legislature prohibits all felons from possessing such weapons for five

years after their unconditional discharge on the prior offense.

The Code includes a provision prohibiting the possession of loaded firearms in bars. The Subcommission's proposal prohibited the possession of any firearm in a bar, whether loaded or unloaded.

With regard to concealed weapons, the Code provides that it is unlawful to possess a deadly weapon, other than a pocketknife that is concealed on the person. A number of affirmative defenses to the concealed weapons prohibiton are provided. Possession of a concealed weapon, if necessary for personal protection during outdoor activity, is not criminal. The House provision prohibiting concealment of firearms in an automobile was deleted in the final version of the Code.

Prostitution

The Subcommission and House versions of the Code provided that both the prostitute and the patron commit the crime of prostitution. However, the final version of the Code only applies to a seller of sexual services, whether male or female. While the House version provided that public solicitation of prostitution was a Class A misdemeanor, the bill that passed the legislature classifies all solicitations for purposes of prostitution as Class B misdemeanors, whether the solicitation occurs in public or private.

Sentencing

The Code provides the following statutory maximum sentences, regardless of whether the defendant is a repeat offender:

A felony - 20 years

B felony - 10 years

C felony - 5 years

A misdemeanor - 1 year

B misdemeanor - 90 days

All repeat felons and a limited number of first-time Class A felons are subject to presumptive sentencing. A presumptive sentence is a legislative determination of the term of imprisonment the average defendant convicted of an offense should be sentenced to, absent the presence of legislatively prescribed factors in aggravation or mitigation or extraordinary circumstances. A person sentenced to a presumptive sentence may not be placed on probation and is not eligible for suspended imposition of sentence of parole.

As proposed by the Subcommission, a defendant was considered a second or third time felony offender (and subject to presumptive sentencing) only if his prior felony was of the same or more serious class of offense than the felony for which the defendant was being sentenced. The legislature amended this provision and provided that any felony committed less than seven years prior to the offense for which the defendant is to be sentenced can be considered

for purposes of repeat felon status. The seven year period excludes periods of imprisonment, probation and parole.

The following presumptive terms were specified for repeat felons:

Class A - second felony conviction, 10 years; third felony conviction, 15 years;

Class B - second felony conviction, 4 years; third felony conviction, 6 years;

Class C - second felony conviction, 2 years; third felony conviction, 3 years.

If the defendant does not have a prior felony and is to be sentenced for a Class A felony, a presumptive sentence of six years applies if the defendant used or possessed a firearm during the commission of the offense, or caused serious physical injury. Manslaughter is excluded from the six year presumptive term because of the wide range of conduct included within the description of the offense.

Under the House version of the Code, the sentencing judge could increase or decrease a sentence by 50% of the presumptive sentence if statutorily described aggravating or mitigating factors were established by either party by clear and convincing evidence.

The bill that passed the legislature provides that if the presumptive sentence is four years or less (second and third class C felony convictions and second class B felony convictions) the sentencing judge may decrease the pre-

sumptive term by an amount as great as the presumptive term for factors in mitigation, or may increase the presumptive term up to the maximum term of imprisonment for that class of offense for factors in aggravation.

For example, the presumptive term for a defendant who is being sentenced for a Class C felony, and who two years earlier was convicted of another felony, is two years. If factors in mitigation are present that term may be reduced to any term of imprisonment from two years to zero. If factors in aggravation are present the defendant could be sentenced to a term of imprisonment up to five years, the maximum sentence authorized for a Class C felony.

If the presumptive term is more than four years, (third Class B felony convictions and second and third Class A felony convictions) the sentencing judge may decrease the presumptive term by an amount up to 50% of the presumptive term for factors in mitigation, or may increase the presumtive term up to the maximum term of imprisonment for that class of offense for factors in aggravation. For example, the presumptive term for a defendant who is being sentenced for a Class A felony, and who two years earlier was convicted of another felony, is 10 years. If factors in mitigation are present, the defendant could be sentenced to a definite term of imprisonment of between five and ten years; if factors in aggravation are present, the defendant could be sentenced to a term of imprisonment up to 20 years, the maximum sentence authorized for a Class A felony.

The Code recognizes that in rare situations imposition of a presumptive term of imprisonment, whether or not adjusted for aggravating or mitigating factors, may result in manifest injustice. The injustice may be either to the defendant or to the public as a result of the presence of a relevant aggravating or mitigating factor not specifically listed in the Code. Injustice to the defendant may also arise from imposition of the presumptive term, whether or not adjusted for mitigating factors.

A finding by a sentencing court that manifest injustice will result from imposition of the presumptive term does not authorize the court to sentence the defendant outside the presumptive term. Instead, it must transmit a record of the proceedings, including its findings and conclusions, to a three-judge panel for sentencing.

DECLARATION OF PURPOSE

NEW CRIMINAL CODE

Sec. 12.55.005. DECLARATION OF PURPOSE. The purpose of this chapter is to provide the means for determining the appropriate sentence to be imposed upon conviction of an offense. The legislature finds that the elimination of unjustified disparity in sentences and the attainment of reasonable uniformity in sentences can best be achieved through a sentencing framework fixed by statute as provided in this chapter. In imposing sentence, the court shall consider

(1) the seriousness of the defendant's present offense in relation to other offenses;

(2) the prior criminal history of the defendant and the likelihood of his rehabilitation;

(3) the need to confine the defendant to prevent further harm to the public;

(4) the circumstances of the offense and the extent to which the offense harmed the victim or endangered the public safety or order;

(5) the effect of the sentence to be imposed in deterring the defendant or other members of society from future criminal conduct; and

(6) the effect of the sentence to be imposed as a community condemnation of the criminal act and as a reaffirmation of societal norms.

PRIOR CRIMINAL CODE

None.

COMMENTARY

From Senate Journal, 148-149:

This section declares the legislative purpose of the revisions to AS 12.55: the elimination of unjustified disparity in sentences imposed on defendants convicted of similar offenses committed under similar circumstances - disparity which is not related to legally relevant sentencing criteria. (See generally Alaska Felony Sentencing Patterns: A Multivariate Statistical Analysis (1974-1976), The Alaska Judicial Council, April, 1977, and Cutler, Sentencing in Alaska: A Description of the Process and Summary of Statistical Data for 1973, The Alaska Judicial Council, March 1975).

Factors to be considered by a court in imposing sentence are set out in paragraphs (1) - (6). Paragraph (1) requires the court to consider the seriousness of the offense as compared with other offenses; this consideration reflects the "just deserts" theory of punishment, which holds that justice requires that a sentence imposed on a defendant should be based on the crime he committed rather than on speculation as to his future behavior. The considerations in paragraphs (2) - (6) are largely a restatement of the Alaska Supreme Court's interpretation of the mandate of Article I, section 12 of the Alaska Constitution which provides that "Penal administration shall be based on the principle of reformation and upon the need for protecting the public." State v. Chaney, 447 P.2d 441 (Alaska 1970).

Each of the considerations set out in paragraphs (1) - (6) is to be considered by the court before imposing sentence. The factors are not listed in order of importance. In sentencing repeat felons, however, paragraph (1) will be of primary importance, because the presumptive sentencing provisions in AS 12.55.125 - 12.55.175 provide that the presumptive sentence for repeat felons is some term of imprisonment absent a finding by the court that factors in mitigation or extraordinary circumstances exist.

See also TD VI, 18-22.

AUTHORIZED SENTENCES

NEW CRIMINAL CODE

Sec. 12.55.015. AUTHORIZED SENTENCES. (a) Except as limited by secs. 125 - 175 of this chapter, the court, in imposing sentence on a defendant convicted of an offense, may singly or in combination

(1) impose a fine when authorized by law and as provided in sec. 35 of this chapter;

(2) order the defendant to be placed on probation under conditions specified by the court which may include provision for active supervision;

(3) impose a definite term of periodic imprisonment;

(4) impose a definite term of continuous imprisonment;

(5) order the defendant to make restitution as provided in sec. 45 of this chapter;

(6) order the defendant to carry out a continuous or periodic program of community work as provided in sec. 55 of this chapter;

(7) suspend execution of all or a portion of the sentence imposed as provided in sec. 80 of this chapter;

(8) suspend imposition of sentence as provided in sec. 85 of this chapter.

(b) The court, in exercising sentencing discretion as

provided in this chapter, shall impose a sentence involving imprisonment when

(1) the defendant deserves to be imprisoned, considering the seriousness of his present offense and his prior criminal history, and imprisonment is equitable considering sentences imposed for other offenses and other defendants under similar circumstances;

(2) imprisonment is necessary to protect the public from further harm by the defendant; or

(3) a sentence of lesser severity has been imposed in the past and proven ineffective in deterring the defendant.

(c) In addition to the penalties authorized by this section, the court may invoke any authority conferred by law to order a forfeiture of property, suspend or revoke a license, remove a person from office, or impose any other civil penalty.

PRIOR CRIMINAL CODE

None

COMMENTARY

From Senate Journal, 149:

Subsection (a) sets out the sentences which may be imposed on a defendant. They are not listed in order of importance or legislative preference, and they may be imposed either singly or in combination; e.g., a repeat felon may be sentenced to pay a fine and make restitution while he is serving a presumptive term of imprisonment. Certain authorized sentences, e.g., suspended imposition of sentence, may not be employed when a person is sentenced to a presumptive or mandatory minimum term of imprisonment. See AS 12.55.125(f) and (g).

Paragraph (3) recognizes a sentence which judges currently view as inherent in their judicial power: periodic imprisonment of a defendant, such as serving a prison term on weekends. While periodic sentences may pose administrative problems for correctional institutions and should be imposed sparingly, there are occasions which warrant such a sentence.

Subsection (b) is a guide to the court in deciding when to sentence a first time felon, other than one subject to sentencing under AS 12.55.125(a), (b), or (c)(1), (c)(2), (c)(3), (d)(2), (d) (3), (e)(2) and (e)(3), or a misdemeanant, to imprisonment.

Subsection (c) reflects existing law and permits the court to impose, upon conviction, other sanctions as may be permitted or required by statute.

See also TD IV, 22-23.

CROSS REFERENCES

Fines - AS 12.55.035
Suspension of sentence and probation - AS 12.55.080
Restitution - AS 12.55.045
Community work - AS 12.55.055
Suspending imposition of sentence - AS 12.55.085

SENTENCING PROCEDURES

NEW CRIMINAL CODE

Sec. 12.55.025. SENTENCING PROCEDURES. (a) When imposing a sentence of imprisonment exceeding 180 days, the court shall prepare, as a part of the record, a sentencing report which includes the following:

(1) a verbatim record of the sentencing hearing and any other in-court sentencing procedures;

(2) findings on material issues of fact and on factual questions required to be determined as a prerequisite to the selection of the sentence imposed;

(3) a clear statement of the terms of the sentence imposed; and

(4) recommendations as to the place of confinement or the manner of treatment.

(b) The sentencing report required under (a) of this section shall be furnished to the Department of Law, the defendant, the division of corrections, and, if the defendant will be eligible for parole, the state Board of Parole, within 30 days after imposition of sentence.

(c) Except as provided in (d) and (e) of this section, when a defendant is sentenced to imprisonment, his term of confinement commences on the date of imposition of sentence. A defendant shall receive credit for time spent in custody pending trial, sentencing, or appeal, if the detention was

in connection with the offense for which sentence was imposed. A defendant may not receive credit for more than the actual time he spent in custody pending trial, sentencing, or appeal. The time during which a defendant is voluntarily absent from official detention after he has been sentenced may not be credited toward service of his sentence.

(d) A sentence of imprisonment shall be stayed if an appeal is taken and the defendant is admitted to bail. If an appeal is taken and the defendant is not admitted to bail, the Department of Health and Social Services shall designate the faciltiy in which the defendant shall be detained pending appeal or admission to bail.

(e) If the defendant is convicted of two or more crimes before judgment on either has been entered, any sentences of imprisonment may run concurrently or consecutively, as the court provides. If the court does not specify, the sentences of imprisonment shall run concurrently. If the defendant is imprisoned upon a previous judgment of conviction for a crime, the judgment may provide that the imprisonment commences at the expiration of the term limited by the previous judgment or on the date of imposition of sentence.

(f) A sentence that the defendant pay money, either as a fine or in restitution or both, constitutes a lien in the same manner as a judgment for money entered in a civil

action. Nothing in this section limits the authority of the court to otherwise enforce payment of a fine or restitution.

PRIOR CRIMINAL CODE

See former AS 11.05.040, Computation of term of imprisonment and stay; AS 11.05.050, Consecutive sentences; AS 12.55.020, Enforcing judgment to pay money.

COMMENTARY

From Senate Journal 150:

This section contains provisions similar to existing law, with modifications to accommodate the Code's approach to sentencing. Subsections (a) and (b) are similar to AS 12.55.075, except that a sentencing report is required only where a term of imprisonment over 180 days is imposed. In other cases the record of the sentencing proceedings is sufficient.

Subsections (c) and (d) are similar to AS 11.05.040(a) and (b). Subsection (c) provides that the date sentence is imposed is the date any term of confinement commences with credit given for time served pending trial, sentencing, or appeal. This date is important for calculating projected release dates and parole eligibility dates.

Subsection (e) is a revised version of AS 11.05.050, except that it provides that if the court does not specify whether the sentences run concurrently or consecutively, the sentences will run concurrently.

Subsection (f) is similar to AS 12.55.020 and provides for the enforcement of fines and restitution by a civil action, through the contempt power, or by other powers inherent in the sentence, e.g., revocation of probation.

See also TD VI, 23-26.

CROSS REFERENCES

Granting of parole - AS 33.15.080
Persons eligible for parole - AS 33.15.180

FINES

NEW CRIMINAL CODE

Sec. 12.55.035. FINES. (a) Upon conviction of an offense, a defendant may be sentenced to pay a fine as authorized in this section or as otherwise authorized by law. In determining the amount and method of payment of a fine, the court shall take into account the financial resources of the defendant and the nature of the burden its payment will impose. No defendant may be imprisoned solely because of inability to pay a fine.

(b) Upon conviction of an offense, a defendant who is not an organization may be sentenced to pay, unless otherwise specified in the provision of law defining the offense, a fine of no more than

(1) $75,000 for murder in the first or second degree or kidnapping;

(2) $50,000 for a class A, B, or C felony;

(3) $5,000 for a class A misdemeanor;

(4) $1,000 for a class B misdemeanor;

(5) $300 for a violation.

(c) Upon conviction of an offense, a defendant that is an organization may be sentenced to pay a fine not exceeding the greater of

(1) $100,000; or

(2) an amount which is three times the pecuniary

gain realized by the defendant as a result of the offense.

(d) If a defendant is sentenced to pay a fine, the court may grant permission for the payment to be made within a specified period of time or in specified installments.

PRIOR CRIMINAL CODE

None.

COMMENTARY

From Senate Journal, 150-151:

Under the Code a fine may be ordered for all offenses and may be imposed in addition to other authorized or required sentences. Subsection (a) provides that a court must consider the financial resources of a defendant in imposing a fine, and prohibits the imprisonment of a person solely because he cannot pay a fine. See Hood v. Smedley, 498 P.2d 120 (Alaska 1972).

Subsections (b) and (c) set out two schedules for fines, one to be followed when the defendant is a natural person and the other when the defendant is an organization. (See AS 11.16.130 for the scope of criminal liability of an organization for the acts of its agent).

See also TD VI, 49-51.

CROSS REFERENCES

Definition of "organization" - AS 11.81.900(b)
Sentencing procedures (consequences of fine) - AS 12.55.025(f)
Enforcement of fines and restitution - AS 12.55.051

AS 12.55.045

RESTITUTION

NEW CRIMINAL CODE

Sec. 12.55.045. RESTITUTION. (a) The court may order a defendant convicted of an offense to make restitution as provided in this section or as otherwise authorized by law. In determining the amount and method of payment of restitution, the court shall take into account the financial resources of the defendant and the nature of the burden its payment will impose.

(b) Before the court may sentence a defendant to a program of restitution, the victim must be given notice that restitution may be ordered. An order of restitution under this section does not limit any civil liability of the defendant arising from his conduct.

(c) If a defendant is sentenced to pay restitution, the court may grant permission for the payment to be made within a specified period of time or in specified installments.

PRIOR CRIMINAL CODE

None.

COMMENTARY

From Senate Journal, 151-152:

The Code authorizes the court to require the defendant to pay restitution to his victim for all offenses and in addition to other authorized or required sentences. For a discussion of various types of restitution programs, see

Harlan and Warren, National Evaluation of Adult Restitution Programs; Research Report No. 1, Criminal Justice Center, Albany, N.Y. 1977; Hudson and Galaway, Restitution in Criminal Justice. A Critical Assessment of Sanctions, Lexington Books, Cambridge, MA. (1977); Research in Restitution: A Review and Assessment, Presented to the Second National Restitution Symposium, St. Paul, Minn. (11/15/77); and Shafer, Stephen, Restitution to Victims of Crime, Quadrangel Books, Chicago, Ill. (1960).

Subsection (a)requires the court to consider the defendant's financial resources in setting restitution.

Subsection (b) requires the victim be notifed before restitution is ordered; this implies that a victim may refuse restitution. For example, if the victim does not wish to be reminded of the crime by receiving monthly payments from the defendant, the court should accommodate the victim's wishes. This section also provides that payment of restitution does not affect the civil liability of the defendant for his conduct.

Subsection (c) allows the court to order the defendant to make restitution in periodic payments or within a specified period of time.

See also TD VI, 54-56.

CROSS REFERENCES

Enforcement of fines and restitution - AS 12.55.051

ENFORCEMENT OF FINES AND RESTITUTION

NEW CRIMINAL CODE

Sec. 12.55.051. ENFORCEMENT OF FINES AND RESTITUTION. (a) If the defendant defaults in the payment of a fine or any installment or of restitution or any installment, the court may order the defendant to show cause why he should not be sentenced to imprisonment for nonpayment. If the court finds by a preponderance of the evidence that the default was attributable to an intentional refusal or failure to make a good faith effort to pay the fine or restitution, the court may order the defendant imprisoned until the order of the court is satisfied. A term of imprisonment imposed under this section may not exceed one day for each $50 of the unpaid portion of the fine or restitution or one year, whichever is shorter. Credit shall be given toward satisfaction of the order of the court for every day a person is incarcerated for nonpayment of a fine or restitution.

(b) When a fine or restitution is imposed on an organization, the person authorized to make disbursements from the assets of the organization shall pay the fine or restitution from those assets. A person required to pay a fine or restitution under this subsection who intentionally refuses or fails to make a good faith effort to pay is punishable under (a) of this section.

(c) Pursuant to a petition filed by a defendant who has been sentenced to pay a fine or restitution or an installment, the court, upon a finding of inability to pay, may order modification of the fine or restitution, subject to conditions the court finds appropriate.

PRIOR CRIMINAL CODE

See former AS 12.55.010, Imprisonment on judgment for payment of fine.

COMMENTARY

From Senate Journal, 152:

This section sets out a mechanism for the enforcement of a sentence that the defendant pay a fine or restitution. Subsection (a) provides that if a defendant does not pay a fine or restitution, the court may order him to show cause why he should not be imprisoned for nonpayment. If the court finds by a preponderance of evidence that the defendant intentionally refused to pay or failed to make a good faith effort to pay, he may be imprisoned for one day for each $50 of the unpaid fine or restitution.

When the defendant is an organization, subsection (b) authorizes the court to follow the same procedure as provided for in subsection (a) with respect to the person authorized to make disbursements for the organization.

Subsection (c) allows a defendant to petition the court for relief when he is financially unable to pay the fine or restitution.

CROSS REFERENCES

Fines - AS 12.55.035
Restitution - AS 12.55.045
Definition of "organization" - AS 11.81.900(b).

AS 12.55.055

COMMUNITY WORK

NEW CRIMINAL CODE

Sec. 12.55.055. COMMUNITY WORK. (a) The court may order a defendant convicted of an offense to perform community work as a condition of a suspended sentence or suspended imposition of sentence, or in addition to any fine or restitution ordered. If the defendant is also sentenced to imprisonment, the court may recommend to the Department of Health and Social Services that the defendant perform community work.

(b) Community work includes work on projects designed to reduce or eliminate environmental damage, protect the public health, or improve public lands, forests, parks, roads, highways, facilities, or education. Community work may not confer a private benefit on a person except as may be incidental to the public benefit.

PRIOR CRIMINAL CODE

None.

COMMENTARY

From Senate Journal, 152-153:

Community work is a form of restitution to the public, and under the Code may be ordered for all offenses and in addition to most other sentences; however, if the defendant is also sentenced to imprisonment the court may not order community work during the period of incarceration. Thus the court may not order community work for a repeat felon during the period of his presumptive term of imprisonment, although the court may recommend to the Department

of Health and Social Services that the defendant perform community work during his incarceration and may order community work during any period of probation imposed in addition to a term of imprisonment.

Subsection (b) sets out examples of community work, and provides that the community work may not confer benefits on individuals, except to the extent that any benefit to the public necessarily benefits individuals.

See also TD VI, 59-60.

AS 12.55.080; 085

SUSPENSION OF SENTENCE AND PROBATION; SUSPENDING IMPOSITION OF SENTENCE

These sections were not changed by the revised criminal code.

Sec. 12.55.080. SUSPENSION OF SENTENCE AND PROBATION. Upon entering a judgment of conviction of a crime, or at any time within 60 days from the date of entry of that judgment of conviction a court, when satisfied that the ends of justice and the best interests of the public as well as the defendant will be served thereby, may suspend the imposition or execution or balance of the sentence or a portion thereof, and place the defendant on probation for a period and upon the terms and conditions as the court considers best.

Sec. 12.55.085. SUSPENDING IMPOSITION OF SENTENCE. (a) If it appears that there are circumstances in mitigation of the punishment, or that the ends of justice will be served, the court may, in its discretion, suspend the imposition of sentence and may direct that the suspension continue for a period of time, not exceeding the maximum term of sentence which may be imposed, and upon the terms and conditions which the court determines, and shall place the person on probation, under the charge and supervision of the probation officer of the court during the suspension.

(b) At any time during the probationary term of the

person released on probation, a probation officer may, without warrant or other process, rearrest the person so placed in his care and bring him before the court, or the court may, in its discretion, issue a warrant for the rearrest of the person and may revoke and terminate the probation, if the interests of justice require, and if the court, in its judgment, has reason to believe that the person placed upon probation is violating the conditions of his probation, or engaging in criminal practices, or has become abandoned to improper associates, or a vicious life.

(c) Upon the revocation and termination of the probation, the court may pronounce sentence at any time after the suspension of the sentence within the longest period for which the defendant might have been sentence, subject to the limitation specified in AS 12.55.086(c)

(d) The court may at any time during the period of probation revoke or modify its order of suspension of imposition of sentence. It may at any time, when the ends of justice will be served, and when the good conduct and reform of the person held on probation warrants it, terminate the period of probation and discharge the person held. If the court has not revoked the order of probation and pronounced sentence, the defendant shall, at the end of the term of probation, be discharged by the court.

(e) Upon the discharge by the court without imposition of sentence, the court may set aside the conviction and issue to the person a certificate to that effect.

IMPRISONMENT AS A CONDITION OF SUSPENDED IMPOSITION OF SENTENCE

This section was added by sec. 1, ch 32, SLA 1979.

Sec. 12.55.086. IMPRISONMENT AS A CONDITION OF SUSPENDED IMPOSITION OF SENTENCE. (a) When the imposition of sentence is suspended under AS 12.55.085, the court may require, as a special condition of probation, that the defendant serve a definite term of continuous or periodic imprisonment, not to exceed the maximum term of imprisonment that could have been imposed.

(b) A defendant imprisoned under this section is entitled to a deduction from his term of imprisonment for good conduct under AS 33.20.010. Unless otherwise specified in the order of suspension of imposition of sentence, a defendant imprisoned under this section is eligible for parole if his term of imprisonment exceeds one year and is eligible for any work furlough, rehabilitation furlough, or similar program available to other state prisoners.

(c) If probation is revoked and the defendant is sentenced to imprisonment, he shall receive credit for time served under this section. Deductions for good conduct under AS 33.20.010 do not constitute "time served".

AS 12.55.088

MODIFICATION OF SENTENCE

NEW CRIMINAL CODE

Sec. 12.55.088. MODIFICATION OF SENTENCE. (a) The court may modify or reduce a sentence at any time during a term of imprisonment if it finds that conditions or circumstances have changed since the original sentencing hearing such that the purpose of the original sentence is not being fulfilled.

(b) The sentencing court may not be required to entertain a second or successive motion for similar relief brought under (a) of this section on behalf of the same prisoner.

(c) No sentence may be reduced or modified so as to result in a term of imprisonment which is less than the minimum or presumptive sentence required by law for the original sentence.

PRIOR CRIMINAL CODE

None. See Alaska Rule of Criminal Procedure 35.

COMMENTARY

From 1978 Senate Journal, 1445:

The thrust of this amendment is to provide for correction of demonstrable inequities resulting from breakdowns in the process of classifying prisoners.

Presently, after a defendant is sentenced to imprisonment he is classified by a committee within the Division of Corrections for placement, treatment, work and educational releases. If the sentencing court determines that the defendant needs alcohol rehabilitation treatment and

sentences the person with that in mind, the classification committee may inadvertently subvert that purpose by it's decision for placement or manner of treatment. Current rules allow for a motion to modify sentence in such circumstances for only a limited period after the sentencing hearing. This amendment would grant such jurisdiction to the court at any time during a term of imprisonment if it finds that the change in circumstances or conditions results in subverting the intent of the original sentence.

This amendment makes it clear that this section cannot be used to result in a term of imprisonment which may be less than that required by the presumptive sentencing structure in the revised criminal code or by current law.

GRANTING OF PROBATION; CONDITIONS OF PROBATION; NOTICE AND GROUNDS FOR REVOCATION OF SUSPENSION

This section was not changed by the revised criminal code.

Sec. 12.55.090. GRANTING OF PROBATION. (a) Probation may be granted whether the crime is punishable by a fine or imprisonment or both. If a crime is punishable by both fine and imprisonment the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation shall extend to the entire sentence and judgment.

(b) The court may revoke or modify any condition of probation or may change the period of probation.

(c) The period of probation, together with any extension, shall not exceed five years.

Sec. 13, ch 166, SLA 1978 added paragraph (4) to AS 12.55.100

Sec. 12.55.100. CONDITIONS OF PROBATION. (a) While on probation and among the conditions of probation, the defendant may be required

(1) to pay a fine in one or several sums;

(2) to make restitution or reparation to aggrieved

parties for actual damages or loss caused by the crime for which conviction was had;

(3) to provide for the support of any persons for whose support he is legally responsible; and

(4) perform community work.

(b) The defendant's liability for a fine or other punishment imposed as to which probation is granted shall be fully discharged by the fulfillment of the terms and conditions of probation.

This section was not changed by the revised criminal code.

Sec. 12.55.110. NOTICE AND GROUNDS FOR REVOCATION OF SUSPENSION. When sentence has been suspended, it shall not be revoked except for good cause shown. In all proceedings for revocation of a suspended sentence, the defendant is entitled to reasonable notice and the right to be represented by counsel.

AS 12.55.120

APPEAL OF SENTENCE

This section was not changed by the revised criminal code.

Sec. 12.55.120. APPEAL OF SENTENCE. (a) A sentence of imprisonment lawfully imposed by the superior court for a term or for aggregate terms exceeding one year may be appealed to the supreme court by the defendant on the ground that the sentence was excessive. By appealing a sentence under this section, the defendant waives the right to plead that by a revision of the sentence resulting from the appeal he has been twice placed in jeopardy for the same offense.

(b) A sentence of imprisonment lawfully imposed by the superior court may be appealed to the supreme court by the state on the ground that the sentence is too lenient; however, when a sentence is appealed by the state and the defendant has not appealed the sentence, the court is not authorized to increase the sentence but may express its approval or disapproval of the sentence and its reasons in a written opinion.

(c) A sentence appeal under this section does not confer or enlarge the right to bail pending appeal. When the defendant, in the prosecution of a regular appeal, urges excessiveness of the sentence as an additional ground for appeal, the defendant's right to bail pending appeal is governed by the relevant statutes and the rules of the court.

SENTENCES OF IMPRISONMENT FOR FELONIES

NEW CRIMINAL CODE

Sec. 12.55.125. SENTENCES OF IMPRISONMENT FOR FELONIES. (a) A defendant convicted of murder in the first degree shall be sentenced to a definite term of imprisonment of at least 20 years but not more than 99 years.

(b) A defendant convicted of murder in the second degree or kidnapping shall be sentenced to a definite term of imprisonment of at least five years but not more than 99 years.

(c) A defendant convicted of a class A felony may be sentenced to a definite term of imprisonment of not more than 20 years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in secs. 155-175 of this chapter;

(1) if the offense is a first felony conviction, other than for manslaughter, and the defendant possessed or used a firearm or caused serious physical injury during the commission of the offense, six years;

(2) if the offense is a second felony conviction, 10 years;

(3) if the offense is a third felony conviction, 15 years.

(d) A defendant convicted of a class B felony may be sentenced to a definite term of imprisonment of not more

than 10 years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in secs. 155-175 of this chapter:

(1) if the offense is a second felony conviction, four years;

(2) if the offense is a third felony conviction, six years.

(e) A defendant convicted of a class C felony may be sentenced to a definite term of imprisonment of not more than five years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in secs. 155-175 of this chapter:

(1) if the offense is a second felony conviction, two years;

(2) if the offense is a third felony conviction, three years.

(f) If the defendant is sentenced under (a) or (b) of this section,

(1) imprisonment for the prescribed minimum term may not be suspended under sec. 80 of this chapter;

(2) imposition of sentence may not be suspended under sec. 85 of this chapter;

(3) imprisonment for the prescribed minimum term may not be otherwise reduced.

(g) If a defendant is sentenced under (c)(1), (c)(2), (c)(3), (d)(1), (d)(2), (e)(1), or (e)(2) of this section,

except to the extent permitted under secs. 155-175 of this chapter,

(1) imprisonment may not be suspended under sec. 80 of this chapter;

(2) imposition of sentence may not be suspended under sec. 85 of this chapter;

(3) terms of imprisonment may not be otherwise reduced.

(h) Nothing in this section or sec. 135 of this chapter limits the discretion of the sentencing judge except as specifically provided.

PRIOR CRIMINAL CODE

None.

COMMENTARY

From Senate Journal, 153-156:

Subsections (a) and (b), read in conjunction with subsection (f), provide for mandatory minimum penalties for first and second degree murder and kidnapping. A maximum sentence of 99 years is authorized for each crime.

Subsections (c), (d), and (e) specify the maximum and presumptive terms of imprisonment for persons convicted of a class A, B, or C felony. The statutory maximum terms of imprisonment for the three classes of felonies, whether the offense is a first, second or third conviction are:

A Felony -- 20 years

B Felony -- 10 years

C Felony -- 5 years

A presumptive sentence is a legislative determination of the term of imprisonment the average defendant convicted of an offense should be sentenced to, absent the presence of

legislatively prescribed factors in aggravation or mitigation or extraordinary circumstances. The sentence may be increased or decreased as a result of those specified factors pursuant to the range of sentencing discretion provided in §§ 12.55.155-12.55.175, discussed infra.

For class A felonies where the defendant has not been convicted of a prior felony, a presumptive term of imprisonment of six years is provided in subsection (c)(1) if the defendant used or possessed a firearm or caused serious physical injury during the commission of the offense. Because of the wide range of conduct included within the crime of manslaughter, that offense is excluded from the six year presumptive term for class A felonies where the defendant has not been convicted of a prior felony.

For class A felonies not falling within subsection (c)(1) where there is no prior felony conviction, a defendant may be sentenced to a definite term of imprisonment of not more than 20 years. The judge has the discretion to sentence the defendant to any term of imprisonment within the statutory range, or may sentence him to a nonincarcerative sentence if, under the guidelines provided in § 12.55.-015(b), a nonincarcerative sentence is appropriate.

If the defendant is being sentenced for a class A felony and has one prior felony conviction, a presumptive term of imprisonment of 10 years is specified. "Second felony conviction" is defined in § 12.55.185(7). Conviction of any prior felony, whether of the same, higher or lower class than the felony for which the defendant is being sentenced, will make the defendant a repeat felon for purposes of presumptive sentencing. Section 12.55.145, discussed infra, delineates the procedures for determining when prior felonies may be considered for purposes of this section.

If the defendant is being sentenced for a class A felony and has two or more felony convictions, the presumptive term of imprisonment specified in this section is 15 years.

For class B felonies, a defendant who is not being sentenced for a second or third felony conviction, may be sentenced to a definite term of imprisonment of not more than 10 years. The presumptive term for a second felony conviction is four years; the presumptive term for a third or subsequent felony conviction is six years.

For class C felonies, a defendant who is not being sentenced for a second or third felony conviction may be sentenced to a definite term of imprisonment of not more

than five years. The presumptive term for a second felony conviction is two years; the presumptive term for a third or subsequent felony conviction is three years.

Subsection (f) emphasizes that if a defendant is subject to sentencing under (a) or (b), the sentencing court must impose at least the mandatory minimum specified for first and second degree murder and kidnapping. The defendant may not be placed on probation during the applicable minimum term, and imposition of sentence may not be suspended. Note also that the defendant may not be released on parole until he has served at least the prescribed minimum term of imprisonment. See § 33.15.180. Only one method is available to reduce the mandatory minimum sentence: § 33.20.010 provides that all prisoners are entitled to "good time" at a rate of one day for every three days of good conduct served.

Similarly, subsection (g) provides that a defendant who is subject to presumptive sentencing must serve at least the presumptive term imposed, adjusted for aggravating and mitigating factors. He may not be placed on probation for the presumptive term nor may imposition of sentence be suspended. Note also that a defendant who is sentenced to a presumptive term is not eligible for parole under § 33.15.-180, discussed infra, but is entitled to a "good time" deduction under § 33.20.010 of one day for every three days of good conduct served. Only one method is authorized to avoid imposition of the presumptive term. Sections 12.55.-165 and 12.55.175, discussed infra, provide for a three-judge sentencing panel to reduce the presumptive term below the reduction that would have been allowed for factors in mitigation in the event of extrordinary circumstances.

Subsection (h) provides that within the framework of the general considerations set forth in § 12.55.005 and 12.55.015, and the legislative determinations set forth in this section, the discretion of the sentencing court is not restricted except as specified in this section.

CROSS REFERENCES

Definition of "firearm", "serious physical injury", "first felony conviction", "second felony conviction", "third felony conviction" - AS 12.55.185
Classification of offenses - AS 11.81.250
Prior convictions - AS 12.55.145
Factors in aggravation and mitigation - AS 12.55.155
Extraordinary circumstances - AS 12.55.165
Three-judge sentencing panel - AS 12.55.175
Granting of parole - AS 33.15.080

Persons eligible for parole - AS 33.15.180
Computation of good time - AS 33.20.010

See also section 23 of ch. 166, SLA 1978, subsection (c):

(c) AS 12.55.125-12.55.185, enacted in sec. 12 of this Act, apply only upon conviction of the crime of murder in the first or second degree, kidnapping, or any crime classified as a class A, B, or C felony or a class A or B misdemeanor. For purposes of AS 12.55.125, 12.55.145, and 12.55.155, the court shall consider prior convictions whether committed before, on, or after the effective date of this Act.

SENTENCES OF IMPRISONMENT FOR MISDEMEANORS; SENTENCES FOR VIOLATIONS

NEW CRIMINAL CODE

Sec. 12.55.135. SENTENCES OF IMPRISONMENT FOR MISDEMEANORS. (a) A defendant convicted of a class A misdemeanor may be sentenced to a definite term of imprisonment of not more than one year.

(b) A defendant convicted of a class B misdemeanor may be sentenced to a definite term of imprisonment of not more than 90 days unless otherwise specified in the provision of law defining the offense.

Sec. 12.55.140. SENTENCES FOR VIOLATIONS. A defendant convicted of a violation may be sentenced to pay a fine of not more than $300.

PRIOR CRIMINAL CODE

None.

COMMENTARY

From Senate Journal, 156:

Offenses which are misdemeanors and violations are not subject to presumptive sentencing. A defendant convicted of a class A misdemeanor may be sentenced to a definite term of imprisonment of not more than one year. A defendant convicted of a class B misdemeanor may be sentenced to a definite term of imprisonment of not more than 90 days. A defendant convicted of a violation may only be sentenced to pay a fine of not more than $300. See also § 12.55.035(b)(5).

See also TD VI, 79-81.

CROSS REFERENCES

Definition of "misdemeanors", "violation" - AS 11.81.900(b)

Classification of offenses - AS 11.81.250

AS 12.55.145

PRIOR CONVICTIONS

NEW CRIMINAL CODE

Sec. 12.55.145. PRIOR CONVICTIONS. (a) For purposes of considering prior convictions in imposing sentence under this chapter

(1) a prior conviction may not be considered if a period of seven or more years has elapsed between the date of the defendant's unconditional discharge on the immediately preceding offense and commission of the present offense;

(2) a conviction in this or another jurisdiction of an offense having elements substantially identical to those of a felony defined as such under Alaska law is considered a prior felony conviction;

(3) two or more convictions arising out of a single, continuous criminal episode during which there was no substantial change in the nature of the criminal objective are considered a single conviction, except that offenses committed while attempting to escape or avoid detection or apprehension after the commission of another offense are not part of the same criminal episode or objective.

(b) When sentence is imposed under this chapter, prior convictions not expressly admitted by the defendant must be proved by authenticated copies of court records served on the defendant or his counsel at least 10 days before the date set for imposition of sentence.

(c) If the defendant denies the authenticity of a prior judgment of conviction, that he is the person named in the judgment, that the elements of a prior offense committed in another jurisdiction are substantially identical to those of a felony defined as such under Alaska law, or that a prior conviction occurred within the period specified in (a)(1) of this section or if he alleges that two or more purportedly separate prior convictions should be considered a single conviction under (a)(3) of this section, the defendant shall file with the court and serve on the prosecuting attorney notice of denial no later than five days before the date set for the imposition of sentence. The notice of denial shall include a concise statement of the grounds relied upon and may be supported by affidavit or other documentary evidence.

(d) Matters alleged in a notice of denial shall be heard by the court sitting without a jury. If the defendant introduces substantial evidence that he is not the person named in a prior judgment of conviction, that the judgment is not authentic, that the conviction did not occur within the period specified in (a)(1) of this section, or that a conviction should not be considered a prior felony conviction under (a)(2) of this section, then the burden is on the state to prove the contrary beyond a reasonable doubt. The burden of proof that two or more convictions should be considered a single conviction under (a)(3) of this section

is on the defendant by clear and convincing evidence.

(e) The authenticated judgments of courts of record of the United States, the District of Columbia, or any state, territory, or political subdivision of the United States are prima facie evidence of conviction.

PRIOR CRIMINAL CODE

None.

COMMENTARY

From Senate Journal, 156-159:

For purposes of the presumptive sentencing provisions, prior convictions may only be considered if a period of seven or more years has not elapsed from the date of the defendant's unconditional discharge on the immediately preceding offense and the commission of the offense for which the defendant is being sentenced.

The term "unconditional discharge" is defined in § 12.55.185(10) to require that the defendant be "released from all disability arising under a sentence, including probation and parole," in addition to periods of imprisonment. Consequently, periods during which the defendant is on probation or parole as result of a previous conviction may not be considered as part of the seven year period.

By referring to the "immediately preceding offense", the Code provides that convictions which occurred more than seven years prior to the commission of the offense for which the defendant is being sentenced may be considered if seven years has not elapsed between an intervening conviction, plus periods of disability arising under it, and the commission of the offense for which the defendant is being sentenced.

Subsection (a)(2) provides that convictions occurring in Alaska prior to the effective date of the Code, or in another jurisdiction, will be considered a prior felony conviction if the crime is defined by elements substantially identical to a felony under the Code.

Subsection (a)(3) provides that two or more convictions arising out of a "single, continuous criminal episode" are to be considered a single conviction unless there was a

"substantial change in the nature of the criminal episode". The phrase "single, continuous episode" is intended to limit the applicability of this provision to a single criminal event out of which a number of offenses could be charged. For example, the breaking and entering of a building with the intent to commit theft, which can be charged as burglary, and the taking of property in the building which can be charged as theft. In such an instance, convictions for both burglary and theft would be considered a single conviction under this section. However, the commission of three burglaries involving three buildings in a single day, would not be considered part of a "single, continuous criminal episode".

Similarly, the phrase "substantial change in the nature of the criminal objective" is intended to limit the applicability of the provision to a single criminal objective. In the preceding example, the criminal objective is to obtain property and the breaking and entering is an incident of that objective. However, assume that the defendant takes a hostage to facilitate his flight, and then decides to commit a sexual assault on the hostage. He is subsequently convicted of burglary, theft, kidnapping and sexual assault. In such a circumstance the defendant would have been convicted of three prior offenses for purposes of this section, burglary-theft, kidnapping and sexual assault. Additionally, the last clause of subsection (a)(3) provides that an offense committed while attempting to escape or avoid detection or apprehension after the commission of another offense is not included within the provision and is to be considered an additional conviction for purposes of presumptive sentencing.

Subsection (b), (c), (d), and (e) set forth the procedural framework within which prior convictions are to be established whenever the existence or applicability of a prior conviction is denied by the defendant. The procedural framework created in these subsections limits the issues that are to be considered, provides for the manner and burden of proof, and provides that all contested issues are to be decided by the court.

If a defendant denies that he has previously been convicted or asserts that a previous conviction may not be considered in imposing sentence, then the state must file and serve on the defendant authenticated copies of prior judgments 10 days prior to the date set for imposition of sentence. The defendant must then set forth with specificity the grounds for asserting that one or more prior convictions should not be considered. Subsection (e) makes clear that authenticated copies of judgments from this or another

jurisdiction constitute <u>prima facie</u> evidence of a prior conviction which the defendant must rebut through the raising of a reasonable doubt. If the defendant succeeds in raising a reasonable doubt, the state has the burden of proving the matter in issue beyond a reasonable doubt.

<u>CROSS REFERENCES</u>

Definition of "unconditional discharge" - AS 12.55.185
Sentences of imprisonment for felonies - AS 12.55.125
Escape in the first, second, third and fourth degree - AS 12.56.300-330

<u>See also</u> section 23, ch. 166, SLA 1978, subsection (c):

(c) AS 12.55.125-12.55.185, enacted in sec. 12 of this Act, apply only upon conviction of the crime of murder in the first or second degree, kidnapping, or any crime classified as a class A, B, or C felony or a class A or B misdemeanor. For purposes of AS 12.55.125, 12,55.145, and 12.55.-155, the court shall consider prior convictions whether committed before, on, or after the effective date of this Act.

FACTORS IN AGGRAVATION AND MITIGATION

NEW CRIMINAL CODE

Sec. 12.55.155. FACTORS IN AGGRAVATION AND MITIGATION. (a) If a defendant is convicted of an offense and is subject to sentencing under sec. 125(c)(1), (c)(2), (c)(3), (d)(1), (d)(2), (e)(1), or (e)(2) of this chapter and

(1) the presumptive term is four years or less, the court may decrease the presumptive term by an amount as great as the presumptive term for factors in mitigation or may increase the presumptive term up to the maximum term of imprisonment for factors in aggravation;

(2) the presumptive term of imprisonment is more than four years, the court may decrease the presumptive term by an amount as great as 50 percent of the presumptive term for factors in mitigation or may increase the presumptive term up to the maximum term of imprisonment for factors in aggravation.

(b) Sentence increments and decrements under this section shall be based on the totality of the aggravating and mitigating factors set out in (c) and (d) of this section.

(c) The following factors shall be considered by the sentencing court and may aggravate the presumptive terms set out in sec. 125 of this chapter:

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

(2) the defendant's conduct during the commission of the offense manifested deliberate cruelty to another person;

(3) the defendant was the leader of a group of three or more persons who participated in the offense;

(4) the defendant employed a dangerous instrument in furtherance of the offense;

(5) the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, disability, ill health, or extreme youth or was for any other reason substantially incapable of exercising normal physical or mental powers of resistance;

(6) the defendant's conduct created a risk of imminent physical injury to three or more persons, other than accomplices;

(7) a prior felony conviction considered for the purpose of invoking the presumptive terms of this chapter was of a more serious class of offense than the present offense;

(8) the defendant has a criminal history consisting of one or more convictions for misdemeanors having assault as a necessary element;

(9) the defendant knew that the offense involved more than one victim;

(10) the conduct constituting the offense was

among the most serious conduct included in the definition of the offense;

(11) the defendant committed the offense pursuant to an agreement that he either pay or be paid for the commission of the offense, and the pecuniary incentive was beyond that inherent in the offense itself;

(12) the defendant was on release under AS 12.30.-020 or 12.30.040 for another felony charge or conviction or for a misdemeanor charge or conviction having assault as a necessary element;

(13) the defendant knowingly directed the conduct constituting the offense at an active officer of the court or at an active or former judicial officer, prosecuting attorney, law enforcement officer, correctional employee, or fireman during or because of the exercise of his official duties;

(14) the defendant was a member of an organized group of five or more persons, and the offense was committed to further the criminal objectives of the group.

(d) The following factors shall be considered by the sentencing court and may mitigate the presumptive terms set out in sec. 125 of this chapter:

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

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

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

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

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

(6) in a conviction for assault under AS 11.41.-200-11.41.230, the defendant acted with serious provocation from the victim;

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

(8) a prior felony conviction considered for the purpose of invoking the presumptive terms of this chapter was of a less serious class of offense than the present offense;

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

(10) before the defendant knew that his criminal conduct had been discovered, he fully compensated or made a

good faith effort to fully compensate the victim of his criminal conduct for any damage or injury sustained;

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

(12) the defendant assisted authorities to detect or apprehend other persons who committed the offense with him.

(e) If a factor in aggravation is a necessary element of the present offense, that factor may not be used to aggravate the presumptive term. If a factor in mitigation is raised at trial as a defense reducing the offense charged to a lesser included offense, that factor may not be used to mitigate the presumptive term.

(f) If the state seeks to establish a factor in aggravation at sentencing or if the defendant seeks to establish a factor in mitigation at sentencing, written notice must be served on the opposing party and filed with the court not later than 10 days before the date set for imposition of sentence. Factors in aggravation and factors in mitigation must be established by clear and convincing evidence before the court sitting without a jury. All findings must be set out with specificity.

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

(h) As used in this section, "serious provocation" has the meaning ascribed to it in AS 11.41.115(f).

PRIOR CRIMINAL CODE

None.

COMMENTARY

From Senate Journal, 159-161:

The presumptive terms of imprisonment specified in § 12.55.125 may be increased or decreased by the sentencing judge for factors in aggravation and mitigation when factors in aggravation or mitigation are established by clear and convincing evidence. Subsections (a)(1) and (2) specify the range a presumptive sentence may be aggravated or mitigated.

If the presumptive sentence is four years or less (second and third class C felony convictions and second B felony convictions) the sentencing judge may decrease the presumptive term by an amount as great as the presumptive term for factors in mitigation, or may increase the presumptive term up to the maximum term of imprisonment for that class of offense for factors in aggravation. For example, the presumptive term for a defendant who is being sentenced for a class C felony, and who two years earlier was convicted of another felony, is two years under § 12.55.125(e)(1). If factors in mitigation are present that term may be reduced to any term of imprisonment from two years to zero. If factors in aggravation are present the defendant could be sentenced to a term of imprisonment up to five years, the maximum sentence authorized for a class C felony.

If the presumptive term is more than four years the sentencing judge may decrease the presumptive term by an amount up to 50 percent of the presumptive term for factors in mitigation, or may increase the presumptive term up to the maximum term of imprisonment for that class of offense for factors in aggravation. For example, the presumptive term for a defendant who is being sentenced for a class A felony, and who two years earlier was convicted of another felony, is 10 years. If factors in mitigation are present, the defendant could be sentenced to a definite term of imprisonment of between 5 and 10 years; if factors in aggravation are present the defendant could be sentenced to a term of imprisonment up to 20 years, the maximum sentence authorized for a class A felony.

Subsection (b) provides that in decreasing or increasing the presumptive term the court shall consider the totality of the aggravating and mitigating factors, within the range of sentencing discretion permitted, in determining the weight to be given to each of them at arriving at a sentence.

Fourteen aggravating factors are listed in subsection (c); 12 mitigating factors are listed in subsection (d). Only those factors listed may be considered by the court. If a factor is not listed, and either the state or the defendant believes the factor should be considered for increasing or decreasing the presumptive term, the factor may only be considered by a three-judge sentencing panel pursuant to the procedures specified in AS 12.55.165-12.55.175.

Under subsections (c)(7) and (d)(8) a presumptive term may be aggravated or mitigated if a prior felony conviction considered for invoking the presumptive sentencing provisions was for a more or less serious class of offense than the offense for which the defendant is being sentenced. For example, if the defendant was convicted of a class C felony two years ago and is now being sentenced for a class A felony, the fact that the prior offense was a less serious class of offense than the present offense may be considered in mitigating the presumptive sentence under subsection (d)(9).

Under subsections (c)(10) and (d)(9) a presumptive term may be aggravated or mitigated if the conduct constituting the offense was among the most or least serious conduct included within the definition of the offense. For example, if the defendant was convicted of a felony two years earlier, and is now being sentenced for the theft of $24,999, theft in the second degree, a class C felony, the fact that the conduct constituting the offense was among the most serious conduct included in theft in the second degree may aggravate the presumptive term.

Because some aggravating and mitigating factors may also constitute elements of the offense, proof of which is required to obtain conviction, or possible defenses, proof of which might reduce the offense to a lower class, subsection (e) is necessary to accommodate considerations of double jeopardy and to insure that a single set of facts may not be twice relied on to mitigate an offense.

Subsection (f) is designed to permit the parties sufficient time to prepare for sentencing when either factors in aggravation or mitigation will be asserted. Factors in aggravation or mitigation must be proven by "clear and

convincing" evidence so that deviation from the presumptive sentence does not occur routinely. To preserve the rights of both parties on appeal, the subsection requires that the judge specifically set forth decisions with respect to aggravating or mitigating factors on the record.

Subsection (g) emphasizes that voluntary alcohol or drug intoxication or addiction may not be considered by the court as an aggravating or mitigating factor. The provision is consistent with § 11.81.630, Intoxication as a Defense.

CROSS REFERENCES

Sentences of imprisonment for felonies - AS 12.55.125
Extraordinary circumstances - AS 12.55.165
Three-judge sentencing panel - AS 12.55.175
Definition of "physical injury", "dangerous instrument" - AS 11.81.900(b)
Intoxication as a defense - AS 11.81.630

See also section 23, ch. 166, SLA 1978, subsection (c):

(c) AS 12.55.125-12.55.185, enacted in sec. 12 of this Act, apply only upon conviction of the crime of murder in the first or second degree, kidnapping, or any crime classified as a class A, B, or C felony or a class A or B misdemeanor. For purposes of AS 12.55.125, 12.55.145, and 12.55.155, the court shall consider prior convictions whether committed before, on, or after the effective date of this Act.

EXTRAORDINARY CIRCUMSTANCES

NEW CRIMINAL CODE

Sec. 12.55.165. EXTRAORDINARY CIRCUMSTANCES. If the defendant is subject to sentencing under sec. 125(c)(1), (c)(2), (c)(3), (d)(1), (d)(2), (e)(1), or (e)(2) of this chapter and the court finds by clear and convincing evidence that manifest injustice would result from failure to consider relevant aggravating or mitigating factors not specifically included in sec. 155 of this chapter or from imposition of the presumptive term, whether or not adjusted for aggravating or mitigating factors, the court shall enter findings and conclusions and cause a record of the proceedings to be transmitted to a three-judge panel for sentencing under sec. 175 of this chapter.

PRIOR CRIMINAL CODE

None.

COMMENTARY

From Senate Journal, 162:

This section recognizes that in rare situations, imposition of a presumptive term of imprisonment, whether or not adjusted for aggravating or mitigating factors, may result in manifest injustice. The injustice may be either to the defendant or to the public as a result of the presence of a relevant aggravating or mitigating factor not specifically listed in the Code. Injustice to the defendant may also arise from imposition of the presumptive term, whether or not adjusted for mitigating factors. The legislature expects, however, that the probability of such a result will be minimal.

Note that a finding by a sentencing court that manifest

injustice will result does not authorize it to sentence the defendant outside the presumptive term. Instead it must transmit a record of the proceedings, including its findings and conclusions, to a three-judge panel for sentencing under § 12.55.175.

See also TD VI, 77-78.

CROSS REFERENCES

Sentences of imprisonment for felonies - AS 12.55.125
Factors in aggravation and mitigation - AS 12.55.155
Three-judge sentencing panel - AS 12.55.175

THREE-JUDGE SENTENCING PANEL

NEW CRIMINAL CODE

Sec. 12.55.175. THREE-JUDGE SENTENCING PANEL. (a) There is created within the superior court a panel of five superior court judges to be appointed by the chief justice in accordance with rules and for terms as may be prescribed by the supreme court. Three judges of the panel shall be designated by the chief justice as members. The remaining two judges shall be designated by the chief justice as first and second alternates to sit as members in the event of disqualification or disability in accordance with rules as may be prescribed by the supreme court.

(b) Upon receipt of a record of proceedings under sec. 165 of this chapter, the three-judge panel shall consider all pertinent files, records, and transcripts, including the findings and conclusions of the judge who originally heard the matter. The panel may hear oral testimony to supplement the record before it. If the panel finds that manifest injustice would result from failure to consider relevant aggravating or mitigating factors not specifically included in sec. 155 of this chapter or from imposition of the presumptive term, whether or not adjusted for aggravating or mitigating factors, it shall sentence the defendant in accordance with this section. If the panel does not find that manifest injustice would result, it shall remand the case to the sentencing court, with a written statement of

its findings and conclusions, for sentencing under sec. 125 of this chapter.

(c) The three-judge panel may in the interest of justice sentence the defendant to any definite term of imprisonment up to the maximum term provided for the offense or to any sentence authorized under sec. 15 of this chapter.

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

PRIOR CRIMINAL CODE

None.

COMMENTARY

From Senate Journal, 162-163:

If the sentencing court finds under §12.55.165 that manifest injustice would result from imposition of the presumptive term, it must transmit the case to a three-judge panel for sentencing. This section establishes the three-judge panel and specifies its authority.

The three-judge panel is appointed from the superior court by the chief justice. If the three-judge panel agrees with the sentencing court and finds that manifest injustice would result from imposition of the presumptive term, it may sentence the defendant to any term of imprisonment, up to the maximum authorized for the offense, or may impose any other sentence authorized in § 12.55.005.

If the three-judge panel does not agree with the sentencing court's finding, it is required to remand the case to the sentencing court with a written statement of its findings and conclusions for sentencing under § 12.55.125. The sentencing court must then sentence the defendant to the presumptive term, adjusted for any relevant aggravating or mitigating factors established under § 12.55.155.

See also TD VI, 78-79.

CROSS REFERENCES

Sentences of imprisonment for felonies - AS 12.55.125
Extraordinary circumstances - AS 12.55.165

DEFINITIONS

NEW CRIMINAL CODE

Sec. 12.55.185 DEFINITIONS. As used in this chapter, unless the context requires otherwise,

(1) "dangerous instrument" has the meaning ascribed to it in AS 11.81.900;

(2) "division of corrections" means the division of corrections within the Department of Health and Social Services;

(3) "firearm" has the meaning ascribed to it in AS 11.81.900;

(4) "judicial officer" has the meaning ascribed to it in AS 11.56.900;

(5) "pecuniary gain" means the amount of money or value of property at the time of commission of the offense derived by the defendant from the commission of the offense, less the amount of money or value of property returned to the victim of the offense or seized by or surrendered to lawful authority before sentence is imposed;

(6) "first felony conviction" means that the defendant has not been previously convicted of a felony;

(7) "second felony conviction" means that the defendant previously has been convicted of a felony;

(8) "third felony conviction" means that the defendant has been at least twice previously convicted of a felony;

(9) "serious physical injury" has the meaning ascribed to it in AS 11.81.900;

(10) "unconditional discharge" means that a defendant is released from all disability arising under a sentence, including probation and parole.

PRIOR CRIMINAL CODE

None

COMMENTARY

See commentary accompanying statutes in which terms are used.

CROSS REFERENCES

Definitions - AS 11.56.990, AS 11.81.900(b)

GRANTING OF PAROLE; PERSONS ELIGIBLE FOR PAROLE

NEW CRIMINAL CODE

Sec. 33.15.080. GRANTING OF PAROLE. If it appears to the board from a review that a prisoner eligible for parole will, in reasonable probability, live and remain at liberty without violating the laws, or without violating the conditions imposed by the board, and if the board determines that his release on parole is not incompatible with the welfare of society, the board may authorize the release of the prisoner on parole. However, no prisoner may be released on parole who has not served at least one-third of the period of confinement to which he has been sentenced.

Sec. 33.15.180. PERSONS ELIGIBLE FOR PAROLE. (a) A state prisoner other than a juvenile delinquent, wherever confined and serving a definite term of over 180 days or a term the minimum of which is at least 181 days, and who is not imprisoned in accordance with AS 12.55.125(c)(1), (c)(2), (c)(3), (d)(1), (d)(2), (e)(1), or (e)(2), whose record shows that he has observed the rules of the institution in which he is confined, may, in the discretion of the board, be released on parole, subject to the limitation prescribed in secs. 80 and 230(a)(1) of this chapter.

(b) A state prisoner who has been imprisoned in accordance with AS 12.55.125(a) or (b) may not be released

on parole until he has served at least the prescribed minimum term of imprisonment.

(c) A state prisoner imprisoned in accordance with AS 12.55.125(c)(1), (c)(2), (c)(3), (d)(1), (d)(2), (e)(1), or (e)(2) who is released under AS 33.20.030 shall be placed on parole for the period specified in the certificate of deduction, subject to written rules and conditions imposed by the board or his parole officer.

PRIOR CRIMINAL CODE

Sec. 33.15.080. GRANTING OF PAROLE. If it appears to the board from a review that a prisoner eligible for parole will, in reasonable probability, live and remain at liberty without violating the laws, or determines that his release on parole is not incompatible with the welfare of society, the board may authorize the release of the prisoner on parole. However, no prisoner may be released on parole who has not served at least one-third of the period of confinement to which he has been sentenced, or in the case of a life sentence, has not served at least 15 years.

Sec. 33.15.180. PERSONS ELIGIBLE FOR PAROLE. A state prisoner other than a juvenile delinquent, wherever confined and serving a definite term of over 180 days or a term the minimum of which is at least 181 days, whose record shows that he has observed the rules of the institution in which he is confined, may, in the discretion of the board, be released on parole, subject to the limitation prescribed in §§ 80 and 230(a)(1) of this chapter.

COMMENTARY

See commentary accompanying AS 12.55.125, Sentences of imprisonment for felonies.

CROSS REFERENCES

AS 12.55.125, Sentences of imprisonment for felonies
AS 33.20.030, Discharge

Sec. 23, ch 166, SLA 1978 provides: (d) AS 33.15.180, as amended in secs. 15 and 16 of this Act, applies only to persons imprisoned for crimes committed on or after the effective date of this Act.

COMPUTATION OF GOOD TIME

NEW CRIMINAL CODE

Sec. 33.20.010. COMPUTATION OF GOOD TIME. Notwithstanding AS 12.55.125(f)(3) and (g)(3), each prisoner convicted of an offense against the state and sentenced to imprisonment, whose record of conduct shows that he has faithfully observed the rules of the institution in which he is confined, is entitled to a deduction from his term of imprisonment of one day for every three days of good conduct served.

PRIOR CRIMINAL CODE

Sec. 33.20.010. COMPUTATION GENERALLY. (a) Each prisoner convicted of an offense against the state and confined in a penal or correctional institution for a definite term other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subject to punishment, is entitled to a deduction from the term of his sentence beginning with the day on which the sentence starts to run, as follows:

(1) five days for each month, if the sentence is not less than six months and not more than one year;

(2) six days for each month, if the sentence is more than one year and less than three years;

(3) seven days for each month, if the sentence is not less than three years and less than five years;

(4) eight days for each month, if the sentence is not less than five years and less than ten years;

(5) ten days for each month, if the sentence is ten years or more.

(b) When two or more consecutive sentences are served, the basis upon which the deduction is computed is the aggregate of the several sentences.

COMMENTARY

See commentary accompanying AS 12.55.125, Sentences of imprisonment for felonies.

CROSS REFERENCES

Sentences of imprisonment for felonies - AS 12.55.125

Sec. 23, ch 166, SLA 1978 provides:

(e) AS 33.20.010, as re-enacted in sec. 17 of this Act applies to all persons serving terms of imprisonment in state correctional institutions on or after the effective date of this Act, but is not retroactive in application.

Sec. 21, ch. 166, SLA 1978

Statutes Repealed by Criminal Code

AS 02.30.020; AS 03.35.060; AS 03.40.100; AS 06.05.515; AS 06.30.875; AS 11.05.010 - 11.05.060, 11.05.100, 11.05.140 - 11.05.150; AS 11.10; AS 11.15.010 - 11.15.050, 11.15.070 - 11.15.340; AS 11.20.010 - 11.20.650, 11.20.670 - 11.20.690; AS 11.22; AS 11.25; AS 11.30; AS 11.35; AS 11.-36; AS 11.40; AS 11.45; AS 11.50; AS 11.55; AS 11.60.010 - 11.60.220, 11.60.340, 11.60.350; AS 11.65.030; AS 11.70.-010 - 11.70.030; AS 11.75; AS 12.15.010 - 12.15.040; AS 12.25.130; AS 12.45.030, 12.45.040; AS 12.55.010, 12.55.020, 12.55.040 - 12.55.075; AS 12.60.010, 12.60.030, 12.60.200; AS 18.65.070; AS 23.10.005; 23.10.010; AS 27.05.100 - 27.05.130; AS 28.35.010 28.35.020; AS 33.20.020; AS 33.30.-055; AS 34.05.030; AS 35.10.140, 35.10.150; AS 38.05.360; AS 39.51.010; AS 45.50.471(d), 45.50.551(c); and AS 45.75.370.

Sec. 22, ch. 166, SLA 1978

TITLE 11 STATUTES NOT REPEALED BUT RENUMBERED AND PLACED OUTSIDE TITLE 11

AS 11.05.070	Effect of judgment of imprisonment in penitentiary
AS 11.05.080	Effect of sentence of life imprisonment
AS 11.05.090	Crime against convict in penitentiary
AS 11.05.110	Employment of imprisoned persons
AS 11.05.120	Credit for labor while imprisoned
AS 11.05.130	Forfeiture of property upon conviction and lien for fines and costs
AS 11.15.060	Abortions
AS 11.20.660	Opening or publishing contents of sealed letters
AS 11.60.225	Improper use state seal
AS 11.60.250	Extension of curfews outside cities
AS 11.60.260	Enforcement of curfews
AS 11.60.270	Penalty for violation of curfew
AS 11.60.280	Unauthorized publication or use of communications
AS 11.60.290	Eavesdropping
AS 11.60.300	Exemptions
AS 11.60.310	Penalty
AS 11.60.320	Definitions
AS 11.65.010	Discharging ballast into navigable waters
AS 11.65.020	Interfering with buoys and beacons
AS 11.70.050	Arctic winter games

Secs. 23-25, ch 166, SLA 1978

Application of Criminal Code

Sec. 23. (a) Except as otherwise provided, secs. 1-10 of this Act govern the construction of any offense committed on or after the effective date of this Act, as well as the construction and application of any defense to a prosecution for an offense.

(b) Except as provided in (c) of this section, sec. 12 of this Act governs the punishment for any offense committed on or after the effective date of this Act.

(c) AS 12.55.125-12.55.185, enacted in sec. 12 of this Act, apply only upon conviction of the crime of murder in the first or second degree, kidnapping, or any crime classified as a class A, B, or C felony or a class A or B misdemeanor. For purposes of AS 12.55.125, 12.55.145, and 12.55.155, the court shall consider prior convictions whether committed before, on, or after the effective date of this Act.

(d) AS 33.15.180, as amended in secs. 15 and 16 of this Act, applies only to persons imprisoned for crimes committed on or after the effective date of this Act.

(e) AS 33.20.010, as re-enacted in sec. 17 of this Act, applies to all persons serving terms of imprisonment in state correctional institutions on or after the effective date of this Act, but is not retroactive in application.

(f) Sections 1-12 of this Act do not apply to or govern the construction of and punishment for any offense committed before the effective date of this Act or the construction or application of any defense to a prosecution for the offense. An offense shall be construed and punished according to the law existing at the time of the commission of the offense in the same manner as if this Act had not become law.

Sec. 24. AS 12.55.088, enacted in sec. 12 of this Act, changes Rule 35 of the Alaska Rules of Criminal Procedure by defining additional circumstances without regard to time limit wherein a defendant's sentence may be modified or reduced.

Sec. 25. This Act takes effect January 1, 1980.