

# ALASKA’S RESPONSES TO THE *BLAKELY* CASE

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*Following the 2004 Supreme Court decision in Blakely v. Washington, states were forced to change their sentencing practices. In the wake of the Blakely decision, Alaska has experienced changes such as new sentencing laws, new appeals, and courts of appeals decisions that have raised new legal issues.*

## I. INTRODUCTION

The June 24, 2004 United States Supreme Court decision in *Blakely v. Washington*<sup>1</sup> has changed sentencing practices across the United States. The purpose of this brief comment is to describe some of the changes in Alaska that flowed from the decision. These changes have included new sentencing laws, a continuing stream of new appeals, and Alaska Court of Appeals decisions that have further unsettled the legal landscape.

With Justice Antonin Scalia writing for the majority, the Court in *Blakely* held that a defendant had a Sixth Amendment right to a jury trial on factual findings that would increase the defendant’s sentence, rather than allowing judicial decisions at a lower standard of evidence to increase the sentence.<sup>2</sup> In her dissent, Justice Sandra Day O’Connor noted that Alaska and several other states had sentencing systems that would be rendered unconstitutional by the majority decision.<sup>3</sup> Alaska’s presumptive sentencing scheme was contrary to the Supreme Court’s decision because it allowed judges to impose aggravated sentences for certain factors of the crime that

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1. 542 U.S. 296 (2004).

2. *Id.* at 304, 313–14.

3. *Id.* at 323. Part IV.A of Justice O’Connor’s dissent cites Alaska as one of several states that “have enacted guidelines systems . . . . Today’s decision casts constitutional doubt over them all . . . .” *Id.*; see ALASKA STAT. § 12.55.155 (2003) (current version at ALASKA STAT. § 12.55.155 (2006)).

had not been presented to a jury for proof beyond a reasonable doubt.<sup>4</sup>

An earlier Supreme Court case, *Apprendi v. New Jersey*,<sup>5</sup> set the stage for the *Blakely* decision. In *Apprendi*, the Court said: “Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”<sup>6</sup> The Court’s majority decision in *Blakely* held that the Washington trial judge’s decision to impose extra time for an aggravating factor in the defendant’s kidnapping case violated the same Sixth Amendment right to a jury trial as had the trial judge’s decision in *Apprendi*.<sup>7</sup>

## II. ALASKA’S INITIAL RESPONSES

Alaska prosecutors immediately took action in 2004 to comply with the new requirements. They started to present potential aggravating factors to grand juries for indictment.<sup>8</sup> If the aggravators were approved by the grand jury, or were added later in the case, prosecutors presented them at the jury trial.<sup>9</sup> Most cases continued to be negotiated; in these, prosecutors asked for a *Blakely* waiver when appropriate.<sup>10</sup>

Early on, one judge found Alaska’s presumptive sentencing system unconstitutional as a result of *Blakely*.<sup>11</sup> Judge Michael Wolverton in Anchorage said in a 2004 opinion that “the most appropriate resolution of the issues at this juncture, and until the Alaska Legislature has had the opportunity to remedy the myriad concerns raised by *Blakely v. Washington* (citation omitted), is to declare that Alaska’s presumptive sentencing scheme as set forth in Title 12 is unconstitutional.”<sup>12</sup> Judge Wolverton based his decision

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4. See ALASKA STAT. § 12.55.155.

5. 530 U.S. 466 (2000).

6. *Id.* at 490.

7. *Blakely*, 542 U.S. at 303–05.

8. *Blakely in Alaska*, THE SENTENCING GUIDELINE (National Association of Sentencing Commissions, Washington, D.C.), Feb. 2005, at 3, available at [http://www.uscc.gov/states/NASC\\_030205.pdf](http://www.uscc.gov/states/NASC_030205.pdf). The section in the newsletter is based on an interview with Susan Parkes, Deputy Attorney General for Criminal Affairs. Interview information available from the Alaska Judicial Council.

9. *Id.*

10. *Id.*; see ALASKA STAT. § 12.55.155(f)(2) (2006).

11. State v. Herrmann, No. 3AN-S02-11320-CR (Alaska Super. Ct. Oct. 6, 2004).

12. *Id.* at 1.

in part on a Utah federal case, *United States v. Croxford*,<sup>13</sup> in which the court said that its only viable option was to treat the U.S. guidelines “as unconstitutional in their entirety . . . and sentence Croxford between the statutory minimum and maximum.”<sup>14</sup>

On August 4, 2006, the court of appeals vacated Judge Wolverton’s decision and remanded the case to the superior court for sentencing.<sup>15</sup> The court said:

It is true that Alaska’s pre-2005 presumptive sentencing law is flawed in certain respects. Specifically, some of the provisions of the pre-2005 sentencing law do not comply with the right to jury trial . . . . Because Herrmann has not shown that he is prejudiced by any of the *Blakely* flaws in our pre-2005 presumptive sentencing law, the superior court decided a purely hypothetical controversy when it declared the entire pre-2005 presumptive sentencing law to be unconstitutional.<sup>16</sup>

The State’s most important response was a new sentencing plan filed at the beginning of the 2005 legislative session.<sup>17</sup> In essence, the new law replaced the single presumptive sentences with a range of presumptive sentences for each offense and codified the right to jury trial for alleged aggravators.<sup>18</sup> The legislature passed the bill quickly, and it became effective when Governor Murkowski signed it on March 22, 2005.<sup>19</sup>

Alaskans varied in their responses to the legislation. The governor’s press release said that “[j]udges will have the discretion to weigh the facts and circumstances of individual defendants to determine an appropriate sentence within the presumptive range.”<sup>20</sup> The Department of Law, chief drafters of the new bill, said that the sentencing ranges adopted by legislators were “in keeping with the spirit of the [U.S.] Supreme Court decision.”<sup>21</sup> Defense attorneys observed that the new legislation would result in more incarceration for defendants by subjecting them to higher sentences based on less evidence.<sup>22</sup> They noted that defendants

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13. 324 F. Supp. 2d 1230 (D. Utah 2004).

14. *Id.* at 1242.

15. *State v. Herrmann*, 140 P.3d 895 (Alaska Ct. App. 2006).

16. *Id.* at 895–96.

17. *See* S.B. 56, 2005 Leg., 24th Sess. (Alaska 2005).

18. *See id.*

19. Press Release, Governor Frank Murkowski, Murkowski Signs Bill Fixing Criminal Sentencing Statutes (Mar. 22, 2005), available at <http://www.law.state.ak.us/pdf/press/pr-blakely-signing.pdf>.

20. *Id.*

21. Matt Volz, *Judges Get More Sentencing Leeway*, ANCHORAGE DAILY NEWS, Mar. 23, 2005, at B5.

22. *Id.*

would be more reluctant to plead guilty because sentences in negotiated cases would be less certain.<sup>23</sup>

### III. TWENTY-FIVE YEARS OF PRESUMPTIVE SENTENCING - 1980 TO 2005

Alaska courts began to structure judicial sentencing decisions with one of the supreme court's earliest sentence appeals.<sup>24</sup> In *State v. Chaney*,<sup>25</sup> the court required judges to consider the seriousness of the offense, the offender's prior record, likelihood of rehabilitation, protection of the public, harm to the victim and the community, deterrence, community condemnation and reaffirmation of societal norms, and restoration of the victim and the community.<sup>26</sup> For the next several years, the court referred frequently to these criteria in its sentencing decisions.<sup>27</sup>

In 1978, Alaska's legislature adopted a criminal code paired with a presumptive sentencing scheme that replaced the former indeterminate sentencing system.<sup>28</sup> Both the code and the sentencing system took effect on January 1, 1980.<sup>29</sup> Derived from

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23. *Id.*

24. In 1969, the legislature granted the Alaska Supreme Court authority to review the length of trial court sentences. See ALASKA STAT. § 12.55.120(a) (2006).

25. 477 P.2d 441 (Alaska 1970).

26. *Id.* at 443.

27. *E.g.*, *State v. Graybill*, 695 P.2d 725, 727 (Alaska 1985) ("We reverse the court of appeals and reinstate the original sentence based on the trial judge's discretion under the *Chaney* criteria . . .").

28. For a detailed discussion of the then-new legislation see Barry Stern, *Presumptive Sentencing in Alaska*, 2 ALASKA L. REV. 227 (1985).

Until the presumptive sentencing legislation took effect on January 1, 1980, Alaska statutes called for judges to impose a specific term for a sentence within broad ranges. Once the term was imposed, other statutes governed parole eligibility and good time, but the defendant would not serve more than the specific sentence imposed by the judge. Judges could suspend part or all of the sentence. Under presumptive sentencing, the statutes called for either a sentence within a statutory minimum/maximum range (most first felony offender Class B and C), or the imposition of a specified presumptive sentence (more serious or repeat offenders). The system could be categorized as a "mixed" system, combining a structured sentencing system and an indeterminate system (because discretionary parole still operated under specific circumstances). See Jon Wool, *Beyond Blakely: Implications of the Booker Decision for State Sentencing Systems*, 2005 VERA INST. OF JUST. STATE SENTENCING AND CORR. POL'Y & PRAC. REV. 2 (Feb. 2005).

29. See Stern, *supra* note 28 at 230 n.9. The Judicial Council, at the request of the legislature, reported on 1974–1976 felony sentencing patterns throughout the

work by the Twentieth Century Fund Task Force on Criminal Sentencing,<sup>30</sup> presumptive sentencing called for a combination of structured sentencing and judicial discretion.<sup>31</sup>

Presumptive sentencing set a single term that, absent other factors, was presumed to be the appropriate sentence. The new sentences applied to repeat Class B and C (lesser) offenders, to all Class A felons, and to unclassified felons convicted of sexual offenses.<sup>32</sup> Presumptive sentences for subsequent felony offenders in all categories also had presumptive sentences specified by law, with statutory aggravators and mitigators available to adjust the sentences.<sup>33</sup>

First offenders convicted of Class B and C felonies did not have presumptive sentences,<sup>34</sup> and they were eligible for discretionary parole after they had served one-third of the active

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state to provide a basis for the Criminal Code Commission's work. See ALASKA JUDICIAL COUNCIL, ALASKA FELONY SENTENCING PATTERNS: A MULTIVARIATE STATISTICAL ANALYSIS (1977), available at <http://www.ajc.state.ak.us/reports/akfel74.pdf> [hereinafter ALASKA FELONY SENTENCING]. At the request of the Criminal Code Revision Subcommittee, the Council reviewed other possible sentencing schemes, including mandatory minimums and flat time, and recommended that presumptive sentencing be adopted.

30. THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976).

31. Stern, *supra* note 28, at 227.

32. ALASKA STAT. § 12.55.125 (1980) (current version at ALASKA STAT. § 12.55.125 (2006)). A handful of the most serious offenses had mandatory minimum sentences and fell outside of the presumptive sentencing scheme. The legislature assigned a twenty-year minimum for Murder 1, § 12.55.125(a) (1980) (current version at ALASKA STAT. § 12.55.125(a) (2006)), a ten-year minimum for Murder 2, and a five-year minimum for Kidnapping, § 12.55.125(b) (1980) (current version at ALASKA STAT. § 12.55.125(b) (2006)). In 1995, the legislature created the offense of Felony Driving While Intoxicated (a Class C offense) and assigned a mandatory minimum sentence of 120 days of incarceration for the first felony DWI. § 28.35.030(n) (2006).

For a more detailed description of sentencing structure, sentencing ranges, and other provisions, see JUDICIAL COUNCIL, ALASKA FELONY PROCESS: 1999, at 35–37 (2004), available at <http://www.ajc.state.ak.us/reports/Fel99FullReport.pdf> [hereinafter ALASKA FELONY PROCESS].

33. § 12.55.155(f) (1980) (current version at ALASKA STAT. § 12.55.155(f) (2006)). With specific findings, a judge also could refer the case for sentencing to a three-judge panel that could impose the original presumptive sentence or any sentence within the statutory range. § 12.55.165 (1980) (current version at ALASKA STAT. § 12.55.165 (2006)).

34. See § 12.55.125(d)–(e) (1980) (current version at ALASKA STAT. § 12.55.125(d)–(e) (2006)).

time imposed.<sup>35</sup> The legislation eliminated discretionary parole for those sentenced presumptively, at least during the period attributable to the presumptive sentence.<sup>36</sup> The legislature made further changes that took effect in 1982<sup>37</sup> and 1983–1984.<sup>38</sup>

Case law<sup>39</sup> quickly built on the presumptive sentencing structure to set limits to the possible range of sentences for most first offenders.<sup>40</sup> The legislation also codified the *Chaney* criteria.<sup>41</sup> Subsequent case law required judges to consider these factors at most points when they sentenced, whether they were looking at the magnitude of difference made by an aggravator or mitigator, at sentencing on a probation revocation, or at imposing the original sentence.<sup>42</sup>

The 1980 sentencing statute's opening "Declaration of Purpose" stated that "[t]he 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."<sup>43</sup> Later

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35. ALASKA ADMIN. CODE tit. 22, §§ 20.020–20.025 (2007).

36. See § 12.55.125(g) (1980) (current version at ALASKA STAT. § 12.55.125(g) (2006)). Separate provisions could apply to the aggravated portions of sentences or consecutive sentences. *Id.*

37. The major change in 1982 was including all drug offenses under the presumptive sentencing plan. See, e.g., § 12.55.125(b) (1980) (current version at ALASKA STAT. § 12.55.125(b) (2006)).

38. See *id.* In 1983, the legislature revised the charging and sentencing structure for sexual offenses, increasing the penalties substantially. § 12.55.125(i) (1980) (current version at ALASKA STAT. § 12.55.125(i) (2006)).

39. The legislature created a court of appeals to handle only criminal cases, and the court began its work in late 1980. See Susanne D. DiPietro, *The Development of Appellate Sentencing Law in Alaska*, 7 ALASKA L. REV. 265, 276–77 (1990).

40. Stern, *supra* note 28, at 255–66 (discussing *Austin v. State*, 627 P.2d 657 (Alaska Ct. App. 1981) (per curiam)).

41. See § 12.55.005 (1980) (current version at ALASKA STAT. § 12.55.005 (2006)).

42. See, e.g., *Bossie v. State*, 835 P.2d 1257, 1258 (Alaska Ct. App. 1992) ("The sentencing court must . . . determine whether this mitigating factor, analyzed in the light of the sentencing criteria contained in . . . *State v. Chaney* (citation omitted) calls for some adjustment of the presumptive term."); *State v. Wentz*, 805 P.2d 962, 964 (Alaska 1991) ("Applying the foregoing principles [derived from *Chaney*] to the case at bar, it is apparent that the trial court was permitted . . . to increase *Wentz's* presumptive five-year term by as much as fifteen years, depending upon the number and severity of statutory aggravating factors present . . .").

43. § 12.55.005 (1980) (current version at ALASKA STAT. § 12.55.005 (2006)).

decisions from the court of appeals affirmed these purposes of the new sentencing scheme.<sup>44</sup> The intent was to eliminate both the ethnicity-related disparities found in sentencing studies in the 1970s and the disparities based on the identity of the judge.<sup>45</sup> Reviews of felony sentencing practices in 1980,<sup>46</sup> 1984–1987,<sup>47</sup> and 1999<sup>48</sup> showed that presumptive sentencing had apparently been successful at eliminating the disparities associated with the ethnicities of presumptively sentenced defendants.<sup>49</sup> However, the 1999 data showed disparities for Black and Native defendants in non-presumptive drug sentences.<sup>50</sup>

#### IV. ALASKA'S NEW SENTENCING SYSTEM, PRESUMPTIVE RANGES

The new law sets a range of permissible sentences for each offense. It expands the scope of presumptive sentencing to all felony convictions, including Class B and C first offenders.<sup>51</sup> Typically, the new ranges start at the previous presumptive sentence (if there was one) and go up to several years above that.<sup>52</sup> Mitigators can still be argued to reduce the sentence.<sup>53</sup> Aggravators

44. *See, e.g.*, *Juneby v. State*, 641 P.2d 823, 833 (Alaska Ct. App. 1982) (“[U]nless a measured and restrained approach is taken in the adjustment of presumptive sentences . . . the potential for irrational disparity in sentencing would threaten to become reality . . .”), *modified and superceded*, *Juneby v. State*, 665 P.2d 30 (Alaska Ct. App. 1983).

45. *See* ALASKA FELONY SENTENCING, *supra* note 29, at 40–41.

46. ALASKA JUDICIAL COUNCIL, ALASKA FELONY SENTENCES: 1980 (1982), available at <http://www.ajc.state.ak.us/reports/akfel80.pdf> [hereinafter ALASKA FELONY SENTENCES: 1980].

47. Teresa White Carns & John Kruse, ALASKA JUDICIAL COUNCIL, ALASKA'S PLEA BARGAINING BAN RE-EVALUATED at 149–52 (1991).

48. ALASKA FELONY PROCESS, *supra* note 32.

49. *See, e.g.*, ALASKA FELONY SENTENCES: 1980, *supra* note 46, at 57 (“The present analysis of 1980 offenses reveals that racially disproportionate sentencing outcomes have been totally eliminated.”).

50. ALASKA FELONY PROCESS, *supra* note 32, at 1, 277.

51. *E.g.*, ALASKA STAT. § 12.55.125(e) (2006) (“[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 a definite term within the following presumptive ranges . . .”).

52. *See infra* Table: Alaska: Current Presumptive Terms Compared to Presumptive Ranges in Senate Bill 56.

53. *E.g.*, § 12.55.125(d)(1) (“[T]he defendant is required to serve an active term of imprisonment within the range specified in this paragraph, unless the court finds . . . a mitigation factor . . .”). Aggravating and mitigating factors are located in ALASKA STAT. § 12.55.155 (2006).

that would take the sentence above the presumptive range must meet *Blakely* requirements.<sup>54</sup>

The presumptive ranges are set out in the following table, with the new ranges in bold letters and the former presumptive sentence (if any) in parentheses. Most felony convictions are for Class C and Class B offenses such as Thefts, Frauds, Misconduct Involving a Controlled Substance, and less serious assaults and sexual offenses. First offenders in these categories now have presumptive ranges for their sentences, in addition to case law guidance.<sup>55</sup> Class C first offenders have a range of zero to two years,<sup>56</sup> and Class C sex offenders (who formerly had a typical range of zero to two years) have a presumptive one to two year range.<sup>57</sup> Class B first offenders have a presumptive range of one to three years, similar to the previous “court-made law”<sup>58</sup> that set one to three years as an appropriate sentencing range. First offenders convicted of Class B sexual offenses now have a two to four-year presumptive range rather than the earlier one to three-year court-made law range.<sup>59</sup>

The presumptive ranges apply to the total sentence imposed, including any suspended time.<sup>60</sup> Active time (i.e., the amount of time that the defendant must spend incarcerated) and suspended time together cannot total more than the upper end of the presumptive range.<sup>61</sup> The presumptive ranges for second and subsequent felony B and C offenders, and for all other offenders

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54. See § 12.55.155.

55. See § 12.55.125(d) (Class B felonies); § 12.55.125(e) (Class C felonies).

56. § 12.55.125(e)(1).

57. See *infra* Table: Alaska: Current Presumptive Terms Compared to Presumptive Ranges in Senate Bill 56. An interesting historical note is that the Supreme Court’s Sentencing Guidelines Committee that operated between 1978 and 1982 drafted guidelines for first offender Class B and C offenders. The draft guidelines for Class C first offenders call for probation to sixty days for Property and Drug offenses without aggravating circumstances, and generally for a range of “probation to two (2) years.” For Class B offenders, the proposed range was probation to four years. The new presumptive range for Class B offenders is narrower than was the proposed guideline, but the Class C presumptive range is identical to the earlier proposal. The draft guidelines were not adopted, although the committee did adopt guidelines for drug offenses that were used from 1980 to 1982. Further information is available from the Alaska Judicial Council.

58. See *infra* Table: Alaska: Current Presumptive Terms Compared to Presumptive Ranges in Senate Bill 56.

59. *Id.*

60. § 12.55.125(n). For sentences imposed consecutively or concurrently the new legislation specifies that “presumptive term” in that section now means the middle of the presumptive range. § 12.55.127(d)(3) (2006).

61. § 12.55.125(n).

who were sentenced presumptively under the earlier law, begin at the former presumptive sentence and go up by varying amounts. The new ranges will permit judges to sentence anywhere within the range without calling upon aggravating or mitigating factors to justify their sentences.

Alaska: Current Presumptive Terms Compared to Presumptive Ranges in Senate Bill 56

	First Felony	First Felony (special crimes)	Second Felony	Sex Felony with a Prior Sex Felony	Third+ Felony	Sex Felony with Two Prior Sex Felonies	Max
Unclassified Offense	Sex (8) <b>8 to 12</b> (20-35)	Weapon or serious injury (10) <b>12 to 16</b> (25-35)	(15) <b>15 to 20</b> (30-45)	(20) <b>20 to 30</b> (35-45)	(25) <b>25 to 35</b> (40-60)	(30) <b>30 to 40</b> (99)	(40) <b>99</b>
Class A Felony Offense	Sex (5) <b>5 to 8</b> (15-30)	Weapon or serious injury (10) <b>10 to 14</b> (25-35)	(10) <b>12 to 16</b> (25-35)	(15) <b>15 to 20</b> (30-40)	(15) <b>15 to 20</b> (35-50)	(20) <b>20 to 30</b> (99)	(30) <b>99</b>
Class A Felony	(5) <b>5 to 8</b>	Weapon, serious injury, or police victim (7) <b>7 to 11</b>	(10) <b>10 to 14</b>	n/a	(15) <b>15 to 20</b>	n/a	(20)
Class B Felony Offense	(0; 1 to 3 by court-made law) <b>2 to 4</b> (5-15)	n/a	(5) <b>5 to 8</b> (10-25)	(10) <b>10 to 14</b> (15-30)	(10) <b>10 to 14</b> (20-35)	(15) <b>15 to 20</b> (99)	(20) <b>99</b>
Class B Felony	(0; 1 to 3 by court-made law) <b>1 to 3</b> (SIS permitted if prison imposed as condition)	Crim neg hom of child (0; 1 to 3 by court-made law) <b>2 to 4</b>	(4) <b>4 to 7</b>	n/a	(6) <b>6 to 10</b>	n/a	(10)
Class C Felony Offense	(0) <b>1 to 2</b> (2-12)	n/a	(2) <b>2 to 5</b> (8-15)	(3) <b>3 to 6</b> (12-20)	(3) <b>3 to 6</b> (15-25)	(6) <b>6 to 10</b> (99)	(10) <b>99</b>
Class C Felony	(0) <b>0 to 2</b> (SIS permitted)	Felony guiding crimes (1) <b>1 to 2</b>	(2) <b>2 to 4</b>	n/a	(3) <b>3 to 5</b>	n/a	(5)

Numbers in parentheses are the presumptive terms and maximums that apply to crimes committed before March 23, 2005

Numbers in bold show the 2005 presumptive ranges and new maximum

Numbers in italics and brackets for sex offenders show 2006 changes

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An example will help clarify these changes. A first felony offender convicted of one count of Robbery 1 with a weapon under the previous code (a Class A offense; see Table), who did not have any aggravating or mitigating factors would have had a presumptive sentence of seven years.<sup>62</sup> The offender would have been eligible for release on good time after serving two-thirds of the sentence, assuming no discipline while incarcerated that would have reduced the amount of good time. If the judge had wished to impose additional probationary time to provide longer supervision, he or she could not have done so without alleged and proven (by clear and convincing evidence) aggravators that would allow additional suspended time to serve.<sup>63</sup>

Under the new presumptive ranges, the judge could sentence the same offender to any length of sentence within the seven-to-eleven-year range.<sup>64</sup> If the judge sentenced the offender to eight years of active time to serve, the judge could also impose up to three years of suspended time and require that the offender be supervised on probation for that period of time.<sup>65</sup>

Statutory provisions for mitigators changed very little under the new legislation. The legislature added two new mitigators,<sup>66</sup> but it did not otherwise alter existing statutes. The active time cannot go below the bottom of the range without allegation and proof by clear and convincing evidence of mitigating factors.<sup>67</sup> If the low end

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62. § 12.55.125(c)(2)(A) (2004) (current version at ALASKA STAT. § 12.55.125(c) (2006)).

63. *See* § 12.55.155 (2004) (current version at ALASKA STAT. § 12.55.155 (2006)).

64. § 12.55.125(c)(2)(A) (2006).

65. *See* § 12.55.125(o) (“[T]he court shall impose . . . (2) suspended imprisonment of three years and a minimum period of probation supervision of 10 years for conviction of a class A or class B felony . . .”).

66. The new mitigators allow the judge to decrease the sentence under some circumstances if the defendant is part of or has completed a state-approved treatment program, § 12.55.155(d)(17); additionally, the new mitigators permit a decrease in sentence for defendants who suffer “from a mental disease or defect . . . that significantly affected the defendant’s behavior but is not sufficient for a complete defense.” § 12.55.155(d)(18). Again, the mitigator can only be used under limited circumstances.

67. *See* § 12.55.155(d)(1) (“The following factors shall be considered by the sentencing court if proven in accordance with this section, and may allow imposition of a sentence below the presumptive range . . .”). The judge also can refer the case for sentencing to a three-judge panel which may “in the interest of justice sentence the defendant to any definite term of imprisonment up to the

of the range is four years or less, the court may impose any sentence below the presumptive range for factors in mitigation (including probation).<sup>68</sup> If the low end of the range is more than four years, the court can sentence up to fifty percent below the low end of the range.<sup>69</sup>

The larger changes came in the provisions for aggravating offenses above the new presumptive ranges. Aggravators now fall into two categories: those that must be proved to a jury<sup>70</sup> and those that can still continue to be proved to the judge by clear and convincing evidence.<sup>71</sup> In the latter category are the eight “prior conviction” aggravators excluded from the jury requirement by the *Blakely* decision.<sup>72</sup> These include aggravators related to the number of the defendant’s prior felony convictions;<sup>73</sup> the defendant’s probation, parole, release or furlough status;<sup>74</sup> the defendant’s history of juvenile adjudications for adult felony equivalents;<sup>75</sup> the defendant’s history of assaultive behavior and convictions of offenses similar to the current conviction;<sup>76</sup> a history of more serious offenses;<sup>77</sup> or a history of five or more convictions for Class A misdemeanors (a new aggravator added in the present legislation).<sup>78</sup>

Aggravators that must be proved to a jury comprise all of the other aggravators specified in the prior statute and carried over in the new legislation. Those factors for which the prosecutor seeks a sentence higher than the presumptive range must “be presented to a trial jury under procedures set by the court”<sup>79</sup> and be proven beyond a reasonable doubt. The prosecutor must give the

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maximum term provided for the offense or to any sentence authorized under AS 12.55.015.” § 12.55.175(c).

68. § 12.55.155(a)(1).

69. § 12.55.155(a)(2).

70. § 12.55.155(f)(2).

71. § 12.55.155(f)(1).

72. *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” (quoting *Apprendi v. New Jersey*, 530 U.S. 436, 490 (2000))).

73. § 12.55.155(c)(15).

74. § 12.55.155(c)(12), (20).

75. § 12.55.155(c)(19).

76. § 12.55.155(c)(21).

77. § 12.55.155(c)(7)–(8).

78. § 12.55.155(c)(31).

79. § 12.55.155(f)(2). The section also provides that the defendant can waive trial on the factor, can stipulate to the existence of the factor, or can consent to have the factor proven under the clear and convincing evidence standard. *Id.*

defendant and court written notice “of the intent to establish a factor in aggravation.”<sup>80</sup>

The aggravators that must go to a jury after March 23, 2005 (without a waiver from the defendant) include approximately twenty-seven different situations specified in section 12.55.155.<sup>81</sup> Behavior that involved a group of three or more persons (with the defendant as the leader),<sup>82</sup> organized groups of five or more persons,<sup>83</sup> or gangs<sup>84</sup> are all aggravating factors that must be proven to a jury. Various aggravators involving financial remuneration from the offense such as a pecuniary incentive beyond that inherent in the offense<sup>85</sup> or substantial monetary gain with little risk of prosecution and punishment<sup>86</sup> must go to the jury. Injury to a person other than an accomplice,<sup>87</sup> the victim’s vulnerability,<sup>88</sup> domestic-related offenses,<sup>89</sup> and involvement of minors<sup>90</sup> also are among the aggravators subject to jury trial.

Once the jury has accepted the aggravating factor as proved beyond a reasonable doubt, the judge fashions the sentence using the criteria established under existing law. Even if the jury finds a guilty verdict on the aggravator, the judge is not obliged to impose a higher sentence.<sup>91</sup> If the judge does decide to increase the sentence, further case law structures the decision by use of the *Chaney* criteria and various other case law limitations.<sup>92</sup>

Most of the offenses set out in the criminal code retained the same statutory maximum penalties under the new law. The changes that occurred, both in maximum penalties and in increased penalties and restrictions for some offenses, were unrelated to the *Blakely* provisions. In particular, the laws governing penalties for sexual offenses were revised in 2005 and again in 2006.<sup>93</sup> The

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80. *Id.*

81. § 12.55.155.

82. § 12.55.155(c)(3).

83. § 12.55.155(c)(14).

84. § 12.55.155(c)(29).

85. § 12.55.155(c)(11).

86. § 12.55.155(c)(16).

87. § 12.55.155(c)(1).

88. § 12.55.155(c)(5).

89. § 12.55.155(c)(18).

90. § 12.55.155(c)(23)(B), 27(A)–(B).

91. *See* §12.55.155(c) (“The following factors shall be considered by the sentencing court if proven in accordance with this section, and *may* allow imposition of a sentence above the presumptive range set out in AS 12.55.125.” (emphasis added)).

92. *See* DiPietro, *supra* note 39, at 280 n.99.

93. *See* ALASKA STAT. § 12.55.125 Notes to Decisions (2006).

presumptive ranges set in 2005 were boosted substantially in 2006.<sup>94</sup> In addition, requirements for longer suspended sentences and probation terms for sexual offenses were imposed,<sup>95</sup> and offenders were ordered to submit to polygraph testing under some circumstances.<sup>96</sup>

## V. ANTICIPATED EFFECTS OF THE BILL

### A. Reduction of disparities

The Senate's Letter of Intent,<sup>97</sup> which was incorporated into the legislation, noted that the legislature intended to preserve "the basic structure of Alaska's presumptive sentencing system, which is designed to avoid disparate sentences."<sup>98</sup> This language echoes that in the declaration of purpose in the 1978 legislation, "[t]he legislature finds that the elimination of unjustified disparity in sentences . . . can best be achieved through a sentencing framework fixed by statute."<sup>99</sup> The Judicial Council findings of unexplainable ethnic disparities in non-presumptive drug sentences in the 1999 database would support the legislature's continuing concern about disparities.<sup>100</sup> Because the Council found no unwarranted disparities in presumptive sentences and the new system

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94. *See id.*

95. § 12.55.125(o). This provision was added by the 2006 amendments. § 12.55.125 app. at 686.

96. *See* ALASKA STAT. § 12.55.100(e) (2006).

97. The full text of the Letter of Intent is:

It is the intent of the legislature in passing this bill to preserve the basic structure of Alaska's presumptive sentencing system, which is designed to avoid disparate sentences. With this bill the legislature sets out a sentencing framework, subject to judicial adjustment for statutory aggravating or mitigating factors that are determined in a manner that is constitutional under the decision of the U. S. Supreme Court in *Blakely v. Washington*. The single, definite presumptive terms set out in current law can unduly constrain the sentencing process, particularly under the mandates of *Blakely v. Washington*. Although the presumptive terms are being replaced by presumptive ranges, it is not the intent of this bill in doing so to bring about an overall increase in the amount of active imprisonment for felony sentences. Rather, the bill is intended to give judges the authority to impose an appropriate sentence, with an appropriate amount of probation supervision, by taking into account the considerations set out in AS 12.55.005 [sic] and 12.55.015. ALASKA SENATE JOURNAL, S.24-56, 1st. Sess., at 0102-03 (2005) [hereinafter ALASKA SENATE JOURNAL].

98. *Id.* at 0102.

99. ALASKA STAT. § 12.55.005 (1978) (current version at ALASKA STAT. § 12.55.005 (2006)).

100. ALASKA FELONY PROCESS, *supra* note 32, at 1.

emphasizes uniformity in the context of the presumptive ranges,<sup>101</sup> it could be anticipated that ranges might help to reduce sentencing disparity.

#### B. Increased judicial discretion

The Letter of Intent emphasized the legislature's desire "to give judges the authority to impose an appropriate sentence."<sup>102</sup> The need for more discretion for judges was emphasized in a news column by then-Attorney General Gregg Renkes which was published at about the same time that the bill was introduced.<sup>103</sup> Mr. Renkes characterized the *Blakely* decision as shifting "much of the decision-making in sentencing to jurors who probably serve on only one felony case in their lives, rather than judges who deal with felony sentencing every day . . . making it much more difficult for judges to give stiff sentences for aggravated crimes."<sup>104</sup>

#### C. No increase in sentence lengths

The Senate Letter of Intent also noted that the legislature did not intend to increase the overall amount of active imprisonment.<sup>105</sup> When the Department of Corrections (DOC) submitted its second set of fiscal notes (analysis provided to the legislature about the fiscal impacts of bills that the legislature is considering), it said that it did not expect increased sentence lengths or added burdens for its work.<sup>106</sup> To support its fiscal notes, the DOC cited its research that suggested that the average un-suspended incarceration for first felony Class B and C offenders fell within the middle of the new ranges.<sup>107</sup> For 4097 Class C convicted offenders sentenced between January 1, 2001 and December 31, 2004, the DOC showed an average un-suspended incarceration of 366 days.<sup>108</sup> The Table shows that the new range of sentences for first offender Class C

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101. *Id.* at 3.

102. ALASKA SENATE JOURNAL, *supra* note 97, at 0103.

103. Gregg Renkes, *Ruling Handcuffs Alaska's Judges*, ANCHORAGE DAILY NEWS, Jan. 19, 2005, at B4.

104. *Id.*

105. ALASKA SENATE JOURNAL, *supra* note 97, at 0103.

106. ALASKA DEP'T OF CORRECTIONS, FISCAL NOTE SIX, S.24-56, 1st. Sess., at 2 (2005) [hereinafter FISCAL NOTE SIX]; ALASKA DEP'T OF CORRECTIONS, FISCAL NOTE SEVEN, S.24-56, 1st. Sess., at 2 (2005) [hereinafter FISCAL NOTE SEVEN].

107. FISCAL NOTE SIX, *supra* note 106, at 1; FISCAL NOTE SEVEN, *supra* note 106, at 1.

108. FISCAL NOTE SIX, *supra* note 106, at 2.

convictions was zero to two years.<sup>109</sup> For Class B convictions, the new range was one to three years of un-suspended incarceration, and the results were similar to the previous sentences.<sup>110</sup> DOC data showed a mean sentence of 864 days (2.4 years) for the 1155 offenders between January 1, 2001 and December 31, 2004.<sup>111</sup>

A second source of data about average sentence lengths for Class B and C first offenders was the data underlying the Alaska Judicial Council's report, *Alaska Felony Process: 1999*.<sup>112</sup> Data from that report, submitted to the Alaska House Finance Committee on February 16, 2005,<sup>113</sup> showed that the typical Class C first felony offender received a mean sentence of 163 days of un-suspended incarceration.<sup>114</sup> The first offender Class C felons in the Judicial Council data appeared to receive an average sentence of only about half of that in the DOC average.<sup>115</sup> The Council's data from 1999 showed a mean sentence of 609 days of un-suspended incarceration for Class B first felony offenders, or about fifty percent less than the DOC average.<sup>116</sup> The differences between the two calculations of sentence length could be related to the different data sets used, or it could be related to increases in average sentences in cases filed after 1999.

#### D. More suspended sentences accompanied by probation

A Department of Law summary<sup>117</sup> of the bill characterized the legislative intent language as "the legislature intended to give judges authority to impose suspended periods of incarceration. This is important because the legislature adopted presumptive ranges that start at the former presumptive term."<sup>118</sup> The

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109. *Supra* Table: Alaska: Current Presumptive Terms Compared to Presumptive Ranges in Senate Bill 56.

110. *Id.*

111. FISCAL NOTE SIX, *supra* note 106, at 2.

112. ALASKA FELONY PROCESS, *supra* note 32. The Council used data about first felony B and C offenders included in the report's database to report on lengths of mean sentences to the legislature.

113. Memorandum from the Alaska Judicial Council on *Blakely* Data to the House Finance Co-chairs (Feb. 16, 2005) (on file with the author) [hereinafter Alaska Judicial Council Memo].

114. *Id.* at 5.

115. *See* FISCAL NOTE SIX, *supra* note 106, at 2.

116. *See* Alaska Judicial Council Memo., *supra* note 113, at 5; FISCAL NOTE SIX, *supra* note 106, at 2.

117. Summary of new legislation prepared by Department of Law (July 20, 2005) (on file with author).

118. *Id.*

Department's statement could have been drawing on the sentence in the legislative letter that says: "Rather, the bill is intended to give judges the authority to impose an appropriate sentence, with an appropriate amount of probation supervision."<sup>119</sup> The Department of Law phrase suggested that the department might expect increased suspended sentences, with longer probationary terms and greater exposure to the possibility of probation revocations.<sup>120</sup> However, the Department of Law's fiscal note submitted on January 21, 2005 says that the Department does not expect any increase in its own expenses associated with implementation of the new sentencing scheme.<sup>121</sup>

#### E. Defense attorney concerns

In the defense agencies' fiscal notes,<sup>122</sup> agency heads noted concerns about the probability of increasing sentence lengths, increasing overall incarceration, increasing numbers of defendants on probation (with an associated increase in probation revocations), and increasing appellate work.<sup>123</sup>

### VI. ACTUAL EFFECTS OF *BLAKELY*

#### A. Increased appeals

The most noticeable effect of *Blakely* in 2004 and 2005 was a substantial increase in *Blakely* and *Apprendi*-related appellate work. The clerk of the appellate courts estimated that the number of appeals had risen substantially in twelve months between July 1, 2004 and June 30, 2005.<sup>124</sup> In Fiscal Year 2004, the court of appeals had a total of 219 filed cases.<sup>125</sup> For Fiscal Year 2005, the total had risen to an estimated 475 filed cases, a 117% increase during the year.<sup>126</sup>

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119. ALASKA SENATE JOURNAL, *supra* note 97, at 0103.

120. *See id.*

121. ALASKA DEP'T OF LAW, FISCAL NOTE ONE, S.24-56, 1st. Sess., at 1 (2005) [hereinafter FISCAL NOTE ONE].

122. ALASKA PUBLIC DEFENDER AGENCY, FISCAL NOTE EIGHT, S.24-56, 1st. Sess., at 1 (2005) [hereinafter FISCAL NOTE EIGHT]; ALASKA OFFICE OF PUBLIC ADVOCACY, FISCAL NOTE NINE, S.24-56, 1st. Sess., at 1 (2005) [hereinafter FISCAL NOTE NINE].

123. FISCAL NOTE EIGHT, *supra* note 122, at 1; FISCAL NOTE NINE, *supra* note 122, at 1.

124. ALASKA COURT SYSTEM, 2005 ANNUAL REPORT 51 (2006).

125. *Id.*

126. *Id.*

Most of the increase was probably due to *Blakely*-related issues.<sup>127</sup> The clerk's office reviewed the cases on file during the summer of 2005 for *Blakely* or *Apprendi* issues. In 191 files, one or both of these cases were mentioned by name.<sup>128</sup> Those numbers could still underestimate the effect of *Blakely* and *Apprendi* because attorneys could have raised similar issues without specifically naming the cases.

Appellate attorneys for both the Public Defender Agency and the Department of Law agreed that appeals had increased substantially.<sup>129</sup> They suggested in interviews in 2005 that between 150 and 200 cases were filed in Fiscal Year 2005 that focused on *Blakely* and *Apprendi*.<sup>130</sup> Interviewed again in November 2006, defense attorneys and prosecutors perceived an undiminished rate of new appeals and a rapidly accumulating backlog.<sup>131</sup> Attorneys continued to file appeals for a variety of reasons, despite a total of thirty-three separate appellate decisions on *Blakely* issues by November 2006.<sup>132</sup>

Several reasons have been cited for the continued high rate of appeals. Both prosecutors and defendants appeared unwilling to abandon *Blakely* arguments that were unsuccessful in the court of appeals until the Alaska Supreme Court has decided them.<sup>133</sup> When federal grounds for relief were unsuccessful, new appeals have been filed based on state grounds. If new federal issues were raised, attorneys seem to be continuing to file cases until the federal courts resolve the issues. The prosecutors and defense

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127. *Id.*

128. Telephone Interview with Marilyn May, Clerk of the Appellate Courts (July 2005). The data collection was possible because the court had one-time externs available to review the cases. The court does not routinely track appeals filed by the nature of the issues raised.

129. Telephone Interview with Quinlan Steiner, attorney, Pub. Defender Agency (June 10, 2005); Telephone Interviews with Doug Kossler, attorney, Dep't of Law (June 10, 2005 and Nov. 2006); Telephone Interview with Linda Wilson, attorney, Pub. Defender Agency (Nov. 2006).

130. Telephone Interview with Quinlan Steiner, attorney, Pub. Defender Agency (June 10, 2005); Telephone Interview with Doug Kossler, attorney, Dep't of Law (June 10, 2005).

131. Telephone Interview with Doug Kossler, attorney, Dep't of Law (Nov. 2006); Telephone Interview with Linda Wilson, attorney, Pub. Defender Agency (Nov. 2006).

132. Telephone Interview by Larry Cohn with Linda Wilson, attorney, Pub. Defender Agency (Nov. 2006).

133. Telephone Interview by Larry Cohn with Doug Kossler, attorney, Dep't of Law (Nov. 2006).

attorneys noted that the amount of continuing appellate work generated by *Blakely* has strained already limited resources.<sup>134</sup>

### B. *Smart v. State*

On October 27, 2006, the court of appeals decided *Smart v. State*.<sup>135</sup> The court held that *Blakely*'s requirement of proof beyond a reasonable doubt was essential "to a fair and lawful determination of a defendant's sentence under Alaska's presumptive sentencing law,"<sup>136</sup> and had to be applied retroactively.<sup>137</sup> The court also decided that Alaska's retroactivity law applied, rather than the federal law,<sup>138</sup> and that the defendant was entitled to a jury decision on aggravators.<sup>139</sup>

The Alaska Judicial Council calculated the number of offenders who might still be incarcerated in June 2007, based on the data in its report on 1999 felony charges. Extrapolating from the 1999 offenders and using the court system's annual reports to estimate increases in felony filings, the Council estimated that about 120 offenders were likely to still be incarcerated who might qualify for relief of some sort under *Smart*. Some of those offenders would not qualify because their aggravating factors were prior convictions or other factors that would not qualify for *Blakely* relief. The Council did not estimate how many more offenders charged before 1999 might still be incarcerated and might qualify for relief under *Smart*, nor did it estimate how many offenders who were on probation or parole would qualify for reductions in suspended sentences and probation periods.<sup>140</sup>

The Department of Law asked the court of appeals to stay the retroactive application of *Blakely* while it petitioned the Alaska Supreme Court to reverse the *Smart* decision.<sup>141</sup> The Public Defender Agency did not file an opposition to the request for the

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134. Telephone Interview by Larry Cohn with Linda Wilson, attorney, Pub. Defender Agency (Nov. 2006); Telephone Interview by Larry Cohn with Doug Kossler, attorney, Dep't of Law (Nov. 2006).

135. *Smart v. State*, 146 P.3d 15 (Alaska Ct. App. 2006).

136. *Id.* at 17.

137. *Id.*

138. *Id.* at 27. A sizable part of the opinion was devoted to discussing the *Teague* test used in federal habeas corpus litigation and why it did not apply to this situation.

139. *Id.* at 35.

140. Further information available from the author.

141. Telephone Interview with Doug Kossler, attorney, Dep't of Law (Nov. 2006).

stay, but it did oppose the State's petition.<sup>142</sup> It also was preparing its own petition to the supreme court for a review of portions of the *Smart* decision.<sup>143</sup> The appellate court clerk reported that the court of appeals had stayed 256 appeals, another indication of its current *Blakely*-related caseload.<sup>144</sup>

### C. Trial court effects

1. *Jury trials for aggravators.* Trial attorneys interviewed for this comment reported very few jury trials on *Blakely* aggravators.<sup>145</sup> In Fiscal Year 2004 (July 1, 2003 to June 30, 2004), the court showed 142 felony jury trials, which was 3.3% of all of the felony cases filed.<sup>146</sup> In Fiscal Year 2005 (July 1, 2004 to June 30, 2005), the 151 jury trials were 2.9% of all felonies filed.<sup>147</sup> These data do not suggest that at least during the first year after the decision, the trial courts experienced any effects from new jury trials related to *Blakely*.<sup>148</sup>

2. *Other trial court filings related to Blakely.* Attorneys also commented about other forms of litigation in the trial courts. Most cases in the trial courts after June 24, 2004 have already received the benefits of *Blakely*. Original actions for relief will be much reduced as time passes.<sup>149</sup> Attorneys did suggest that if the Alaska Supreme Court upholds *Smart*, the trial courts will see substantial new work.<sup>150</sup> If *Smart* is upheld and the currently-stayed cases are

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142. Telephone Interview with Linda Wilson, attorney, Pub. Defender Agency (Nov. 2006).

143. *Id.*

144. Telephone Interview with Marilyn May, Clerk of the Appellate Courts (Nov. 2006).

145. Interview information available from author.

146. ALASKA COURT SYSTEM, 2004 ANNUAL REPORT S-28 (2005).

147. ALASKA COURT SYSTEM, 2005 ANNUAL REPORT S-28 (2006).

148. Data for Fiscal Year 2006 felony jury trials were not available from the court at the time this comment was prepared. However, the trend in felony jury trials as a percentage of felony cases filed has gone steadily downward. In Fiscal Year 2003, jury trials were 3.5% of all felony cases filed. ALASKA COURT SYSTEM, 2003 ANNUAL REPORT S-28 (2004). In Fiscal Year 2002, they were 4.3%. ALASKA COURT SYSTEM, 2002 ANNUAL REPORT S-28 (2003).

149. Telephone Interview with Quinlan Steiner, attorney, Pub. Defender Agency (June 10, 2005); Telephone Interviews with Doug Kossler, attorney, Dep't of Law (June 10, 2005 and Nov. 2006); Telephone Interview with Linda Wilson, attorney, Pub. Defender Agency (Nov. 2006).

150. Telephone Interviews with Doug Kossler, attorney, Dep't of Law (Nov. 2006); Telephone Interview with Linda Wilson, attorney, Pub. Defender Agency

remanded to the trial courts for relief, attorneys and judges will be kept busy determining the appropriate response for each offender.

## VII. CONCLUSION

The discussion of *Blakely* continues to affect much of the appellate caseload, but it seems to have less effect on trial courts and trial attorneys. At this time, attorneys throughout the state debate a wide variety of issues. Some of the issues are legal: Will the supreme court uphold *Smart*? How will Alaska's courts finally resolve the other *Blakely* and *Apprendi* issues? Will the new law, once subjected to appellate scrutiny, be found constitutional? Will it comply with the *Blakely* requirements? Will the *Booker*<sup>151</sup> case eventually be found to apply to Alaska sentencing law?<sup>152</sup>

Other issues are more tied to agency and system caseloads and effects. Two and one-half years after the *Blakely* decision, the question of increases in active sentence lengths has not been researched. Anecdotally, attorneys believe that judges are imposing more suspended time and probation. One question is whether petitions to revoke probation will increase because offenders are subject to increasing probation supervision. Until the higher appellate courts have an opportunity to review some of the court of appeals decisions and until actual sentences imposed can be researched, many of the questions will remain.

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(Nov. 2006). Attorneys said that they were continuing to file new appeals. Consequently, the number of stayed cases is likely to grow while the supreme court is considering the petitions.

151. *United States v. Booker*, 543 U.S. 220 (2005). The Court found the federal sentencing guidelines unconstitutional based on its decision in *Blakely*; its remedy was to declare the guidelines voluntary.

152. Wool, *supra* note 28, at 3. Based upon the *Booker* decision, the author observed that “[b]ecause the rulings in the remedial opinion are not based in the Constitution but in the Court’s interpretation of the relevant federal statutes, they have no binding effect on state systems. The states are free to choose a different course, as is Congress.”