A RE-EVALUATION OF ALASKA'S PLEA BARGAINING BAN*

TERESA WHITE CARNS** AND DR. JOHN KRUSE**

I. INTRODUCTION

In 1975, Attorney General Avrum Gross banned plea bargaining in Alaska. Although few thought that the policy would still be in

---

* This article was prepared under a grant from the State Justice Institute. Points of view expressed herein are those of the authors and do not necessarily represent the official position or policies of the State Justice Institute.

** Senior Staff Associate, Alaska Judicial Council, Anchorage, Alaska; B.A., Kalamazoo College, 1967; Project Director for both the Judicial Council's original and present evaluations of Alaska's ban on plea bargaining.

*** Professor of Public Policy, Institute of Social and Economic Research, University of Alaska-Anchorage; Ph.D., University of Michigan, 1975; M.A., University of Michigan, 1975; B.A., Williams College, 1972; Research Consultant for the present re-evaluation of Alaska's ban on plea bargaining.

1. In his original ban, Attorney General Gross used the term "plea bargaining" to include both sentence bargaining and charge bargaining. A sentence bargain is an arrangement in which the defendant pleads guilty or nolo contendere in exchange for a specific sentence agreed to by the prosecutor, who then recommends it to the judge. A charge bargain is an arrangement in which the prosecutor agrees to reduce the original charge or dismiss one or more charges in exchange for the defendant's plea of guilty or nolo contendere. Plea bargaining in general is governed by Alaska Rule of
effect fifteen years later, the Alaska Judicial Council's most recent evaluation of the ban\(^2\) shows that it continues to affect virtually every important aspect of Alaska's criminal justice system.

Attorney General Gross enunciated several purposes for his decision to ban plea bargaining, including both the establishment of a system that could fairly charge, try and sentence defendants and the restoration of public confidence in the justice system.\(^3\) The attorney general also believed that the number of cases going to trial would increase as a result of the ban, that such an increase in trials would improve the skills of his prosecutorial staff.\(^4\) Nevertheless, the announcement met with some shock and stiff resistance from the legal community, including most prosecutors.

Although the National Advisory Commission on Criminal Justice Standards and Goals had, in 1973, called for the abolition of plea bargaining in all states by 1978,\(^5\) most experts considered such a ban impossible, undesirable or both.\(^6\) Many attorneys and scholars predicted that banning plea bargaining would result in a flood of defendants exercising their right to trial, jamming the courts and creating huge backlogs.\(^7\) Others suggested that it would be impossible to truly ban plea bargaining because it would simply be forced underground or

---


3. ALASKA BANS PLEA BARGAINING, supra note 2, at 14.

4. Id. at 15-16; see infra note 24 and accompanying text.


changed in nature. Still other attorneys argued that plea bargaining was a just and rational way to resolve cases because it enabled the parties with the best knowledge of the case, the prosecutor and defense attorney, to decide the outcome.

From 1975 to 1988, the social, economic and demographic characteristics of Alaska's criminal justice system changed significantly. In the face of a new criminal code, new provisions for presumptive sentencing and a drastically altered state economy, it was unclear whether the ban persisted and evolved or decayed. In 1988, the State Justice Institute provided funding for the Alaska Judicial Council to conduct a re-evaluation of the ban on plea bargaining. The study assessed the evidence for continued existence of the ban, analyzed the interaction of the ban with presumptive sentencing and the revised criminal code, and reviewed other demographic and economic factors that helped reshape Alaska’s criminal justice system.

The Judicial Council’s re-evaluation concluded that the original ban caused substantial decreases in both sentence and charge bargaining. Comparing the situation fifteen years ago to the situation today,


9. ALASKA BANS PLEA BARGAINING, supra note 2, at 242.


12. The state’s economy has cycled through two boom-bust periods since 1975. During construction of the Alaska pipeline for transport of oil from the North Slope, the economy benefited from increasing population and substantial construction money. That period started in 1974 and ended in 1978. The economy was relatively weak from 1978 until 1981, when oil prices increased worldwide and the state's revenues soared. Population and construction again increased rapidly until late 1985-early 1986. Oil prices then dropped suddenly. The economic upturns contributed substantial resources for increased law enforcement and justice system agencies, while the downturns caused limits on justice system funding and were used to argue for increased plea bargaining. See infra notes 227-30 and accompanying text.
the report found that the ban remains the official policy, albeit somewhat modified, of the attorney general's office. The ban has caused increased attention to the screening and charging decisions for the acceptance of cases. The standard shifted from probable cause to beyond a reasonable doubt. Charge bargaining became fairly common in most parts of the state during the latter half of the 1980s, although sentence bargaining remained infrequent. Finally, the report found that over the past fifteen years the percentage of convicted offenders sentenced to jail time increased substantially, and the mean active sentence length for those sentenced to jail lengthened.

This article summarizes the data and conclusions found in the Judicial Council's re-evaluation report, and elaborates on its recommendations. The article begins with a brief description of the history of the ban, including an analysis of its evolution over the last fifteen years. It then looks at the report's statistical and interview findings, and the Council's recommendations on the key issues of screening, charge reductions and dismissals, trials and the interaction of the ban with presumptive sentencing.

14. Id. The report further concluded that these trends probably resulted as much from increased societal concerns about crime as from presumptive sentencing and the ban on plea bargaining. Id.
15. The statistical analyses reported here relied on data taken from the state's PROMIS (Prosecutor's Management and Information System) database, supplemented with data from the Alaska Department of Public Safety's APSIN system (on prior criminal history and race) and the Department of Corrections' OBSCIS system (presumptive sentence and race verification). The information from the three databases was merged into a single file which was then analyzed on the University of Alaska-Anchorage's VAX, using SPSSX for the majority of the analyses.

The second major component of the re-evaluation of the ban was a series of interviews conducted with experienced attorneys, judges, police, defendants and corrections personnel. The interviews were conducted in several distinct groups. The first set of interviews included 27 attorneys and judges, approximately 35 police officers and 10 probation and parole officers, all of whom had handled criminal cases from 1975 or earlier through at least 1983. These interviews were partially structured and usually lasted one to two hours. The second set of interviews included about 100 judges and attorneys who were currently handling criminal cases. All had at least one year's experience, and most had substantially more. This group includes a few of the attorneys who had been interviewed earlier. The interviews were somewhat more structured and took about an hour each. Both sets of interviews included attorneys from a variety of communities; the second set covered all of the major rural areas as well as Anchorage, Fairbanks and Juneau. The attorneys in both sets included prosecutors, public defense attorneys and private attorneys experienced in criminal cases. Judges were drawn from both the trial and appellate courts. Twenty-nine interviews were conducted with defendants. See infra note 170.
II. HISTORY OF THE BAN

A. Plea Bargaining Practices: Pre-1975

Before the ban, prosecutors typically filed charges with the court without first screening the allegations brought to them by the police. In fact, most charges were either filed by the police officer, or the prosecutor filed charges identical to those recommended by the police. The lack of standards for accepting cases meant there was little consistency in screening decisions among prosecutors. The practical result was that the police could make arrests and bring charges with a minimum of investigation. These cases often suffered from evidentiary problems, making a plea bargain an attractive alternative to trial for the prosecutors.

Before the ban on plea bargaining, policies regarding plea negotiations were established in each local office, often by individual prosecutors. Most criminal cases were negotiated under Alaska Rule of Criminal Procedure 11(e). Attorneys throughout the state described the former criminal case disposition process in much the same terms in the Judicial Council's 1978 evaluation of the ban: "[N]egotiating was almost mandatory. We had so few trials we were afraid of..."
them." 22 Attorneys also agreed that while most judges were not directly involved in plea negotiations, some did indicate their approval of an arrangement prior to the actual entry of the plea. 23

The focus of plea negotiations was on the sentence. 24 Prosecutors and defense attorneys typically agreed on the specific sentence that a defendant should serve, and their recommendation was nearly always accepted by the judge. 25

Assistant district attorneys tended to be young and inexperienced, and most offices had a fairly high turnover rate. Because few cases were tried, assistant district attorneys did not gain much trial experience. 26

B. Implementation of the Ban

The attorney general announced on July 3, 1975 that his new policy prohibiting plea bargaining in most cases would take effect on August 15, 1975. Included in the prohibition were all recommendations for specific sentences, and charge reductions done solely to obtain a guilty plea. 27

Exceptions to the policy were allowed only with the permission of the attorney general's central office in Juneau. In 1980, Attorney General Wilson Condon relaxed this policy to permit the head of each local district attorney's office to authorize bargains. 28

Because of the degree of centralization in Alaska's criminal justice system, 29 the state's attorney general was able to prohibit plea bargaining by all state prosecutors through a simple intra-office edict. No

22. ALASKA BANS PLEA BARGAINING, supra note 2, at 11.
23. Id. at 6-7.
24. Attorney General Gross described the existing practices: "Presently, after the initial complaint is filed, negotiations take place with defense counsel over the appropriateness of the charge, continued conferences take place, and eventually as a result of either preliminary proceedings or continuous negotiation, some agreement is reached on sentence." Memorandum from Alaska Attorney General Avrum Gross to Alaska District Attorneys and Assistant District Attorneys 4 (July 24, 1975) [hereinafter Gross Memorandum], reprinted in THE BAN RE-EVALUATED, supra note 2, at A-4; see also ALASKA BANS PLEA BARGAINING, supra note 2, at 4.
25. ALASKA BANS PLEA BARGAINING, supra note 2, at 6.
26. Id. at 11.
27. Gross Memorandum, supra note 24, at 3-4.
28. ALASKA DEP'T OF LAW, CRIM. DIV., STANDARDS APPLICABLE TO CASE SCREENING AND PLEA NEGOTIATIONS 24-25 (June 1, 1980) [hereinafter 1980 STANDARDS], reprinted in THE BAN RE-EVALUATED, supra note 2, at A-13 to A-27.
29. Alaska's criminal justice system is characterized by highly-centralized, state-financed justice agencies. The Department of Law is headed by the attorney general, who is appointed by the governor. All of the state's district attorneys and assistant district attorneys are employed by the Department of Law. All courts are part of the state court system; there are no local or county courts. The Department of Corrections controls most of the state's correctional facilities. The state pays all jail and prison costs with the exception of a few local jails in rural towns and villages, which
change in statutes or court rules or cooperation from other agencies was necessary for his policy to take effect.

C. Immediate Effects of the Ban on Plea Bargaining: 1975-79

The Alaska Judicial Council's first evaluation of the effectiveness of the policy prohibiting plea bargaining found that plea bargaining as an institution was substantially curtailed.\(^{30}\) The ban eliminated most sentence recommendations. Charge bargaining persisted informally, but the opportunities were greatly attenuated, except in rural areas.\(^{31}\) Trial rates, which more than doubled in the two years after the ban, peaked in 1977 and dropped off slightly in 1978 and 1979, suggesting less rigid enforcement of the ban.\(^{32}\) For about a year after the ban, some judges took a more active role in plea negotiations,\(^{33}\) perhaps in an effort to obtain a fairer result. This practice halted after the Alaska Supreme Court decided in two separate cases that judges should not participate in plea discussions.\(^{34}\)

Critics of the policy suggested then, as now, that despite its official status the policy was never enforced.\(^{35}\) A few defense attorneys said that the policy did not inhibit their access to negotiated pleas.\(^{36}\) Others have suggested that because the data showed little substantial change in reductions and dismissals of charges in the first year after the ban, there is no proof that plea bargaining ever stopped.\(^{37}\) To at least some observers, the fact that sentences imposed after pleas of guilty or nolo contendere tend to be shorter than those imposed after conviction at trial is another indication of continuing plea bargaining.\(^{38}\)

---

are paid for by contracts with the state Department of Public Safety. Indigent defendants are represented by the state public defender. If a conflict arises within the Public Defender Agency, most affected clients are represented by another state agency, the Office of Public Advocacy.

30. ALASKA BANS PLEA BARGAINING, supra note 2, at 31.
31. For purposes of this study, rural areas of the state were defined as those communities with a single superior court (court of general jurisdiction) judge. In most such courts, the judge was assisted by a law-trained magistrate who handled most misdemeanors. These courts include Barrow, Bethel, Kenai, Ketchikan, Kodiak, Kotzebue, Nome, Palmer, Sitka and Valdez.
33. ALASKA BANS PLEA BARGAINING, supra note 2, at 111.
35. THE BAN RE-EVALUATED, supra note 2, at 9, 13-17.
36. Id. at 19.
37. Id. at 24.
38. W. McDonald, supra note 8, at 6.
Attorney General Gross emphasized the need to increase prosecutorial screening of police charges, both to prevent overcharging and to keep prosecutors’ caseloads manageable. Screening of charges filed by the police was a crucial element of the new policy. Since police throughout the state had been accustomed to making charging decisions, this aspect of the policy was controversial. In Anchorage, for example, according to a former police officer, the new screening procedures led to a “tough two years in the relationship between police and the district attorney.”

The adoption of a “beyond a reasonable doubt” standard for screening cases “forced [the police] to go back and become good investigators....” Screening standards were also tightened in other communities, but did not create the same degree of anxiety as in Anchorage.

The ban was not implemented uniformly throughout the state. The “local legal culture” shaped the contours of the policy in each area. In Southeast Alaska, for example, trial rates did not increase as much as in Anchorage or Fairbanks, although attorneys agreed that the policy was faithfully implemented. The legal community of Southeast Alaska had always been fairly collegial and remained so after the ban. In Fairbanks, by contrast, where the atmosphere had been adversarial prior to the ban, the trial rate, already the highest in the state, increased substantially. Anchorage trial rates also increased.

Case outcomes changed in two important ways after the ban. First, case disposition times dropped, rather than increased, as had been almost universally expected. Second, sentence lengths increased. In the first year after the ban, the primary increase in sentence length that could be statistically linked to the ban was for relatively low-risk offenders, those with minimal prior records convicted of non-violent offenses. In the second year after the ban,

---

39. The Ban Re-evaluated, supra note 2, at 35-36.
40. Id. at 37.
41. Id.
42. The term “local legal culture” is found in T. Church, A. Carlson, J. Lee & T. Tan, Justice Delayed: The Pace of Litigation in Urban Trial Courts 54 (1978) [hereinafter Justice Delayed]. The original 1978 study of the plea bargaining ban concluded that “situs of prosecution had stronger associations with differences in the outcomes of court dispositions than whether or not those dispositions were subject to the policy against plea bargaining.” Alaska Bans Plea Bargaining, supra note 2, at iii; see also Justice Delayed, supra at 235-41.
43. Southeast Alaska includes Juneau, Sitka and Ketchikan.
44. Alaska Bans Plea Bargaining, supra note 2, at 279-80 (Table V-1).
45. Id. at 45.
46. Id. at 279-80 (Table V-1).
47. Id. at 119-21.
48. Id. at 293-94 (Table VII-1).
49. Id. at 303 (Table VII-5).
sentences for violent offenders more than doubled, sentences for property offenders doubled and sentences for fraud offenses rose substantially.\textsuperscript{50} At least some of this change can be attributed to the prohibition on plea bargaining.

D. Changes in the Status of the Plea Bargaining Ban: 1980-90

The Alaska Attorney General still maintains an official policy prohibiting plea bargaining in most situations. However, attorneys who practiced in Alaska prior to the ban and continue to do so generally do not believe the current system resembles the 1975 system.\textsuperscript{51} Factors that caused the policy to change over the years include official changes promulgated by attorneys general who succeeded Avrum Gross, as well as incremental modifications that came about as local district attorneys were given progressively more discretion in implementing the policy without frequently consulting the central office in Juneau.

Perhaps the most interesting effect of these changes is that a continuum of perceptions of the policy still exists, ranging from those who profess ignorance of any prohibitions on plea bargaining\textsuperscript{52} to those who contend that exceptions to the policy are rare and that most pleas occur without specific agreed-upon concessions from the prosecutor.\textsuperscript{53} The most general understanding of the policy, even among many prosecutors, is that sentence bargains are prohibited absent special circumstances, but that charge bargaining is allowed.\textsuperscript{54}

The first important modification of the ban occurred in 1980. Gross' successor, Attorney General Wilson Condon issued guidelines permitting a wider range of charge reductions and dismissals.\textsuperscript{55} The guidelines reiterated the general policy of the Department of Law that prosecuting attorneys for the State of Alaska will not engage in the practice of plea bargaining.\textsuperscript{56} The guidelines, however, allowed the

\begin{itemize}
\item \textsuperscript{50} N. \textsc{Maroules} \& T. \textsc{White}, \emph{supra} note 32, at 20.
\item \textsuperscript{51} \emph{The Ban Re-evaluated}, \emph{supra} note 2, at 17-18.
\item \textsuperscript{52} \emph{Id.} at 24.
\item \textsuperscript{53} \emph{Id.} at 15.
\item \textsuperscript{54} \emph{Id.} at 17. Gross commented in 1988 that he had not expected the ban to remain as inflexible as it had been during the first few years. He noted that it was rigid in the beginning to prevent attorneys from getting "through the loopholes," but that its experimental nature guaranteed that the policy would change over time. \emph{Id.}
\item \textsuperscript{55} \emph{1980 Standards}, \emph{supra} note 28, at 24.
\item \textsuperscript{56} \emph{The Ban Re-evaluated}, \emph{supra} note 2, at 19. Plea bargaining was defined as:
\begin{quote}
a process which involves discussions between the prosecution and the defendant or his attorney, if he is represented, that are designed to arrive at an agreement under which the defendant will waive his right to trial and enter a plea of guilty to one or more charges in exchange for some concession from the prosecution usually in the form of a reduced charge, a reduced number
\end{quote}
\end{itemize}
defendant to plead, in cases not including offenses involving violence against a person, "to one or more counts included in the charging instrument which includes at least the major charge, if any, and which represents a plea to the 'essence' of the conduct engaged in and represented in the original charging document ...."57 The guidelines also noted that "information pertaining to the additional count or counts may be fully related to the court at sentencing."58

Condon's 1980 guidelines were described as "a major change" that "allowed some negotiation if the defendant pled to the essence of the crime committed."59 A long-time attorney noted that at the time these guidelines were issued, the central office in Juneau was "easing up on . . . control of all bargains."60 It was no longer necessary to "consult with upstairs" on every case.61 This attorney's theme was common among long-time lawyers: as the prosecutors' offices became more professional, thus satisfying one of the goals of the ban, more trust was placed in local offices. Turnover rates among prosecutors were lower as well, which encouraged the decentralization of authority.

The second important modification of the ban occurred in late 1986, when Attorney General Harold Brown issued a memorandum permitting sentence recommendations in cases where the sentence after trial was reasonably predictable.62 One district attorney believed

of charges and/or a particular sentence recommendation or agreement not to oppose a defense recommendation at sentencing.

Id. Although the written directives were carefully phrased to emphasize the policy of no plea negotiations, these changes were inevitably perceived as allowing some types of plea bargaining.

57. Id. at 24. Condon's guidelines required the prosecutor to obtain specific approval from the supervising attorney (usually the district attorney in charge of a local office) before dismissing the remaining counts. Id. at 25.

58. Id. This option became an item of negotiation between prosecutors and defense attorneys, as did discussions of whether to file aggravating and mitigating factors in presumptive sentencing cases, recommendations about probation conditions, and other factors related to the sentence. Id. at 157.

59. Id. at 19.

60. Id.

61. Id.

62. The memorandum stated:

Part II-C. of the Standards is modified to allow each office, through the supervising attorney or the intake attorney if one is designated, to make specific sentencing recommendations or to agree to not oppose a recommendation. This authority may be exercised in cases involving non-presumptive sentences when, based on experience and professional judgment, the specific sentence being recommended would be reasonably foreseeable after a trial. This authority may also be exercised in cases involving presumptive sentences when an analysis of cases involving similar facts, including aggravating or mitigating factors and published or unpublished appellate decisions, provide specific guidance as to an appropriate sentence.
this new provision was intended “to allow for plea bargaining without taking the political heat.”\textsuperscript{63} Another described the new modification more eloquently, saying that specific recommendations were not meant to bind the courts, but to lead them “to an area of a proper sentence, rather than having the attorney provide the sentence for them.”\textsuperscript{64}

These two sets of formal changes to the policy, combined with the revision of the criminal code and the implementation of presumptive sentencing in 1978, created an environment conducive to widespread charge bargaining. In 1989, one assistant district attorney said that, while the ban was officially absolute, charge bargaining was acceptable in practice.\textsuperscript{65} Another prosecutor noted that the formal ban had decayed since 1985 to become a ban “in name only.”\textsuperscript{66} An assistant public defender agreed that adherence to the ban relaxed in 1986. He attributed the change to a new awareness of the costs of prosecuting and imprisoning offenders sentenced to long presumptive terms.\textsuperscript{67}

Another attorney who had practiced in Alaska since the early 1970s said: “The ban does not drive the system the way it used to.”\textsuperscript{68} This is evidenced by the fact that budget documents prepared by criminal justice agencies for the legislature in the 1980s used arguments other than the ban to justify their needs for additional staff.\textsuperscript{69} Presumptive sentencing, a new criminal code and substantial changes in the state's population and economy replaced the plea bargaining policy as persuasive arguments for budgetary adjustments.

\begin{footnotes}
\footnotetext{63}{THE BAN RE-EVALUATED, supra note 2, at 20.}
\footnotetext{64}{\textit{Id.}}
\footnotetext{65}{\textit{Id.} at 21.}
\footnotetext{66}{\textit{Id.}}
\footnotetext{67}{\textit{Id.}}
\footnotetext{68}{\textit{Id.} at 17.}
\footnotetext{69}{One example is that budget documents prepared by the Department of Law for fiscal year 1987 (July 1986 through June 1987) emphasized the state's increasing population, the increased number of child sexual abuse cases, and the increased number of drug cases as reasons for funding new prosecutors and associated staff. The ban was not mentioned. Budget Request from Alaska Dep't of Law, Crim. Div., to Alaska Legislature (June 11, 1985). In the 1970s, by contrast, the ban had been used as an argument in favor of increased budgets for the state judicial system. A former Anchorage district attorney noted, “the ban was great as far as a budget because I could moan and groan about the burden of the ban and the legislature would listen.” THE BAN RE-EVALUATED, supra note 2, at 97.}
\end{footnotes
The Alaska Judicial Council’s 1978 report evaluating the ban on plea bargaining concluded that:

[P]lea bargaining as an institution was clearly curtailed. The routine expectation of a negotiated settlement was removed; for most practitioners justifiable reliance on negotiation to settle criminal cases greatly diminished in importance. There is less face-to-face discussion between adversaries, and when meetings do occur, they are not usually as productive as they used to be.70

By 1989, however, Anchorage prosecutors were describing the routine “pre-indictment” hearings71 as opportunities for charge bargaining in most cases. One prosecutor noted that charge bargaining was commonplace.72 Still, there was little bargaining after the intake phase of case processing.73

Although other areas of the state were not using pre-indictment hearing procedures to negotiate charges in 1989, attorneys still bargained their cases. An assistant prosecutor in one of the smaller communities said that he had heard about the ban before coming to Alaska two years earlier and was surprised to find as much plea bargaining in his new community as he had engaged in outside the state. He added that he thought the ban was enforced more in Anchorage than elsewhere in the state.74 Another attorney commented that the ban was a tool in the prosecutors’ arsenal: ‘I don’t recall being encumbered by the ban [after 1980]. The ban was a device, like those used by car salesmen: ‘I’ll have to ask the manager.’ Charge bargaining was commonplace.’75

These comments strongly suggest that the policy has decayed, particularly in the last five years. Although some attorneys paid relatively little attention to the attorney general’s policy in their practices,
a prohibition on plea bargaining did exist for many others. The prohibition applied most strongly to sentence bargaining. More often than not, cases went to “open sentencing,” at which both the defense attorney and prosecutor presented arguments and recommendations, with the prosecutor stopping short of recommending a specific term of years. The formal plea bargains that were made seemed to be reserved for cases that traditionally would have been bargained even under the policy at its strictest: sexual abuse or sexual assault cases, drug cases and cases involving informants.  

The evidence from the interviews also unequivocally suggests that prosecutors regularly engaged in charge bargaining, although most of these bargains were never formalized under Alaska Rule of Criminal Procedure 11. Attorneys appeared to interpret this rule to require notice to the court of an agreement only if the prosecutor recommended a specific sentence. Some attorneys viewed the charge bargaining that occurred as consistent with the existing attorney general’s guidelines; others believed that the situation was inconsistent with the policy but that bargaining was necessary or justified.

A manual for defense attorneys prepared in 1989 for the Alaska Bar Association’s Continuing Legal Education program sheds further light on current practices. The manual notes that in Anchorage, felony charge bargaining with the state is fairly common, while sentence bargaining is much less frequent. The manual also describes practices in other parts of the state. For example, although plea negotiations are not discussed in the pointers given for Juneau and the Second Judicial District, the manual notes that charge bargaining is common in Fairbanks, but sentence bargaining is not.

Interviews indicate that differences in enforcing the ban depending upon the area of the state are common knowledge. A district attorney in Palmer said that he did not think the ban was a clear one, but merely that plea bargaining was “frowned on to some degree.”

---

76. Id. at 25.
77. Id. at 26.
78. Id.
79. Id.
80. S. ORLANSKY, CRIMINAL DEFENSE (1989). The manual commented that plea bargaining by Anchorage municipal prosecutors was standard practice. Municipal prosecutors, who handle only misdemeanors, are hired by the municipality of Anchorage and therefore are not subject to the state’s ban on plea bargaining. Id. at 7.
81. Id.
82. The Second Judicial District includes the Barrow, Nome and Kotzebue courts.
83. S. ORLANSKY, supra note 80, at Fourth Judicial District (Fairbanks) Practice appendix.
84. THE BAN RE-EVALUATED, supra note 2, at 14.
A public defender in Fairbanks perceived a much stricter policy, saying that there was "appreciably less negotiation in Fairbanks than in other parts of the state."\textsuperscript{85}

Although conventional wisdom held that the ban never was intended for the rural areas of the state, and that no one in the Bush followed it, a fairly large number of the attorneys actually working in Bush communities believed that the ban fully applied to them. In Bethel, a public defender noted that the local prosecutors were "very careful not to show an appearance of plea bargaining."\textsuperscript{86} Because he had worked in other communities, he added that in those areas, the "sensitivity to the prohibition that there is in Bethel" was not always present.\textsuperscript{87}

Attorneys were asked to speculate about what might happen if the ban were eliminated. Although some said that nothing would change, the majority thought the system would change in various ways. Fewer trials, less care taken in police work, less diligent prosecutors, and greater efficiency in the criminal justice system were all seen as possible results of eliminating the ban. Even attorneys who said that the ban was merely pro forma responded to the question about its elimination by citing potential changes.\textsuperscript{88} Some believed there would be less uniformity in the treatment of defendants.\textsuperscript{89} Others thought that elimination of the ban would result in a smaller prison population, fewer trials, and a less-costly justice system.\textsuperscript{90}

Whether the evidence is interpreted as supporting the proposition that the ban has evolved into a stable policy structuring the entry of pleas with relatively little of the bargaining that occurs in other jurisdictions, or as a decay of the policy into a shell maintained for public relations purposes, it was clear that the situation in Alaska in 1990 was not the same as it was in 1975. In 1975, sentence bargaining was the preferred mode of disposition of cases.\textsuperscript{91} By 1990, a guilty or nolo contendere plea with a bargained charge or charges appeared to be the most likely disposition of a case.\textsuperscript{92} While police played a major role in determining the charge to be filed in 1975, prosecutors are currently primarily responsible for charging decisions. Prior to 1975, turnover was high among prosecutors and few had significant trial experience. By 1990, the prosecutors' offices were considered generally professional and experienced at trials.

\textsuperscript{85} Id. at 14-15.
\textsuperscript{86} Id. at 15.
\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Id. at 16.
\textsuperscript{90} Id.
\textsuperscript{91} ALASKA BANS PLEA BARGAINING, supra note 2, at 1-12.
\textsuperscript{92} THE BAN RE-EVALUATED, supra note 2, at 26.
III. Long-Term Effects of the Ban on Plea Bargaining

The re-evaluation concluded that the ban on plea bargaining had several important long-term effects that were either agreed upon by most attorneys, judges and police officers, or suggested by phenomena that could be measured statistically. Pre-filing screening of cases by prosecutors led to new standards for police investigations, resulting in increased police professionalism. Sentence recommendations were initially severely curtailed, and were uncommon in 1990. Charge bargaining, which had been secondary to sentence recommendations as the mode of negotiation prior to the ban, was infrequent for a period of time after the ban, but became more important as a means of case disposition during the 1980s.

The re-evaluation of the ban concluded that the policy had effects on four major aspects of criminal justice case processing: screening and intake of cases by prosecutors, charge reductions and dismissals, trials, and sentencing practices. This section describes the re-evaluation's findings in three of these four areas of interest; sentencing is described in section IV below.

A. Screening

Because the range of possible sanctions against the defendant is dependent on the charges, the screening decisions affect all of the subsequent actions in a case. The attorney general saw screening of cases as the key to making the prohibition of plea bargaining work. He believed there would be substantially less impetus to reduce or dismiss charges later if the prosecutors chose a provable charge at the beginning of the case. In fact, interview and statistical data confirm that a more rigorous screening policy was implemented with the ban.

---

93. The statistical analyses reported in the re-evaluation relied on a database taken from the state's PROMIS system. See supra note 15. The database included all felony charges referred to the Department of Law during 1984-87, and data for 1974-76 cases originally reported in the Alaska Judicial Council's 1978 evaluation of the ban on plea bargaining. The database from the 1978 evaluation included all felony arrests from Anchorage, Fairbanks and Juneau that occurred between August 16, 1974 and August 14, 1976. In the 1978 evaluation, each individual charge constituted a unit of analysis. In the present re-evaluation, for both the 1974-76 and the 1984-87 database, a single case was the unit of analysis. The case was identified by the single most serious charge against the defendant, and, if the defendant was convicted, the single most serious charge of conviction. See The Ban Re-Evaluated, supra note 2, at B-1 to B-9. Because the entire universe of cases handled by prosecutors' offices was represented in the database, statistical methods appropriate to samples generally were not useful.

94. The Ban Re-Evaluated, supra note 2, at 31-35.
95. For a definition of screening see supra note 16.
96. The Ban Re-Evaluated, supra note 2, at 35.
and that this new screening policy generally took the charging decision away from the police and put it into the hands of the prosecutor.\textsuperscript{97} This screening policy also encouraged police officers to improve the quality of their investigations.\textsuperscript{98}

The new screening policy adopted a "beyond a reasonable doubt" standard for accepting cases.\textsuperscript{99} The policy was implemented vigorously in Anchorage and Fairbanks, and adopted in most other parts of the state. The changes brought about by more rigorous screening were among the most significant and long-lasting effects of the ban. Prior to the ban, only about 8\% of the arrested or referred cases brought by the police in Anchorage, Fairbanks and Juneau were screened out (Table 1). During the first year after the ban, a small but significant increase to 11\% occurred. Between 1984 and 1987, about 30\% of cases were screened out (Table 1).\textsuperscript{100}

Attorneys and police officers interviewed agreed that the initial increase in the number of cases screened out was bought at a high price. Because the officers had customarily perceived themselves as making the charging decision, the attorney general's policy of claiming this function for prosecutors left them angry. They were concerned that criminals were not being prosecuted and that victims were not receiving redress. In the longer run, however, police opinion grew more positive. A veteran police officer described the effects of the policy on the Anchorage Police Department, saying that police work prior to 1975 was "very sloppy," and police rarely went to court. After the ban, the prosecutorial demands for stronger cases necessitated better investigations by the police.\textsuperscript{101}

The statistical evidence supported the interview finding that the new case screening was one of the most effective aspects of the plea bargaining ban, particularly because it resulted in improved police work. This was most evident in Anchorage and Fairbanks, where the district attorneys' offices were large enough to permit one or a handful

\textsuperscript{97} Id. at 36.

\textsuperscript{98} Id. at 37.

\textsuperscript{99} Id. at A-16 to A-17. The previous standard had been "probable cause." Id. at 1.

\textsuperscript{100} Id. at 32. Anchorage, Fairbanks and Juneau are the three largest communities in Alaska. For the original evaluation, data was collected only in those three cities. For comparisons to the 1984-87 database, therefore, only data from the same three cities was used. Even so, the 1984-87 data were not entirely comparable to the earlier 1974-76 data because the 1980s database included cases that were referred to the prosecutor prior to an arrest, while the 1970s database included only cases in which an arrest had been confirmed. However, limiting the 1980s database to cases in which an arrest was confirmed would not necessarily make the two databases more comparable, because the 1980s cases probably benefited from greatly improved police work, perhaps making them stronger than the earlier cases.

\textsuperscript{101} Id. at 37.
<table>
<thead>
<tr>
<th>Year</th>
<th>N</th>
<th>%</th>
<th>N</th>
<th>%</th>
<th>N</th>
<th>%</th>
<th>N</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>All Charges Screened Out</td>
<td>94</td>
<td>8%</td>
<td>125</td>
<td>11%</td>
<td>650</td>
<td>31%</td>
<td>536</td>
<td>29%</td>
</tr>
<tr>
<td>All Charges Dismissed</td>
<td>449</td>
<td>30%</td>
<td>452</td>
<td>40%</td>
<td>443</td>
<td>22%</td>
<td>395</td>
<td>21%</td>
</tr>
<tr>
<td>Plea to Reduced Charge</td>
<td>271</td>
<td>24%</td>
<td>203</td>
<td>18%</td>
<td>385</td>
<td>19%</td>
<td>349</td>
<td>19%</td>
</tr>
<tr>
<td>Plea to Original Charge</td>
<td>254</td>
<td>22%</td>
<td>254</td>
<td>22%</td>
<td>439</td>
<td>23%</td>
<td>423</td>
<td>23%</td>
</tr>
<tr>
<td>Trial Conviction</td>
<td>44</td>
<td>4%</td>
<td>44</td>
<td>4%</td>
<td>77</td>
<td>7%</td>
<td>122</td>
<td>6%</td>
</tr>
<tr>
<td>Trial Acquittal</td>
<td>31</td>
<td>3%</td>
<td>31</td>
<td>3%</td>
<td>33</td>
<td>3%</td>
<td>31</td>
<td>3%</td>
</tr>
<tr>
<td>Conviction Rate Per 100 Cases Filed and Completed</td>
<td>50%</td>
<td>47%</td>
<td>47%</td>
<td>47%</td>
<td>33%</td>
<td>33%</td>
<td>33%</td>
<td>33%</td>
</tr>
</tbody>
</table>

*Cases open because of an outstanding warrant or for other reasons were not included in the database. This included about 7% of the 1987 cases that were in the database as of early 1989 when it was compiled.
of attorneys to screen most felonies. It was somewhat less applicable to smaller offices where the combination of fewer attorneys and more cases coming from villages gave the police more opportunity to exercise their traditional prerogative of deciding the criminal charges. In rural areas where weather, distance, and lack of transportation between villages often limited access to justice agencies, few police charges were screened prior to filing. Police and troopers continued to file charges without consulting prosecutors because defendants had to be arraigned within twenty-four hours of arrest. In such communities, prosecutorial review of the case occurred after arrest, and was often postponed until after indictment.

1. Anchorage. Screening in Anchorage was dominated by the head of the intake section, who had been screening cases since 1975. He recalled that the intake practices prior to the ban were very informal, and that the most junior district attorney would usually be assigned to evaluate cases. The result was that most cases were filed and later negotiated. In a separate interview, the same attorney said that a formal intake procedure was set up for screening cases immediately after the ban. He estimated that 30 to 40% of the cases referred by the police in the first two years after the ban were rejected, but added that the percentage was now lower. A former chief of police corroborated the informal nature of pre-ban screening of cases, noting that many were handled by telephone. He also commented that after the ban cases not only had to meet the beyond a reasonable doubt test, but sometimes had to meet additional criteria, such as having an eyewitness in a drug case. He believed that these additional criteria eliminated many provable cases.

The term "screening" came to encompass all pre-indictment activity in Anchorage, and to cover case discussions with defense attorneys as well as unilateral decisions about a case by the prosecutor. Most persons interviewed, including prosecutors, agreed that

102. About 95% of Alaska's communities cannot be reached by road or railroad. Access is only by airplane, snow machine or dog sled in the winter, or boats in the summer. These communities include both major towns such as Barrow, Bethel, Ketchikan, Kodiak, Kotzebue, Nome and Sitka, and over 200 smaller villages spread throughout the state.
103. ALASKA R. CRIM. P. 5(a); see also ALASKA STAT. § 12.25.150(a) (1990).
104. THE BAN RE-EVALUATED, supra note 2, at 41.
105. Id.; see also id. at 33 (Table 2) (showing the percentage of Anchorage cases screened out was 28% in 1984 and 23% in 1987).
106. Id. at 41.
107. Defendants in Alaska have a constitutional right to indictment by a grand jury. ALASKA CONST. art. I, § 8. In practice, this right is often waived and an information is filed by the prosecutor.
108. THE BAN RE-EVALUATED, supra note 2, at 42.
in Anchorage, pre-indictment screening often involved charge bargain-
ing, despite the official prohibition of plea negotiations.109 This charge
bargaining was defended as a necessary means of conserving system
resources, despite the fact that it had been established as an institution
at least since the early 1980s, well before the state began experiencing
revenue losses.110 Screening in Anchorage was defined by the prosecu-
tors as including both the intake activities of the prosecutor's office
prior to filing charges and the prosecutors' review of cases during the
post-filing/pre-indictment period.111

2. Fairbanks. The Fairbanks district attorney's office screened
out more cases in both 1984 and in 1987 than any other in the state. It
was second only to the Bush office in 1985 and 1986.112 Public defense
attorneys in Fairbanks perceived a set screening policy and could iden-
tify the people responsible for screening various types of cases. Police
officers and private defense attorneys did not perceive as much organi-
ization.113 One long-time police officer commented that when he
started work shortly before the ban took effect, cases were "plea bar-
gained on a wide open basis."114 He added that immediately after the
ban there was more filing of multiple charges, but that many of the
extra charges were dismissed. The situation in 1988, in his view, was
quite fluid, with screening practices primarily dependent on the dis-
trict attorney's resources at any given time.115 An assistant district
attorney also emphasized the role of resources in screening. In addi-
tion, he applied other subjective criteria to his screening decisions,
such as whether it would be "worth the time and money to convict [a
particular] case."116 The role of resources and such subjective criteria
was not as prominent for Anchorage attorneys.117

Although Fairbanks screening practices adhered to the same
standard of proof "beyond a reasonable doubt," fewer cases were ac-
cepted for prosecution than in Anchorage.118 This suggests either
more rigorous consideration of cases or application of other screening
criteria, or both. It could also suggest that Fairbanks police did not

109. Id.
110. Id. See infra notes 227-30 and accompanying text.
111. Id.
112. Id. at 45. Fairbanks screened out 40% of all cases in 1984 and 44% in 1987.
Id.
113. Id.
114. Id.
115. Id.
116. Id.
117. Id.
118. Id.
prepare cases as well as in Anchorage. None of the interviewees, however, suggested this as a possibility. The fact that filed conviction rates for Fairbanks were similar to those for Anchorage, despite the much higher Fairbanks screening rate, suggests that other criteria, such as available resources or "bother to the system," may have played a larger part in Fairbanks screening.

3. Other Locations. Between 1984 and 1987, Anchorage screened out 23 to 28% of its cases, the lowest proportion of any community in the state. Anchorage was closely followed by the Southeast Alaska communities, including Juneau, Sitka and Ketchikan, which screened out 24 to 29% of their cases. The Southcentral Alaska communities of Kenai, Kodiak, Palmer and Valdez screened out cases at rates varying from 28 to 36%. Fairbanks and the Bush communities declined the highest number of cases for prosecution. Fairbanks screened out 40 to 44% of its cases, while the Bush screened out 36 to 43%.

In places other than Anchorage and Fairbanks, prosecutors understood "screening" to mean the opportunity to review the charges brought by police and to decide what charge(s) to file. Although many prosecutors, even in the most rural areas, used the beyond a reasonable doubt standard set by the attorney general's office for screening, the standard often was not applied until after the case had been filed in court. At times it was not applied until after indictment, but this was still viewed as screening if the prosecutor felt this was the first opportunity to assess the strength of the case, the need for prosecution and available resources.

One of the attorney general's purposes in instituting the ban on plea bargaining was to clarify roles within the criminal justice system. He believed that police should investigate, prosecutors should charge and convict, and judges should sentence. The screening procedures and standards represented one of the points at which the policy changed existing practices and improved the quality of cases. Although the screening policy was adopted to further the prohibition of plea bargaining, it stands out as an example of a successful policy in its own right.

119. Id.
120. Id.
121. Id. at 46.
122. Id.
123. Id.
124. Id. at 47-48.
B. Charge Reductions and Dismissals

The Alaska Judicial Council's re-evaluation of the ban shows that charge bargaining increased in the middle to late 1980s, and emerged as a significant influence on the disposition of cases. This charge bargaining continues despite the attorney general's written policy prohibiting the reduction or dismissal of charges solely to obtain a guilty plea. Thus, it appears that current practices in Alaska's district attorney's offices are significantly out of step with the attorney general's official policy.

Charge reductions and dismissals may be tangible evidence of charge bargaining, or they may represent unilateral and legitimate decisions by prosecutors to change the charge in response to new information about the case. Attorney General Gross recognized the difficulties of trying to distinguish between legitimate charge reductions or dismissals and those that violated the spirit of his policy. In retrospect, it was relatively easy to change the sentence bargaining practices that had been the standard means of case disposition, because the sentence recommendation was an objectively verifiable action by the prosecutor. Implementing rigorous screening standards was more difficult, but was accomplished within a few years. Prohibiting charge bargaining, however, appears to have been an overly idealistic goal.

125. Id. at 54. Most prosecutors, defense attorneys and judges interviewed said that charge bargaining occurred fairly routinely in most parts of the state. Id. at 61-63. In general, this was perceived as a different situation than existed in the late 1970s and early 1980s. The percentage of pleas associated with reduced or dismissed charges increased from 37% in 1984 to 48% in 1987. Id. at 62 (Table 8).

126. The current policy states:

Unless specifically approved by the Attorney General or the Chief Prosecutor prior to the initiation of any negotiations, prosecuting attorneys will not enter into any agreement or understanding with a defendant or his attorney that is designed to lead to the entry of a plea of guilty . . . that in any way involves a concession with respect to the charge to be filed or which involves an agreement to dismiss or reduce a charge, except as provided under subsection (2) below.

1980 STANDARDS, supra note 28, at 24. Subsection (2) permits the prosecutor, in multiple count cases (excluding felony violent offenses) to communicate to the defendant prior to the entry of a plea that counts may be dismissed if three conditions are met: (1) the defendant must plead to the "essence" of the conduct charged; (2) the information pertaining to the additional count or counts "may be fully related to the court at sentencing;" and (3) the office supervisor approves any dismissals and decides whether the dismissed counts are mentioned at sentencing. Id. at 24-25.

127. ALASKA BANS PLEA BARGAINING, supra note 2, at 24-25. See also THE BAN RE-EVALUATED, supra note 2, at 48.

128. THE BAN RE-EVALUATED, supra note 2, at 48-49.
Immediately after the ban, charge bargaining appeared to decline somewhat in most parts of the state. The exceptions were the rural areas, where most attorneys viewed charge negotiations as essential to the disposition of cases, and Fairbanks. In Fairbanks, charge reductions and dismissals increased during the first year after the ban, but dropped thereafter.

The initial differences between Fairbanks and the rest of the state may have been a result of a combination of the local legal culture and the appointment of a new district attorney in February of 1975, who immediately instituted his own ban on plea bargaining, six months before the statewide ban took effect. His ban permitted the filing of multiple charges, some of which could later be dismissed under appropriate circumstances. After the attorney general's clarification of the statewide policy in June of 1976, charge reductions and dismissals dropped in Fairbanks. Figure 1 emphasizes the relatively low percentage of reductions and dismissals associated with guilty pleas in Fairbanks as compared to Anchorage during the mid-1980s.

The charge bargaining policy evolved very differently in Anchorage than in Fairbanks. In Anchorage, prosecutors emphasized the importance of the pre-indictment hearing in the disposition of cases. Table 2 shows the timing of charge reductions by geographic area. It is clear that the pre-indictment phase accounts for far more charge reductions in Anchorage than elsewhere in the state.

The statistical analysis and interview data from the Council's most recent study showed that charge reductions increased steadily between 1984 and 1987, from 19% of all cases to the pre-ban level of 24% of all cases (Table 1). Dismissal of some charges associated with

129. *Alaska Bans Plea Bargaining*, supra note 2, at 27; see also *The Ban Re-Evaluated*, supra note 2, at 49.
131. *The Ban Re-Evaluated*, supra note 2, at 65; see also infra Figure 1 (showing that charge reductions and dismissals dropped substantially in Anchorage during the first year after the ban, but increased noticeably in Fairbanks).
133. *The Ban Re-Evaluated*, supra note 2, at 49.
134. *Alaska Bans Plea Bargaining*, supra note 2, at 235-36. In 1979 the Fairbanks district attorney said, "We probably have more multiple-count cases than any other part of the state. It's a strategy for going to trial. You're better off going to trial with as many charges as possible. But at sentencing, it doesn't matter much. That hasn't changed much since 1976." *The Ban Re-Evaluated*, supra note 2, at 49. In a 1989 interview, the district attorney in Fairbanks confirmed that his interpretation of the ban permitted the filing of multiple charges that could be dismissed later under appropriate circumstances. He said, "Sentence bargaining is what the ban addressed. Structured approval requirements for charge bargaining were included in the ban. There has always been plea bargaining but it has been within the structured guidelines of the Department of Law." *Id.* at 22.
a plea to other charges also increased. In 1984, 1985 and 1986, about 18% of filed cases fit into this category; that percentage increased to 25% in 1987.\textsuperscript{136}

\begin{table}
\centering
\begin{tabular}{|c|c|c|c|c|}
\hline
\textbf{TIMING OF CHARGE REDUCTIONS WITH PLEA} & \textbf{Screening} & \textbf{Before Indictment} & \textbf{Indictment \\ 
& & & & Final Disposition} \\
& & & \textbf{& Before Final} & \textbf{Disposition} \\
\hline
\textbf{By Major Geographic Area} & & & & \\
Statewide & 1\% & 17\% & 7\% & 6\% \\
Anchorage & 1\% & 23\% & 4\% & 7\% \\
Fairbanks & 0\% & 5\% & 5\% & 4\% \\
Southeast & 3\% & 13\% & 10\% & 4\% \\
Southcentral & 0\% & 0\% & 7\% & 7\% \\
Bush & 0\% & 23\% & 16\% & 8\% \\
\hline
\end{tabular}
\caption{Timing of Charge Reductions with Plea}
\end{table}

Most attorneys in Alaska agreed that charge reductions and dismissals occurred more frequently in the late 1980s than in the 1970s.

\textsuperscript{136} \textit{Id.} at 54, 56 (Table 6).
shortly after the ban was implemented.137 Many said that charge negotiations are used to dispose of the majority of their cases.138 The statistical data indicated that 55 to 60% of the convicted defendants in the 1984-87 database pled guilty or nolo contendere, and had at least one charge reduced or one or more charges against them dismissed.139

In the 1980s, charge reductions varied by duration of the case disposition process, type of offense, amount of the reduction, and location.140 Fairbanks had the largest percentage of offenders convicted on the original most serious charge. It also had the lowest percentage of persons convicted of either lesser felonies or misdemeanors, and the highest percentage convicted after trial.141 Barrow had the highest percentage of tried cases, and moderate percentages of lesser felonies and misdemeanors resulting in convictions.142 In the smaller communities, except for Barrow, Kenai, Palmer and Sitka, only about one-third of the convictions were based on pleas to the top charge.143

The percentage of felonies reduced to misdemeanors in Anchorage was one of the highest in Alaska; the percentage of reductions to lesser felonies was among the lowest.144 A relatively high percentage of Anchorage defendants were convicted after a trial, which may corroborate the interview testimony that little negotiating occurred in Anchorage after the pre-indictment process was completed.145

Charge reductions also varied by type of offense. Except for the unclassified offense of first degree misconduct involving a controlled substance, drug charges were seldom reduced, whereas assault charges were frequently reduced. Unclassified and class A offenses, the most serious crimes, were rarely reduced to misdemeanors, though such reductions were common for other types of offenses. For example, of those defendants charged with second degree assault, a class B offense, and convicted of any offense, only 16% were convicted of the assault charge, while 55.7% were convicted of misdemeanors.146

137. Id. at 54.
138. Id. at 66, 67 (Table 9).
139. Id. at 69 (Table 10).
140. Id. at 77.
141. Id.
142. Id.
143. Id.
144. Id. Of convicted Anchorage cases that started as felonies, 29% ended with the single most serious charge for which a conviction was obtained being a misdemeanor. Fourteen percent of convicted Anchorage cases ended in a lesser felony, and 45% ended with a plea to the original charge. Id.
145. Id. at 71-74.
146. Id. at C-1 to C-10 (Table C-1).
While charge discussions might have occurred in many cases, negotiations resulted in measurable benefits to the defendant in about half of the cases.\textsuperscript{147} The clearest benefit came either from the reduction of a presumptive charge to a non-presumptive charge, or from a felony to a misdemeanor. Dropping to a non-presumptive charge not only meant that the defendant had a good chance of receiving a shorter sentence, but also that the defendant would be eligible for discretionary parole.\textsuperscript{148} Reduction from a felony to a misdemeanor could also provide a shorter sentence, but meant more importantly that any future conviction on a felony charge would not trigger the presumptive sentencing statutes.\textsuperscript{149} Some attorneys, particularly prosecutors, perceived the primary benefits as flowing to the state through cost savings, rather than to the defendant.\textsuperscript{150}

Alaska communities did not exhibit unusual case disposition patterns in comparison to other jurisdictions.\textsuperscript{151} Guilty or nolo contendere pleas remained the overwhelming mode of disposition,\textsuperscript{152} and a sizable minority of defendants appeared to have entered pleas to the original charges against them.\textsuperscript{153} Although charge bargaining may have seemed rampant to those within Alaska, it still affected only about half of the filed and completed cases.\textsuperscript{154} Another 8.9% of the convicted defendants had been convicted after trial,\textsuperscript{155} leaving a full 41% of all convicted defendants who pled guilty or nolo contendere to the original charges against them.

\begin{itemize}
\item \textsuperscript{147} Id. at 69.
\item \textsuperscript{148} Id. at 60; see infra note 184.
\item \textsuperscript{149} See infra note 181.
\item \textsuperscript{150} THE BAN RE-EVALUATED, supra note 2, at 60.
\item \textsuperscript{151} In 1986, 9% of Anchorage cases that were filed by the prosecutor and had been completed at the time of the study went to trial; 15% of Fairbanks cases and 6% of cases in Southeast Alaska were tried. THE BAN RE-EVALUATED, supra note 2, at 92 (Table 20). According to a report prepared by the Bureau of Justice Statistics of the United States Department of Justice, only Portland, Oregon had a comparable rate at 12%. Philadelphia had the highest rate at 30%. Manhattan's rate was 3%, San Diego's rate was 2%, and the trial rate in Washington, D.C., was 7%. B. Boland, C. Conly, L. Warner, R. Sones & W. Martin, The Prosecution of Felony Arrests 1986, at 5 (1989) (Table 3). Another Bureau of Justice Statistics report suggested that communities with high trial rates tended to have lower charge reduction rates. B. Boland & B. Forst, The Prevalence of Guilty Pleas 3 (1986).
\item \textsuperscript{152} Id. at 92 (Table 20).
\item \textsuperscript{153} THE BAN RE-EVALUATED, supra note 2, at 68, 69 (Table 10).
\item \textsuperscript{154} Id. at 62 (Table 8).
\item \textsuperscript{155} Id. at 103 (Table 25).
\end{itemize}
C. Trials

The attorney general expected that his new policy would create more trials; that was, in fact, one of his primary reasons for prohibiting plea bargaining.156 As Table 1 shows, the trial rate did increase in the first year after the ban, from 7% of all cases to 10%.157 Other Alaska Judicial Council studies found that the rate of trials increased again in 1977, but levelled off by 1978.158 By 1980, the trial rate had dropped considerably,159 and by 1984 the rate had dropped back to 7% of all arrests or cases referred to the prosecutors as felonies. The rate stayed at about that level through 1987.160 The increase in the trial rate immediately after the ban may be attributable to the ban itself. The gradual decline in the trial rate and its stability in the mid-1980s suggest that the justice system adjusted to the ban and to subsequent changes in the criminal code and sentencing structure without resorting to trials. Still, Alaska trial rates for filed and completed cases in 1986 were higher than most other major jurisdictions in the United States during that year.161 The continuing high trial rates were related partially to the ban and partially to the current presumptive sentencing laws.

The evidence, both statistical and interview, strongly supports the conclusion that while trials did increase for the first two to three years

156. Mr. Gross said in an interview in 1978 that, "The major concern I had after I was appointed Attorney General was the general level of performance of prosecutors' offices. There were lots of lag times, the conviction rates were appalling, especially in one office." ALASKA BANS PLEA BARGAINING, supra note 2, at 13-15. Other attorneys concurred that there were problems: "[I]n 1973 one of the top trial men in this office... didn't try a single case.... You can't tell me that every one of those cases had evidentiary problems." Id. at 15.

157. Data from other Judicial Council studies show that the percentage of charges (the unit of analysis in all of the Council studies conducted on cases filed between 1974 and 1981) convicted after trial rose from 8.5% in the year before the ban to 15.3% in the first year after the ban. In the second year after the ban, the rate was 22.4%. In 1978, it was 21.8%, and in 1979, it was 21.2%. In 1980, it dropped to 15.8%. It is likely that these changes in trial rates were at least partially related to the ban on plea bargaining. The declines in 1979 and 1980 reflect the system's eventual adjustment to the ban. The lower figure for 1980 is probably due to a combination of factors, including the new standards for case disposition adopted by the Attorney General's office, see supra note 28, the adoption of the new criminal code and presumptive sentencing. See N. MAROULES & T. WHITE, supra note 32, at 15; ALASKA JUDICIAL COUNCIL, ALASKA FELONY SENTENCES: 1980, at 56 (1982).

158. N. MAROULES & T. WHITE, supra note 32, at 15.

159. ALASKA JUDICIAL COUNCIL, ALASKA FELONY SENTENCES: 1980, at 56.

160. THE BAN RE-EVALUATED, supra note 2, at 91.

161. Id. at 91, 93 (Table 21).
after the ban, the increase was handled without adding significant resources to the system. Although a backlog in civil cases was attributed to the ban at one point, no new judges were added specifically because of the ban. However, resources allocated to the Alaska judicial system did increase during the years after the ban. Between 1977 and 1980, the operating budgets for state judicial agencies typically increased by 30 to 50%. Between 1980 and 1986, operating budgets increased by another 67% for courts and public safety, and by as much as 300% for corrections. The increases, however, were arguably related to population growth and substantially higher state revenues from oil, rather than to policy changes.

One major issue related to trials was the persistent question of whether sentences imposed after trial were harsher than those for defendants who pled guilty or nolo contendere. The existence of a differential, or “tariff,” related to post-trial sentences has been taken by some as a form of implicit plea bargaining. A past Judicial Council study has shown consistent evidence of trial/plea differentials in sentences for certain types of offenses. Most attorneys and judges interviewed for the present study, however, said that even though a defendant might receive a longer sentence after trial, there were no trial differentials. Instead, they insisted, longer sentences were justified either by facts about the case that became known at trial or by the offender’s denial of his acts in the face of overwhelming evidence of guilt. A judge suggested that it was the defendant’s position at trial rather than the act of going to trial itself that was considered in determining sentence length. Other judges and attorneys believed that defendants could receive shorter sentences after trial. An Anchorage judge thought that a sympathetic jury could help the defendant’s cause. An Anchorage defense attorney, however, attributed the benefit to the judge’s opportunity to see the defendant as more human.

---

162. The Alaska Court System’s Administrative Director, Arthur Snowden, said resources had been diverted for the trying of criminal cases due to the increase in trials related to the plea bargaining ban. He added: “It may take three or four months more time to process civil cases.” No Crisis in the Courts, Official Says, Anchorage Daily News, May 22, 1978, at A2, col. 6.

163. The Ban Re-Evaluated, supra note 2, at 99. Data was provided by individual agencies.

164. Id. at 98-100.

165. Id. at 108; see McDonald, From Plea Negotiations to Coercive Justice, 13 LAW & SOC’Y REV. 385, 386 (1979).

166. N. Maroules & T. White, supra note 32, at 43-45.

167. The Ban Re-Evaluated, supra note 2, at 108.

168. Id. at 116.

169. Id.
Only two of the defendants interviewed for the study had actually gone to trial. Slightly more than half of the defendants interviewed, however, thought they would have fared better had they gone to trial, because they believed that trial would have produced more facts in their favor. However, many defendants said that their attorneys had advised them against going to trial. The primary reason given by the attorneys, according to the defendants, was that the defendants would be sentenced to longer terms if convicted at trial.

The statistical analysis of trial differentials was separated into consideration of the "in/out" decision and the mean active sentence length. Of the five offenses studied, only two with enough trials to test showed some evidence of trial differentials in the in/out decision. This modest effect could have been merely an artifact of the limited information available to include in the models. Sentence lengths for convictions of third degree drug offenses and sexual assault in the second degree showed some measurable variance in the multiple regression analysis. Again, however, limited information was available for inclusion in the models. In short, there was no evidence of a widespread trial differential, although differences for individual offenses or defendants were shown.

170. *Id.* at 103. Twenty-nine defendants were interviewed. All were incarcerated. *Id.* The difficulties of obtaining interviews with probationers made speaking with them prohibitively expensive. The defendants had to be reasonably articulate, and to have been sentenced within the past few years. No attempt was made to get a representative sample because of the various difficulties involved.

171. *Id.*

172. *Id.* at 105.

173. Test analyses of groups of offenses tended to yield spurious results. Instead, common specific offenses were used in the analysis. Logit analysis and multiple regression were used to test the interaction of plea/trial decisions with the variables of presumptive sentence status, number of prior felonies and number of convicted charges. THE BAN RE-EVALUATED, *supra* note 2, at 109.

174. The "in/out" decision is the judge's decision whether to sentence the offender to some amount of jail time as opposed to placing the offender directly on probation or suspending all jail time imposed. *Id.* at 139.

175. "Mean active sentence length" is the net amount of time the offender was sentenced to serve, meaning the total amount of jail time imposed less any suspended time. *Id.*

176. The two offenses were theft in the second degree, a class C felony typically involving theft of property valued between $500 and $25,000, *see* ALASKA STAT. § 11.46.130 (1989), and drugs in the third degree, a class B felony usually involving the sale of cocaine, *see id.* § 11.71.030.

177. Neither of the logit models explained the variance in the in/out decision well, however. The variance explained was 14% for theft in the second degree and 23% for drugs in the third degree. THE BAN RE-EVALUATED, *supra* note 2, at 110.

178. *Id.* at 114.
IV. SENTENCING AND THE BAN

The sentencing hearing is in many ways the pivotal point of the criminal justice system. Everything that precedes it is oriented toward it; all that follows is structured by the decisions made at that time. Although the attorney general insisted that it was his intent to return sentencing to the judiciary, and not to affect it directly, the prohibition of plea bargaining had profound consequences for sentencing practices in Alaska. The ban, in turn, has been deeply affected by the 1978 adoption of the new criminal code and the presumptive sentencing scheme. The new code and presumptive sentencing statute represented the societal and academic trends toward reconsidering the usefulness of rehabilitation theories and dealing with crime and criminals more severely.\(^\text{179}\)

A. The Structure of Alaska’s Presumptive Sentencing Law and the Revised Criminal Code

The revision of the criminal code and the introduction of presumptive sentencing were the major policy changes that occurred after the institution of the ban in 1975. Although the ban did result in longer sentences for offenders, prohibiting plea bargaining did not halt the impetus in the legislature and among the public for a new approach to sentencing. Presumptive sentencing was based on the Twentieth Century Fund’s recommendations for a “just deserts” sentencing structure that allowed more judicial discretion than “flat time” proposals, and more legislative structure than mandatory minimums.\(^\text{180}\)

Alaska’s presumptive sentencing statutes specify the exact sentence to be imposed on the typical offender for serious first offenses and for all repeat felony offenders.\(^\text{181}\) The sentence can be adjusted only by using statutory or non-statutory aggravating and mitigating factors.\(^\text{182}\) In cases where imposition of the presumptive sentence would result in manifest injustice, the case can be referred to a three-


\(^{180}\) See generally A. DERSHOWITZ, FAIR AND CERTAIN PUNISHMENT: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING (1976).

\(^{181}\) In general, presumptive sentencing applies to all offenders convicted of Class A felonies, and to those Class B and C offenders who have been convicted of a prior felony or who directed the illegal act toward public officers. ALASKA STAT. § 12.55.125(c)-(e) (1990). It also applies to the unclassified offenses of first degree sexual assault and first degree sexual abuse of a minor, and in a limited number of other circumstances. See id. § 12.55.125(i).

\(^{182}\) Id. § 12.55.155.
judge panel for a decision on the sentence. Discretionary parole is not available for offenders sentenced presumptively.

Presumptive sentencing directly affected only a minority of both the convicted offenders studied and all offenders sentenced in Alaska courts. The Alaska Court of Appeals, however, has used presumptive sentencing as a reference in deciding appropriate sentences for non-presumptive offenses, thus indirectly extending the influence of presumptive sentencing to all felony offenders.

Alaska established its Criminal Code Revision Commission in 1975. At that time, Alaska's criminal code had not changed substantially since the early territorial days, when federal decisionmakers had adopted Oregon's statutes with few revisions. The Commission followed the Model Penal Code, which categorizes offenses by levels of seriousness. It also redefined many offenses and broadened many of the grounds for conviction on some offenses by liberalizing intent provisions to include recklessness, thereby making convictions easier to obtain. Most of the Commission's recommendations were adopted

---

183. **Id.** § 12.55.165-175.
184. Offenders who are sentenced non-presumptively to no more that 180 days are eligible for parole at the discretion of the parole board after serving one-quarter of their sentence. **Alaska Stat.** § 33.16.090(a) (1986); **id.** § 33.16.100(e) (1986 & Supp. 1990). Presumptively-sentenced defendants are eligible for parole only after serving their entire sentence less "good time," **id.** § 33.16.090(b)-(c) (1986), of up to one-third of the sentence. **Id.** § 33.20.010(a). If the actual sentence is longer than the presumptive term because of aggravating factors or consecutive sentences, discretionary parole is available during the extended period of the sentence. **Id.** § 33.16.090(b).
185. THE BAN RE-EVALUATED, supra note 2, at 126.
186. For example, 37% of all sentenced offenders incarcerated on November 5, 1986 had presumptive sentences. **Alaska Dep't of Corrections, 1987 Annual Report** 59.
187. The court of appeals has held that "[n]ormally, a first offender should receive a more favorable sentence than the presumptive sentence for a second offender. It is clear that this rule should be violated only in an exceptional case." Austin v. State, 627 P.2d 657, 657-58 (Alaska Ct. App. 1981) (per curiam).
189. The judicial members of the Code Revision Commission formally objected to the structure of the revised code. The two judges stated, "The majority of the sub-commission, in its proposed major revision of the Code, has proposed a maize [sic] of different types and degrees of crime which will create a colossal bureaucracy in the criminal justice system of the state . . . ." Letter from Ralph E. Moody, Presiding
by the legislature in 1978.\textsuperscript{190} The 1978 revisions did not address drug offenses, which were recodified in 1982 into a structure consistent with the earlier revised offenses.\textsuperscript{191} In 1983, sexual offenses also were recodified, with most offenses reclassified and made subject to more severe penalties.\textsuperscript{192}

Presumptive sentencing was of far greater interest to most attorneys and judges interviewed for this study than were the changes in the criminal code. Attorneys in Alaska viewed the relatively broad provisions of the code, in combination with presumptive sentencing, as greatly increasing the power of the prosecutor. They did not agree, however, upon how the new code and sentencing scheme interacted with the plea bargaining ban. No consensus, even within individual communities, could be ascertained about the changes wrought upon the ban by the introduction of presumptive sentencing.\textsuperscript{193}

The difficulty in interpreting these changes may have resulted from the fact that the introduction of presumptive sentencing coincided with national trends toward increased emphasis on non-rehabilitative sentencing policies,\textsuperscript{194} increased openness about and prosecution of sexual offenses,\textsuperscript{195} and very substantial demographic and economic changes within the state.\textsuperscript{196} Any one of these changes alone could have obscured the interpretation of the interaction of the ban and presumptive sentencing. Together, they complicated it to the point that it would be virtually impossible to accurately determine any precise relationships.

The role of Alaska's appellate courts in structuring sentencing has also been critical. The court of appeals was established in 1980, shortly after the new code took effect, with jurisdiction over criminal cases. The supreme court retained a discretionary right of appeal. The court of appeals, which, in addition to its merit appeal decisions, had decided over 1,100 sentence appeals by 1989,\textsuperscript{197} has adopted the

---

\textsuperscript{190} The new criminal code completely rewrote Titles 11 and 12 of the Alaska Statutes. See Stern, \textit{supra} note 10.


\textsuperscript{193} \textit{THE BAN RE-EVALUATED}, \textit{supra} note 2, at 125-28.


\textsuperscript{195} Memorandum from Gretchen Keiser, Legislative Analyst, to Alaska House of Representatives 3 (June 21, 1985) (available in the Alaska Judicial Council library).

\textsuperscript{196} \textit{See infra} notes 227-30 and accompanying text.

\textsuperscript{197} \textit{Id.} at 295 (citation omitted).
role envisioned by the original proponents of appellate review of sentencing. The court routinely reduces excessive sentences to conform them to sentences given in comparable cases. It has also created an extensive body of case law articulating appropriate sentencing principles, establishing benchmark terms for many types of offenses, and promulgating standards for the extent to which sentences can be increased in aggravated cases. In addition, the court of appeals has moved to limit possible excesses in the presumptive sentencing scheme by regulating the total aggregate terms that may be imposed for offenders convicted of multiple counts of certain crimes.199

B. Changes in Sentencing Patterns

Whatever the cause, sentence lengths increased substantially in Alaska after the ban, and defendants' chances of being sentenced to straight probation were substantially lessened. Tables 3 and 4 show the changes in sentencing patterns for specific offenses over the past fifteen years, clearly delineating the marked increase in the severity of sentences for most offenses between the 1970s and 1980s. Comparison of offenses from the 1970s with those after the 1980 change in the criminal code must be made with caution because many of the offenses are not precisely comparable. In a few instances, apparent changes in sentencing patterns indicate a lack of comparability between the pre-1980 criminal code and the revised code, rather than actual changes in sentencing.

The likelihood of receiving a jail sentence200 increased for most offenses immediately after the ban, and was even higher in the mid-1980s than in the period from 1975 to 1976 for each major group of offenses.201 Among individual offenses the likelihood of receiving jail

199. Id. at 294.
200. Virtually all jails in Alaska are run by the state Department of Corrections. When a judge imposes a sentence of incarceration, the defendant is committed to the custody of the Department of Corrections, which then classifies the offender and determines the correctional facility to which he or she will be sent. ALASKA STAT. § 33.30.011 (1986 & Supp. 1990).
201. According to a recent Department of Justice study, Alaska's incarceration rates appeared to be about the same or lower for most offenses than the average for other state courts. For example, in 1986, 31% of Alaska felons convicted of first degree burglary received a sentence with no incarceration, as did 37% of those convicted of second degree burglary. In other state courts, the average for no incarceration was 26%. However, average drug trafficking probation rates for other states were 36%, while Alaska's rate for third and fourth degree drug offenses (Classes B and C) was 47%. Langan, Felony Sentences in State Courts, 1986, BUREAU OF JUSTICE STATISTICS BULLETIN 2 (Feb. 1989); The Ban Re-Evaluated, supra note 2, at 140 (Table 29).
time varied, with some decreases and some increases. Overall, however, three-quarters of the 1984 offenders were sentenced to some jail time. By 1987, the overall percentage of defendants incarcerated had dropped to 69%, due primarily to a drop from 71% down to 57% in the percentage of property offenders likely to go to jail (Table 3).

### Table 3

**OFFENDERS SENTENCED TO JAIL (*IN/OUT* DECISION) BY OFFENSE FOR ANCHORAGE/FAIRBANKS/JUNEAU**

<table>
<thead>
<tr>
<th>Offense</th>
<th>8/15/74-8/14/75</th>
<th>8/15/75-8/14/76</th>
<th>1984</th>
<th>1985</th>
<th>1986</th>
<th>1987</th>
</tr>
</thead>
<tbody>
<tr>
<td>Violent</td>
<td>62%</td>
<td>63%</td>
<td>79%</td>
<td>74%</td>
<td>84%</td>
<td>83%</td>
</tr>
<tr>
<td>Robbery I</td>
<td>80%</td>
<td>82%</td>
<td>97%</td>
<td>94%</td>
<td>100%</td>
<td>100%</td>
</tr>
<tr>
<td>Assault II &amp; III</td>
<td>57%</td>
<td>50%</td>
<td>71%</td>
<td>68%</td>
<td>73%</td>
<td>57%</td>
</tr>
<tr>
<td>Property</td>
<td>48%</td>
<td>51%</td>
<td>71%</td>
<td>63%</td>
<td>59%</td>
<td>57%</td>
</tr>
<tr>
<td>Burglary I</td>
<td>46%</td>
<td>67%</td>
<td>66%</td>
<td>63%</td>
<td>69%</td>
<td>69%</td>
</tr>
<tr>
<td>Burglary II</td>
<td>36%</td>
<td>51%</td>
<td>65%</td>
<td>63%</td>
<td>63%</td>
<td>58%</td>
</tr>
<tr>
<td>Theft II</td>
<td>46%</td>
<td>48%</td>
<td>57%</td>
<td>54%</td>
<td>49%</td>
<td>46%</td>
</tr>
<tr>
<td>Crim. Mischief II</td>
<td>[100%]</td>
<td>[20%]</td>
<td>64%</td>
<td>65%</td>
<td>47%</td>
<td>47%</td>
</tr>
<tr>
<td>Forgery II</td>
<td>78%</td>
<td>63%</td>
<td>68%</td>
<td>68%</td>
<td>57%</td>
<td>47%</td>
</tr>
<tr>
<td>Sexual</td>
<td>61%</td>
<td>77%</td>
<td>86%</td>
<td>86%</td>
<td>81%</td>
<td>90%</td>
</tr>
<tr>
<td>Sex Assault I</td>
<td>[75%]</td>
<td>92%</td>
<td>92%</td>
<td>87%</td>
<td>[88%]</td>
<td>94%</td>
</tr>
<tr>
<td>Sex Abuse I</td>
<td>[56%]</td>
<td>[67%]</td>
<td>95%</td>
<td>100%</td>
<td>91%</td>
<td>100%</td>
</tr>
<tr>
<td>Sex Abuse II</td>
<td>[0%]</td>
<td>[100%]</td>
<td>84%</td>
<td>78%</td>
<td>80%</td>
<td>80%</td>
</tr>
<tr>
<td>Drugs</td>
<td>36%</td>
<td>48%</td>
<td>67%</td>
<td>59%</td>
<td>59%</td>
<td>69%</td>
</tr>
<tr>
<td>Drugs III &amp; IV</td>
<td>38%</td>
<td>42%</td>
<td>60%</td>
<td>55%</td>
<td>53%</td>
<td>65%</td>
</tr>
<tr>
<td><strong>ALL OFFENSES</strong></td>
<td>51%</td>
<td>56%</td>
<td>75%</td>
<td>70%</td>
<td>68%</td>
<td>69%</td>
</tr>
</tbody>
</table>

Brackets [ ] indicate fewer than 10 cases.

Mean sentence lengths fluctuated more than the in/out decisions between 1976 and 1984.\(^{202}\) Sentence lengths increased for all offenses that carried first felony offender presumptive sentences. First degree robbery rose from 56 months to 61 months. Sexual assault in the first degree rose from 82 to 101 months, and sexual abuse in the first degree rose from 18 to 86 months.\(^{203}\) Sentences also increased for all other

\(^{202}\) See Table 4. Some differences may be due to lack of comparability among offenses, such as “robbery” under the old code, which included both armed robbery and “strongarm robbery.” These offenses are generally distinguished in the new code as robbery in the first degree and robbery in the second degree. **Alaska Stat. § 11.41.500-510 (1989).**

\(^{203}\) **The Ban Re-Evaluated, supra** note 2, at 141. There were fewer than ten cases in the 1975-76 group.
TABLE 4
MEAN ACTIVE SENTENCE LENGTH (IN MONTHS)
FOR SELECTED OFFENSES
FOR ANCHORAGE/FAIRBANKS/JUNEAU

<table>
<thead>
<tr>
<th></th>
<th>8/15/74-8/14/75</th>
<th>8/15/75-8/14/76</th>
<th>1984</th>
<th>1985</th>
<th>1986</th>
<th>1987</th>
</tr>
</thead>
<tbody>
<tr>
<td>Violent</td>
<td>17</td>
<td>15</td>
<td>23</td>
<td>25</td>
<td>30</td>
<td>19</td>
</tr>
<tr>
<td>Robbery I</td>
<td>32</td>
<td>20</td>
<td>61</td>
<td>80</td>
<td>127</td>
<td>55</td>
</tr>
<tr>
<td>Assault II &amp; III</td>
<td>11</td>
<td>9</td>
<td>13</td>
<td>13</td>
<td>14</td>
<td>16</td>
</tr>
<tr>
<td>Property</td>
<td>5</td>
<td>4</td>
<td>10</td>
<td>10</td>
<td>10</td>
<td>10</td>
</tr>
<tr>
<td>Burglary I</td>
<td>4</td>
<td>6</td>
<td>18</td>
<td>17</td>
<td>26</td>
<td>24</td>
</tr>
<tr>
<td>Burglary II</td>
<td>2</td>
<td>6</td>
<td>14</td>
<td>10</td>
<td>13</td>
<td>11</td>
</tr>
<tr>
<td>Theft II</td>
<td>4</td>
<td>3</td>
<td>9</td>
<td>10</td>
<td>7</td>
<td>8</td>
</tr>
<tr>
<td>Forgery II</td>
<td>13</td>
<td>8</td>
<td>17</td>
<td>13</td>
<td>14</td>
<td>10</td>
</tr>
<tr>
<td>Sexual</td>
<td>31</td>
<td>50</td>
<td>54</td>
<td>54</td>
<td>50</td>
<td>71</td>
</tr>
<tr>
<td>Sex Assault I</td>
<td>[57]</td>
<td>82</td>
<td>101</td>
<td>76</td>
<td>[69]</td>
<td>159</td>
</tr>
<tr>
<td>Sex Abuse I</td>
<td>[27]</td>
<td>[18]</td>
<td>86</td>
<td>111</td>
<td>89</td>
<td>81</td>
</tr>
<tr>
<td>Sex Abuse II</td>
<td>[0]</td>
<td>[18]</td>
<td>29</td>
<td>22</td>
<td>29</td>
<td>34</td>
</tr>
<tr>
<td>Drugs</td>
<td>5</td>
<td>17</td>
<td>18</td>
<td>14</td>
<td>12</td>
<td>13</td>
</tr>
<tr>
<td>Drugs III &amp; IV</td>
<td>4</td>
<td>8</td>
<td>10</td>
<td>14</td>
<td>11</td>
<td>15</td>
</tr>
<tr>
<td>ALL OFFENSES</td>
<td>13</td>
<td>17</td>
<td>29</td>
<td>26</td>
<td>31</td>
<td>27</td>
</tr>
</tbody>
</table>

Brackets [ ] indicate fewer than 10 cases.

offenses, reflecting a general tendency toward higher sentences.\(^{204}\) The total active time sentenced in 1974 was 7,377 months for 569 convictions. The total in 1975 was 8,922 months for 534 convictions.\(^{205}\) From 1984 through 1987, the average months of active time sentenced was 24,856 months per year for an average 931 convictions per year. The average active time per conviction in 1975 was 16.7 months; for the 1984 to 1987 period, it was 26.7 months. While some of the increase is due to the higher number of offenders, a substantial portion is due to the higher sentences.\(^{206}\)

\(^{204}\) See The Ban Re-Evaluated, supra note 2, at C-11 to C-18 (Tables C-2 to C-7). The tables show the sentences for each specific type of offense convicted in the 1984-87 database. The misdemeanors included in the tables were the most serious offenses convicted in cases where at least one original charge was a felony.

\(^{205}\) No accurate data are available on the actual amount of time served as compared to actual time sentenced for the average offender. Parole guidelines determine to some extent the amount of time served by offenders eligible for parole. Alaska Stat. § 33.16.090-100 (1986 & Supp. 1990). Good time provisions structure the amount of time served by presumptively-sentenced offenders, and also allow reductions in the time served by other offenders. See id. § 33.20.010 (1986).

\(^{206}\) Attorney General Gross commented during the first evaluation of the ban: "I'm inclined to believe that if we hadn't done a thing in terms of plea bargaining,
C. Sentencing and Plea Negotiations

The higher sentences after the ban were typically imposed by the judge in an open sentencing hearing\(^{207}\) with input from the presentence report investigator, the defense attorney and the prosecutor. Prior to the ban, the typical sentence would have been a negotiated agreement between the prosecutor and defense attorney, ratified by the judge in open court.\(^{208}\) After the ban, specific sentence agreements disappeared except in a relatively small number of cases. Thus, one of the first effects of the ban was the almost immediate realization of the attorney general's intention of returning sentencing to judges.\(^{209}\)

Despite the significant increase in charge bargaining during the mid-1980s, the interviews did not indicate that sentence bargaining or recommendations similarly increased.\(^{210}\) The stability of the prohibition of sentence recommendations may have resulted from the ease with which they could be monitored. In contrast, charge negotiations were almost impossible to adequately supervise. The changes in the criminal code and sentencing structure also made charge bargaining far more important than it had been in the past. Under the new code, the choice of charge was, within some broad limits, the choice of sentence.

Prosecutors maintained a role at sentencing, offering information to the judges about the defendants' characteristics, suggesting a range of sentences or a cap, or mentioning dismissed charges or aggravating factors. All of these functions were subject to discussion with the defense, although the discussions often took place only after a plea of guilty or nolo contendere had been entered.\(^{211}\) One rural private defense attorney described several types of sentencing agreements, including a cap on the sentence requested by the prosecutor, a non-

---

\(^{207}\) At an open sentencing hearing, the prosecutor and defendant are free to argue the merits of a specific sentence before the judge. THE BAN RE-EVALUATED, supra note 2, at 154.

\(^{208}\) Id. at 153-54.

\(^{209}\) Id. at 155.

\(^{210}\) Id. at 156.

\(^{211}\) In a manual on criminal defense prepared for the Continuing Legal Education program of the Alaska Bar Association, assistant public defender Susan Orlansky suggested the following:

[t]ry to negotiate that the dismissed or reduced counts will not be considered at sentencing. Try to stipulate to a version of the facts both sides will accept. Get these concessions in writing or on the record.

....

The state and the defense may agree not to file or not to contest reasonably debatable aggravators and mitigators. If that is part of the deal, make it explicit.
binding concurrence on sentence length between prosecutor and defense attorney, an open sentencing hearing, and, least common, a binding sentence agreement under Alaska Rule of Criminal Procedure 11(e).212

Judges, attorneys and defendants varied in their estimations of how much and in what ways the typical defendant benefited from plea negotiations. A judge in Southcentral Alaska believed that prosecutors' sentence recommendations, whether binding under Alaska Rule of Criminal Procedure 11 or not, depended upon each prosecutor's estimation of the judge's sentencing practices. He also thought that defendants generally benefited less by their pleas than did the system.213 A Southeast Alaska judge agreed and added that he believed defendants benefited more by avoiding a trial.214 A Southeast prosecutor suggested that defendants gained only peace of mind by thinking that they knew in advance what the sentence would be.215

An analysis of the mean sentence length for typical offenses suggested that charge reductions could be of great benefit to a defendant. Charge reductions can benefit a defendant both in terms of the sentence for the immediate offense and in terms of the record of convictions to be considered in future sentencings. For example, the mean sentence for assault in the first degree was 78.5 months. Because this is a Class A offense, even first-time felony offenders are subject to a presumptive sentence.216 If the charge was reduced to assault in the second degree, for which the mean active sentence was 24.6 months, the offender clearly received a substantial benefit. The reduction from assault in the second degree to assault in the third degree, which had a mean active sentence of 16.2 months, was less dramatic. The most common reduction was from assault in the third degree to the misdemeanor of assault in the fourth degree. Not only was the mean active sentence for assault in the fourth degree only 3.6 months, but presumptive sentences do not apply to repeat misdemeanor offenders.


212. The Ban Re-evaluated, supra note 2, at 157.
213. Id. at 160-61.
214. Id. at 161.
215. Id.
216. Id. at 162. The presumptive sentence for first felony offenders other than first degree murderers is five years, or seven years if the victim was seriously harmed or a firearm was used. Alaska Stat. § 12.55.125 (1990). Since first degree assault by definition causes serious harm to the victim, id. § 11.41.200, the typical first felony offender sentence would be seven years. Offenders sentenced presumptively are not eligible for parole but may earn good time of up to one-third of the sentence. See supra note 184.
Most importantly, if the defendant was convicted of a subsequent felony, the misdemeanor conviction did not affect his or her status as a first felony offender.\textsuperscript{217}

Plea bargaining for time served was found primarily in Anchorage. An Anchorage judge described the system:

The technique for sentence negotiations at the DA's office for a defendant charged with a felony can be setting the defendant's case aside for 30 to 90 days while the defendant stays in jail. After an agreed-upon time has elapsed, then the case is reduced to a misdemeanor. The defense makes a recommendation [to the judge] to time served and the state does not object.\textsuperscript{218}

Defense attorneys commented that "[t]he DA will reduce to a misdemeanor but won't take the action until the defendant has done time up front. This is done in less serious cases."\textsuperscript{219} The practice emphasizes the ability of the prosecutor in this situation to determine the defendant's sentence even more directly than by adjusting the level or number of charges.

Various commentators have suggested that structured sentencing systems comparable to Alaska's presumptive sentencing scheme would encourage charge bargaining. In Minnesota, for example, charge bargaining appeared to increase for some offenses after the introduction of sentencing guidelines.\textsuperscript{220} In Omaha, Nebraska, where third-offense drunk driving is a felony, 42\% of the third-offense charges filed were plea bargained down to second-offense charges.\textsuperscript{221}

Evidence from Alaska suggests that the percentage of charge reductions rose after the 1982-83 amendments increased the severity of presumptive sentences for some offenses and greatly expanded the number of defendants to whom presumptive sentencing would apply.\textsuperscript{222} The patterns of charge reductions, however, do not clearly support a hypothesis that the increase in charge reductions was a direct result of the changes in presumptive sentencing. For example, the

\textsuperscript{217} THE BAN RE-EVALUATED, supra note 2, at 162.

\textsuperscript{218} Id. at 163.

\textsuperscript{219} Id.

\textsuperscript{220} Cohen & Tonry, supra note 8, at 426. Cohen and Tonry cited the Minnesota Sentencing Guidelines Commission report, which showed that the proportion of charge reductions increased for cases with low criminal history scores. Fewer cases were actually convicted of aggravated robbery. There were apparently adjustments in case processing to avoid imposing the prescribed prison term for marginally serious defendants when prison was not deemed appropriate in every case by court personnel. With high criminal history scores, however, the proportion of charge reductions declined. Id.

\textsuperscript{221} S. WALKER, SENSE AND NONSENSE ABOUT CRIME 110 (2d ed. 1989).

\textsuperscript{222} THE BAN RE-EVALUATED, supra note 2, at 166.
definitions of sexual offenses were drastically revised in 1983, and penalties were increased for most sexual offenses. The rates of charge reductions for sexual offenses did not increase after 1984; they dropped in 1985 from 31% to 27%, increased in 1986 to 33%, and increased again in 1987 to 35%. The differences are not substantial in either direction, and do not suggest that the changes in either the code or the sentences played a role. The charge reduction rates for robbery in the first degree, which became subject to a five-year presumptive sentence for first felony offenders in 1983, also declined, from 31% in 1984 to 6% in 1985. Then they increased sharply, rising to 28% in 1986 and 46% in 1987.

Although some attorneys thought that the increasing amount of charge bargaining after 1985 was related to the requirement of presumptive sentences for first felony offenders, it is likely that other factors were more important. Chief among these factors were personnel changes in the attorney general’s office and the budget constraints related to declining state revenues because of the drop in world oil prices.

The relationship between presumptive sentencing and the ban on plea bargaining is complicated by the striking demographic and economic changes taking place in Alaska throughout the 1980s. The state's revenues, in 1979 dollars, tripled by 1982, from $1.5 billion to $4.5 billion, due to a combination of increased oil production at Prudhoe Bay and a tripling of world oil prices. In 1986, the state's economy plummeted, due to falling world oil prices, but began to recover in 1988 and 1989. Between 1979 and 1986, the state’s population increased over 30% to approximately 542,000, then dropped, but began increasing again in 1988 and 1989. Some of the problems in the state's justice system that were commonly attributed to the plea bargaining ban, presumptive sentencing, or both, were often better explained by reference to increases and decreases in the state’s revenues,
or to the dramatically increased numbers of convictions resulting from increased enforcement efforts in the early 1980s.231 Many attorneys believed that presumptive sentencing encouraged or forced charge bargaining, particularly for first offenders, but the statistical evidence did not provide any strong support for that hypothesis.

V. SUMMARY

The re-evaluation of the plea-bargaining ban found major differences between practices in Alaska before the ban and current practices that could be directly attributed to the ban. First, screening cases was dramatically increased, with consequent improvements in case quality. Second, routine sentence recommendations for specific terms were virtually eliminated soon after the ban and have not returned. As a result, most defendants are sentenced by the judge at an open hearing with participation by the prosecutor, defense attorney and pre-sentence reporter.

A third major finding was that charge bargaining was substantially curtailed for some years, but has become steadily more prevalent since the mid-1980s. A combination of circumstances appears responsible, including personnel changes in the attorney general's office and local district attorneys' offices, changes in the criminal code structure and the reduction of resources available for the prosecution of cases after mid-1986.

The data clearly show that sentences increased substantially in length in the years after the ban, and that the likelihood of a jail sentence increased for most offenders. Society's increased concern with crime and willingness to allocate significant resources to law enforcement, courts and corrections, however, were probably at least equally responsible for the longer sentences and larger jail populations as were the ban or presumptive sentencing alone.

Finally, appellate review of sentencing by the Alaska Court of Appeals and the Alaska Supreme Court has resulted in comprehensive case law guidelines for most offenses and benchmark sentences for several types and groups of offenses. The courts have extended the principles of the presumptive sentencing structure to all non-presumptive sentences in an effort to carry out the legislative mandate for greater fairness and uniformity in sentencing.

231. The analysis shows that neither increased population (up by 30%), nor higher crime rates (reported crime increased by 16% between 1980 and 1984) explain the 100% increase in the number of convicted offenders between 1980 and 1984. Criminal justice agency operating budget increases appear to be more closely related to the increase in convictions. See F. BREMSON & T. CARNS, ALASKA FELONY SENTENCES: 1984, at 54-61 (1987).
VI. SUMMARY OF RECOMMENDATIONS

The Alaska Judicial Council makes the following recommendations based on its findings from the re-evaluation of the ban on plea bargaining:

A. Screening

The Judicial Council recommends that the present high standards for screening be maintained.

According to most persons interviewed, the present screening policy is both a positive influence on the quality of cases and a useful tool for prosecutors. If extra time is needed for screening cases in some situations, especially in rural areas, that need should be formally recognized in the written policy guidelines.

B. Charge Bargaining

The Judicial Council recommends that the Attorney General clarify the current policy on charge bargaining.

Despite the attorney general's written policy prohibiting charge bargaining, most prosecutors, defense attorneys and judges interviewed said that charge bargaining occurred fairly routinely in most parts of the state. In general, they perceived this as a different situation than existed in the late 1970s and early 1980s. The statistical evidence also supported the hypothesis that charge bargaining increased substantially in the mid- to late-1980s.

The Alaska Judicial Council takes no position with respect to the practice of charge bargaining. The attorney general may wish either to reiterate the present written policy and encourage its application in practice, or to incorporate the existing practices into his policy. In either case, the written policy and actual practice should be consistent to avoid confusion among the legal community and the public.

C. Sentencing

Some aspects of presumptive sentencing should be reconsidered.

The legal community does not appear to have achieved a consensus about the merits of presumptive sentencing. Attorneys, judges, police officers and probation officers interviewed over the past two years expressed some satisfaction with the greater uniformity of sentences, but many were concerned that the length of presumptive sentences for some first felony offenders was too great, or that presumptive sentencing was too inflexible for first offenders' situations. Little concern was expressed about presumptive sentences for repeat offenders; most

of those interviewed seemed to believe that presumptive sentences were generally appropriate for them.

Presumptive sentencing influences the entire criminal justice system, from the arrest and charging decisions made by prosecutors to the numbers of offenders going to trial and being sentenced to overcrowded prisons. Although the ideas underlying presumptive sentencing are still useful, re-thinking the implementation of those ideas could be helpful. In the original presumptive sentencing proposals made by Professor Alan Dershowitz, for example, sentences were tied to narrowly-defined offenses. When presumptive sentencing was adopted in Alaska, it was combined with a criminal code in which the emphasis was on broader definitions of offenses. Sentences were imposed based on a system that classified all offenses into six general groups. Presumptive sentencing in Alaska might better meet the needs of practitioners and legislators if sentences were more closely tied to specific offenses.

Other proposals that have been made for altering presumptive sentencing include expanding it to cover all first felony offenders and all misdemeanor offenders, shortening the lengths of some terms, increasing others and providing discretionary parole. The Judicial Council does not take a position on any specific proposal. Rather, based on the interviews and information compiled in the course of the past ten years, the Council recommends that the legislature, through the Alaska Sentencing Commission, carefully review presumptive sentencing and its interactions with other statutes and case law, as well as its effects on the criminal justice system.

The Judicial Council recommends that the legislature establish procedures to thoroughly evaluate existing and proposed sentencing provisions to compare the relative seriousness of offenses, and carefully consider the full range of costs associated with new sentencing proposals. This process should begin immediately, before Alaska develops the virtually unsolvable prison overcrowding problems found in so many other states.

While the comparative contributions of presumptive sentencing, the plea bargaining ban and the changes in public attitudes in favor of tougher sentences are not necessarily clear, it is apparent that some combination of these factors, together with population and resource increases, have led to longer sentences overall and a much larger prison population. Alaska ranked fourth among the states in 1987 in the percentage of its population that it incarcerated.\(^{233}\)

In spite of Alaska's relatively large prison population, prison overcrowding is much less of a problem in Alaska than in many other

states. Abundant state resources, especially before 1986, allowed Alaska the flexibility to increase funding for its criminal justice agencies. Those substantial state resources are likely to decline, however, both as a result of decreasing oil production and public pressure for reduced government spending.

Alaska is not the only state that has adopted determinate sentencing laws that emphasize substantial prison terms. To the extent that the plea bargaining ban still exists in Alaska, however, prosecutors are constrained in taking economic realities into account in sentencing. The chance of receiving a reduced sentence in exchange for a plea in Alaska is substantially less than in most other states. It is likely that one reason for the increase in charge bargaining in Alaska is the perception of the actors in the criminal justice system that system resources are becoming more scarce.

This is not to say that plea bargaining, either in the form of sentence or charge bargaining, should be encouraged. Plea bargaining, to the extent it allows the system to conserve scarce resources, does so only by overriding the legislative intent that particular conduct constitutes a crime that should be sanctioned in a particular way. The costs of banning this mechanism have not been as great as anticipated, and the benefits to the criminal justice system have been substantial.

The consequence of Alaska's tough sentencing laws in the face of limited state resources will inevitably intensify pressure on the system to allow for more plea bargaining and make other systemic changes to allow the continued functioning of the criminal justice system. If the legislature structures its criminal code and sentencing provisions to incarcerate felons to a greater extent than it can pay for, the consequence can only be a deterioration in other aspects of the criminal justice system.

The Alaska Legislature has already taken the first step in this regard by establishing the Alaska Sentencing Commission. The Commission is charged with considering the seriousness of each offense in relation to other offenses, alternatives to traditional forms of incarceration, and the projected financial effect of changes in sentencing laws and practices. This Commission has the potential to solve many problems in Alaska's sentencing structure before the structure becomes unmanageable.

235. Id. § 44.19.571(2)(A).
236. Id. § 44.19.569(3), (8).
D. Current Case Law on Sentencing

The Judicial Council recommends that the legislature, through the Alaska Sentencing Commission, examine the benchmarks established by the state’s appellate courts to guide the discretion of judges.

The legislature and the Sentencing Commission should examine the various benchmarks set by the courts to determine whether there is sentencing law in those decisions that would be more effectively addressed by statutes, and whether the benchmarks and sentencing criteria could be summarized in a way that would make them easily accessible to judges, attorneys and the public. The Alaska Supreme Court and Alaska Court of Appeals have established many benchmarks and criteria to guide the discretion of sentencing judges. The appellate courts’ decisions have been extremely helpful in structuring sentencing activity in the trial courts. Because the decisions have not been compiled in one place, however, it is not always easy to find the current law on sentencing of a particular offense. Summarizing the case law related to sentencing, and possibly codifying portions of it, would have two primary benefits. Codification would permit factors inappropriately considered by an appellate court, such as the state’s resources, to be taken into account in setting benchmarks and guidelines. The process also would encourage input from agencies and persons affected by sentencing decisions, thus increasing the opportunities for accountability.