

# MEANINGLESS OR MANDATORY?: AUTOMATIC PROBATION'S REVIVAL AND THE RULE OF LENITY'S FALL IN *CHINUHUK V.* STATE

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## ABSTRACT

*Alaska's common-law probation system requires that the period of supervision imposed is accompanied by a suspended term of imprisonment. Violation of probation conditions may trigger this suspended term, sending the probationer to prison. Should the probationer complete the entire suspended sentence, he or she is then usually eligible for discharge from probation. In *Chinuhuk v. State*, the Alaska Supreme Court held that the state legislature had abrogated this traditional scheme with respect to felony sex offenders, replacing it with one that allowed probation to continue although the offenders had completed their suspended terms of imprisonment. This Comment argues that in so doing, the court closed its eyes to any ambiguity in the operative statute, bypassing the rule of lenity's lessons and enforcing a more punitive result than the legislature may have intended to create.*

## I. INTRODUCTION

It is widely accepted that the United States suffers from a mass incarceration problem.<sup>1</sup> One population within the criminal justice system that receives less attention than incarcerated individuals are those subject to alternative forms of punishment and supervision, including probation. This population is comprised of millions<sup>2</sup> and must abide by probation's myriad supervisory conditions<sup>3</sup> that often regulate individuals' behavior

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2. U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2017-2018 (Aug. 2020), [https://www.bjs.gov/content/pub/pdf/ppus1718\\_sum.pdf](https://www.bjs.gov/content/pub/pdf/ppus1718_sum.pdf).

3. Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of*

“far beyond what is covered by the criminal law.”<sup>4</sup> With one in fifty-five adults in the United States and one in sixty-six adults in Alaska subject to probation or parole,<sup>5</sup> the public ought to be assured that their respective legislatures are attentive to the public interests and consequences at stake.

In *Chinuhuk v. State*,<sup>6</sup> three sex offenders were sentenced under Alaska Statute section 12.55.125(o), a since-repealed provision that required the court to impose minimum suspended imprisonment and probationary periods depending on the given felony’s classification.<sup>7</sup> After repeated probation violations, all three offenders ultimately served their entire suspended sentences.<sup>8</sup> Because their total sentences were imposed, they each requested to be discharged from probation.<sup>9</sup> In each case, the superior court denied their motions to reject probation, holding that the length of probation was “specifically mandated by the legislature in AS 12.55.125(o).”<sup>10</sup>

The offenders appealed, arguing that section 12.55.125(o)’s repeal restored their right to refuse probation.<sup>11</sup> The court of appeals sided with the State on both issues, holding that the repeal was not retroactive and that the legislature had created mandatory probation that could not be refused.<sup>12</sup> The offenders petitioned for a hearing in the Alaska Supreme Court.<sup>13</sup> After conducting a textual analysis and examining the statute’s legislative history, the Alaska Supreme Court affirmed the court of appeals on all grounds, holding that the trial court had no discretion to modify the terms of the petitioners’ probations and that the repeal of section 12.55.125(o) was not retroactive.<sup>14</sup>

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*Recidivism*, 104 GEO. L.J. 291, 292, 295 (2016) (noting relative lack of attention compared to mass incarceration and the “battery of conditions” courts may impose to regulate a probationer’s behavior).

4. *Id.* at 295.

5. Ronald Fraser, *Alaska’s Parole Merry-Go-Round*, ANCHORAGE DAILY NEWS (Feb. 2, 2020), <https://www.adn.com/opinions/2020/02/02/alaskas-parole-merry-go-round/> (citing a study by PEW Charitable Trusts titled “Probation and Parole Systems Marked by High Stakes, Missed Opportunities”).

6. 472 P.3d 511 (Alaska 2020).

7. ALASKA STAT. § 12.55.125(o) (2006) (repealed 2016) (“The period of probation is in addition to any sentence received under (i) of this section and may not be suspended or reduced. Upon a defendant’s release from confinement in a correctional facility, the defendant is subject to this probation requirement and shall submit and comply with the terms and requirements of the probation.”); *Chinuhuk*, 472 P.3d at 513–14.

8. *Chinuhuk*, 472 P.3d at 513–14.

9. *Id.*

10. *Id.*

11. *Id.* at 514.

12. *Id.* at 515.

13. *Id.*

14. *Id.* at 516–22.

Consequently, the majority enforced a unique, toothless probationary scheme that was unaccompanied by the conventional enforcement mechanism: suspended prison time. The Alaska Supreme Court departed from Alaska's traditional understanding of probation to give force to an "inartfully drafted statute"<sup>15</sup> and denied several individuals freedom from supervision following the completion of their remaining suspended time.<sup>16</sup> In so doing, the court demonstrated a misdirected confidence in its statutory construction and a willingness to put the rule of lenity aside. The rule of lenity holds that "[a]mbiguities in criminal statutes must be narrowly read and construed strictly against the government."<sup>17</sup> It applies not only to provisions criminalizing activity but also to those imposing sentencing,<sup>18</sup> and the Alaska courts have accepted it as a default rule of statutory construction.<sup>19</sup> The court's rejection of the rule of lenity in its interpretation of section 12.55.125(o) opened the door to more punitive results than the legislature may have intended, both in this case and those in the future.

This Comment begins Part II with an overview of probation in Alaska and the statute under which the *Chinuhuk* petitioners were sentenced. Part III describes the facts of *Chinuhuk* and both the majority and the dissent's reasoning. Part IV analyzes why, in the absence of a clear statement from the state legislature and in keeping with the rule of lenity, the court should have (1) construed section 12.55.125(o) against the government and (2) held that probation was only mandatory at the time of sentencing and did not survive fulfillment of the offenders' suspended time.

## II. BACKGROUND

In Alaska, probationers live under supervision and additional court-imposed conditions for a prescribed period of time in exchange for suspended terms of imprisonment.<sup>20</sup> Probation allows offenders to rebuild their lives in a community setting while under strict supervision.<sup>21</sup> During probation, a defendant must obey all court orders and may be required to comply with a number of conditions, including the paying of fines or restitution, participation in rehabilitative programs, and

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15. *Id.* at 525 (Carney, J., dissenting).

16. *Id.* at 512-13.

17. *State v. Andrews*, 707 P.2d 900, 907 (Alaska 1985).

18. *State v. Parker*, 147 P.3d 690, 697 n.44 (Alaska 2006).

19. Lee Perla, *Mens Rea in Alaska: From Bad Thoughts to No Thoughts?*, 23 ALASKA L. REV. 139, 147 (2006).

20. *Chinuhuk v. State*, 413 P.3d 1215, 1219 (Alaska Ct. App. 2018).

21. Fraser, *supra* note 5.

compliance with sanctions imposed by the defendant's probation officer.<sup>22</sup> Traditionally imposed alongside probation, a suspended sentence is a delayed prison sentence that is enforced only if the defendant breaks the law or otherwise violates the terms of their probation.<sup>23</sup> Alaska courts have long considered suspended terms a "necessary prerequisite" to common law probation.<sup>24</sup>

Prior to *Chinuhuk v. State*, an Alaska court had only once upheld a probationary scheme unaccompanied by a suspended sentence. In *State v. Auliye*,<sup>25</sup> the Alaska Court of Appeals reviewed a now-repealed law stating that any youth convicted of underage drinking *must* be placed on probation until they were twenty-one years old, regardless of whether a suspended sentence was imposed.<sup>26</sup> Under Alaska common law, an individual may refuse probation and elect to serve active imprisonment instead.<sup>27</sup> Yet, the court held in *Auliye* that the legislature may abrogate probation's discretionary features, distinguishing this probationary scheme from "ordinary probation [because] neither the sentencing judge nor the defendant ha[d] any choice in the matter."<sup>28</sup>

In 2006, the Alaska Legislature created another mandatory probationary scheme. It enacted subsection (o) to ensure that felony sex offenders underwent a period of probationary supervision and submitted to periodic polygraph examinations.<sup>29</sup> This subsection required courts to impose minimum suspended imprisonment and probationary periods depending on the felony's classification.<sup>30</sup> It stated that "[t]he period of probation is in addition to any sentence received under (i) of this section and may not be suspended or reduced."<sup>31</sup> Prior to its repeal in 2016, this subsection gave rise to the sentencing issues in *Chinuhuk v. State*.<sup>32</sup>

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22. ALASKA STAT. § 12.55.100 (2020).

23. *What is a Suspended Sentence?*, ATTORNEYS.COM, <https://www.attorneys.com/parole-and-probation/suspended-sentence> (last visited Mar. 26, 2021).

24. *Chinuhuk v. State*, 472 P.3d 511, 515 (Alaska 2020); *see also Kelly v. State*, 842 P.2d 612, 613 (Alaska Ct. App. 1992) ("When a court sentences a defendant to serve a probationary period, the court must suspend a period of the sentence or else the probationary term is meaningless.").

25. 57 P.3d 711 (Alaska Ct. App. 2002).

26. ALASKA STAT. § 04.16.050 (2001) (repealed 2016); *Auliye*, 57 P.3d at 718.

27. *Chinuhuk*, 413 P.3d at 1216.

28. *Auliye*, 57 P.3d at 712.

29. *Chinuhuk*, 413 P.3d at 1216, 1219 (citing ALASKA STAT. § 12.55.125(o) (2006) (repealed 2016)).

30. ALASKA STAT. § 12.55.125(o).

31. *Id.*

32. *Chinuhuk*, 413 P.3d at 1217 (citing § 179, 2016 ALASKA SESS. LAWS ch. 36).

### III. CASE DESCRIPTION

In *Chinuhuk*, the Alaska Supreme Court reviewed a consolidated petition from three sex offenders: Edward Chinuhuk, Herman Malutin, and Christopher Wasili.<sup>33</sup> Each was sentenced pursuant to former Alaska Statute section 12.55.125(o).<sup>34</sup> Chinuhuk and Malutin had received convictions for attempted sexual abuse of a minor in the second degree and were each sentenced to five years of imprisonment, with three years suspended, and placed on probation for five years.<sup>35</sup> Wasili was convicted of sexual assault in the second degree and sentenced to seven years of imprisonment, with two years suspended and five years of probation.<sup>36</sup> All three petitioners violated their probations repeatedly, resulting in the enforcement of their maximum suspended sentences.<sup>37</sup> Upon completion of their suspended imprisonments, they each moved to be discharged from probation.<sup>38</sup> The superior courts denied each offender's motion and ordered them to continue probation upon release.<sup>39</sup>

All three petitioners appealed these denials, and the Alaska Court of Appeals consolidated their cases.<sup>40</sup> While the appeal was pending, the legislature repealed the provision under which they had been sentenced: subsection (o).<sup>41</sup> The petitioners subsequently moved to have their appeal declared moot.<sup>42</sup>

The Alaska Court of Appeals rejected the petitioners' argument, relying primarily on the United States Supreme Court's opinion in *Warden v. Marrero*.<sup>43</sup> The court also sided with the State on the merits, holding that the legislature has the power to create mandatory, stand-alone probation and that the legislative history of section 12.55.125(o) suggested that the legislature intended to do just that.<sup>44</sup> Finally, the petitioners appealed to the Alaska Supreme Court.<sup>45</sup>

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33. *Chinuhuk v. State*, 472 P.3d 511, 513 n.1 (Alaska 2020).

34. *Id.* at 513 (citing ALASKA STAT. § 12.55.125(o) (2006) (repealed 2016)). Substantially similar to the repealed subsection, Alaska Statute section 12.55.125(q) was enacted in 2017. ALASKA STAT. § 12.55.125(q) (2017).

35. *Chinuhuk*, 472 P.3d at 513.

36. *Id.* at 514.

37. *Id.* at 513–14.

38. *Id.*

39. *Id.*

40. *Id.* at 514.

41. *Id.*

42. *Id.*

43. *Id.* (citing 417 U.S. 653 (1974) (considering an analogous claim involving amendments to sentencing laws and rejecting the defendant's argument that he should benefit from a change that would allow drug offenders to apply for parole)).

44. *Id.* at 515.

45. *Id.*

## A. Majority Opinion

After conducting a textual analysis and examining subsection (o)'s legislative history, the Alaska Supreme Court affirmed the court of appeals on all grounds, holding that the trial court had no discretion to modify the terms of the petitioners' probations, and that the repeal of section 12.55.125(o) was not retroactive.<sup>46</sup>

The majority began with a textual analysis of the penultimate sentence of former section 12.55.125(o): "The period of probation is in addition to any sentence received under (i) of this section and may not be suspended or reduced."<sup>47</sup> It concluded that both the words "suspended" and "reduced" referred to the "period of probation."<sup>48</sup> It explained that the sentence's grammatical structure and natural reading supported this conclusion, but expressed concern because a court does not typically "suspend probation."<sup>49</sup> This reading of "suspended" therefore "d[id] not comport with common usage."<sup>50</sup> The majority reconciled this, however, by considering "the provision's placement within the section of the criminal procedure code dealing with sentencing."<sup>51</sup> It concluded that the legislature must have "considered imprisonment and probation together to constitute a sex offender's initial sentence," no part of which could be suspended, reduced, or otherwise altered at the trial court's discretion.<sup>52</sup> The majority concluded that by reading the statute in this way, no words were superfluous and the period of probation was necessarily mandatory.<sup>53</sup>

The majority then used the legislative history of section 12.55.125(o) to bolster its conclusion that, regardless of suspension, the statute required mandatory probation. It discussed the legislature's concern with sex offenders' recidivism and the importance of probation as a tool to subject such offenders to mandatory polygraph tests.<sup>54</sup>

Finally, the court held that the repeal of section 12.55.125(o) was not retroactive due to Alaska's general saving statute, which "prevents elimination of penalties or rights under repealed statutes when those

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46. *Id.*

47. *Id.* at 517 (citing ALASKA STAT. § 12.55.125(o) (2006) (repealed 2016)).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 517–18. The majority noted that trial courts usually retain discretion to set the terms of probation under Alaska Statute section 12.55.080. *Id.* at 518. Section 12.55.125(o), the majority reasoned, was intended to foreclose such discretionary sentencing. *Id.*

53. *Id.* at 518.

54. *Id.*

penalties attached or rights vested previously.”<sup>55</sup> The court reasoned that because the petitioners were placed on probation as part of the initial “penalty” incurred under subsection (o), the penalty had “attached” for purposes of the saving statute and therefore could not be “extinguished” by the repeal.<sup>56</sup> The court affirmed the court of appeals on all grounds, holding that the petitioners had to serve their remaining probationary periods.<sup>57</sup>

## B. Justice Carney’s Dissent

The lone dissenter in *Chinuhuk*, Justice Carney, reexamined the legislative history of section 12.55.125(o) and determined that the legislature did not clearly manifest an intent to create a new version of probation. Justice Carney, therefore, would have granted the petitioners’ requests to be released from supervision.

First, Justice Carney identified the legislation’s apparent purpose: to address “the recidivism problem caused by sex offenders choosing to serve prison time without probation following their release.”<sup>58</sup> She then traced this purpose through the subsection’s complicated history. First, the legislature increased the mandatory sentences of each felony.<sup>59</sup> Then, following hearings, it amended the bill to require mandatory probation, but did not yet include suspended time.<sup>60</sup> Finally, the legislature added mandatory suspension because “probation only has teeth if there’s suspended time so that if someone violates probation there’s an ability to punish them.”<sup>61</sup> Justice Carney concluded that the amendment was created to ensure that sentencing courts did not have discretion in sentencing sex offenders.<sup>62</sup>

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55. *Id.* at 520. (citing ALASKA STAT. § 01.10.100(a) (2020) (“The repeal or amendment of a law does not release or extinguish any penalty, forfeiture, or liability incurred . . . unless the repealing or amending act so provides expressly.”)).

56. *Id.* The court’s opinion was bolstered by the United States Supreme Court’s decision in *Warden v. Marrero*, in which the Supreme Court relied on an analogous saving statute to uphold a sentence after post-sentencing revisions to a federal sentencing statute. *Id.* (citing *Warden v. Marrero*, 417 U.S. 653, 660–64 (1974)).

57. *Id.* at 522.

58. *Id.* at 523 (Carney, J., dissenting).

59. *Id.*

60. *Id.*

61. *Id.* (quoting *Hearing on S.B. 218 Before H. Fin. Comm.*, 24th Leg., 2d Sess. (Mar. 7, 2006) (statement of Deputy Att’y Gen. Susan Parkes at 1:50:52–1:51:07) (internal quotation omitted)).

62. *Id.* at 524.

Justice Carney then discussed the necessity of having a suspended sentence run concurrently with probation. She noted that “[t]he court recognize[d] that probation requires suspended time in order to serve as the double-edged incentive and deterrent it was intended to be.”<sup>63</sup> These effects were felt by each of the petitioners, as they all ultimately served their entire suspended prison sentences after violating probation.<sup>64</sup> Justice Carney explained that it would offend long established precedent to add additional probation to the petitioners’ sentences.<sup>65</sup>

Finally, Justice Carney distinguished this case from *State v. Auliye*.<sup>66</sup> While the court in *Auliye* found that “the legislature appeared to have purposefully crafted the unique probationary scheme imposed on the juvenile offender,” the ambiguous legislative history of the “inartfully drafted” section 12.55.125(o), “lacks any such intentional progress toward a probationary scheme for sexual offenders resulting in ‘meaningless probation.’”<sup>67</sup> Thus, Justice Carney would have granted the petitioners’ requests for release from probation.<sup>68</sup>

#### IV. ANALYSIS

To begin, the Alaska Legislature was silent on the key question at issue in *Chinuhuk*: whether Alaska Statute section 12.55.125(o) was intended to supplant the common law understanding and prevailing operation of probation in Alaska.<sup>69</sup> Typically, the imposition of suspended time goes hand-in-hand with probation, and one may not be imposed without the other.<sup>70</sup> Section 12.55.125(o) seemed to tread the line between this traditional system and a novel one, requiring both the imposition of suspended time and probation at initial sentencing, while also stating that the probationary period is “in addition to any sentence received” under the primary sentencing provision and “may not be suspended or reduced.”<sup>71</sup> In the absence of a clear statement rendering the statute unambiguous on this point, the Alaska Supreme Court should

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63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 525 (citing *State v. Auliye*, 57 P.3d 711 (Alaska Ct. App. 2002)).

67. *Id.*

68. *Id.*

69. *Id.* at 516 (“The core disagreement between the parties concerns what happens when the probationer has served the entirety of the suspended term but has not been on probation for the required amount of time.”).

70. *Kelly v. State*, 842 P.2d 612, 613 (Alaska Ct. App. 1992) (“When a court sentences a defendant to serve a probationary period, the court *must* suspend a portion of the sentence or else the probationary term is meaningless.”) (emphasis added).

71. ALASKA STAT. § 04.16.050 (2001) (repealed 2016).

have, in accordance with the rule of lenity, construed the statute strictly and against the State.<sup>72</sup> Despite the statute’s silence, the *Chinuhuk* majority remained satisfied, without expressly saying so, that section 12.55.125(o) was unambiguous once it parsed the law’s text and legislative history.<sup>73</sup>

**A. The Majority Relied on Legislative History to Provide What Section 12.55.125(o)’s Text Could Not**

The *Chinuhuk* majority began its textual analysis by conceding that a plain reading of subsection (o) “does not comport with common usage” but nevertheless reconciled this reading with the provision’s placement within the broader felony sentencing statute.<sup>74</sup> The majority reasoned that because a sex offender’s initial sentence would consist of *both* mandatory imprisonment and mandatory probation, neither may be “suspended [n]or reduced.”<sup>75</sup> The court took that as adequate—when viewed alongside muddled legislative history—to mean that the mandatory probation survived the completion of all initial and suspended imprisonment.<sup>76</sup> Indeed, the court stopped short of finding that the plain text required anything more than removing a lower court’s discretion to “alter the terms of the mandatory probation . . . during initial sentencing”<sup>77</sup>—i.e., when the probation would have carried a mandatory suspended sentence.<sup>78</sup> The majority therefore relied on section 12.55.125(o)’s legislative history to bridge the gap and bypass any ambiguity.

However, the legislative history on which the majority relied is far from dispositive regarding the statute’s clarity. First, two of the most convincing statements for the majority’s interpretation of the statute derived from hearings that *predate* the inclusion of subsection (o)’s

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72. See *State v. Andrews*, 707 P.2d 900, 907 (Alaska 1985) (“If a statute establishing a penalty is susceptible of more than one meaning, it should be construed so as to provide the most lenient penalty.”); see also *Municipality of Anchorage v. Brooks*, 397 P.3d 346, 349 (Alaska Ct. App. 2017) (explaining that the rule of lenity “comes into play only when, after employing normal methods of statutory construction, the legislature’s intent cannot be ascertained or remains ambiguous” (quoting *De Nardo v. State*, 819 P.2d 903, 907 (Alaska Ct. App. 1991))).

73. *Chinuhuk*, 472 P.3d at 517–19.

74. *Id.* at 517–18.

75. *Id.*

76. *Id.* at 519.

77. *Id.* at 518 (emphasis added).

78. See ALASKA STAT. § 12.55.125(o) (2006) (repealed 2016) (requiring, in addition to the imposition of mandatory probation, the imposition of a mandatory suspended sentence).

mandatory suspended sentences.<sup>79</sup> While this, standing alone, does not serve as proof that the legislature intended subsection (o)'s probation to be "identical to probation imposed under section .080,"<sup>80</sup> it certainly dilutes the court's reasoning that the statute, as enacted, is unambiguous. Second, the court relied on then-Deputy Attorney General Susan Parkes' statement to the House Finance Committee to explain this later addition. By its own terms, however, the statement leaves open the possibility that the legislature did not intend the probationary period to outlast offenders' suspended time: "[P]robation only has teeth if there's suspended time required so that if someone violates probation there's an ability to punish them. And so, section eight now mandates that there be suspended time . . . ."<sup>81</sup> That the legislature would have intended only a fraction of the probation imposed to have "teeth" is inconsistent with the legislature's supposed effort to combat recidivism.<sup>82</sup>

### **B. The Majority's Interpretation of Section 12.55.125(o) Lacks Support in Alaska's Tradition of Common Law Probation**

The majority attempted to buttress its holding with a reference to *State v. Auliye*,<sup>83</sup> but that case is distinguishable in significant ways. There, Alaska Statute section 04.16.050<sup>84</sup> would not have necessarily carried an associated suspended sentence, or any prison time at all.<sup>85</sup> Because the statute dealt with minors' lower-level offenses, probation, and the conditions it imposed, was likely the *only* form of punishment those minors would receive. Thus, it was reasonable to read the legislature's command that "[t]he person may not refuse probation"<sup>86</sup> as establishing an automatic, mandatory probationary scheme that would supplant the

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79. *Chinuhuk*, 472 P.3d at 518. Senator Gretchen Guess emphasized the significance of post-release supervision and mandatory polygraph tests as public protection measures. *Id.* (citing *Hearing on S.B. 218 Before the S. Judiciary Comm.*, 24th Leg., 2d Sess. (Jan. 19, 2006) (statement of Sen. Gretchen Guess at 9:58:45–9:59:15)). Senator Con Bunde focused on the deterrent effect of mandatory probation and polygraph testing. *Id.* (citing *Hearing on H.B. 353 Before the H. Judiciary Comm.*, 24th Leg., 2d Sess. (Feb. 15, 2006) (statement of Sen. Con Bunde at 2:39:47–2:40:47)).

80. *Id.* at 519.

81. *Id.* (quoting *Hearing on S.B. 218 Before H. Fin. Comm.*, 24th Leg., 2d Sess. (Mar. 7, 2006) (statement of Deputy Att'y Gen. Susan Parkes at 1:50:52–1:51:24)).

82. *Id.* at 518.

83. 57 P.3d 711 (Alaska Ct. App. 2002).

84. ALASKA STAT. § 04.16.050 (2001) (repealed 2016).

85. See *Auliye*, 57 P.3d at 718 ("[I]he statute requires sentencing judges to place first offenders on probation even though, in most cases, there will be no suspended sentence to impose in the event that the defendant fails to honor the terms of probation . . . .").

86. ALASKA STAT. § 04.16.050 (2001) (repealed 2016).

usual operation of Alaska Statute 12.55.080.<sup>87</sup> In stark contrast, a person convicted of a sexual offense pursuant to section 12.55.125(o)—on both the parties’ and the court’s reading—will *always* have a suspended sentence associated with his or her initial sentencing.<sup>88</sup> Therefore, probation under section 12.55.125(o) is more analogous to Alaska’s common law probation, and the majority’s reliance on *Auliye* as a comparable recognition of a legislative abrogation of the traditional probation approach was misplaced.

While it is not entirely correct that the probation at issue in *Chinuhuk* serves “[n]o purpose,”<sup>89</sup> the purpose served—subjecting sex offenders to polygraph tests—is a shell of what probation is understood to mean in Alaska. The representatives to which the majority cited for support of its reading produced a statute that was silent on the crucial question, but ultimately included a hallmark of common law probation in the enacted bill: mandatory suspended imprisonment.<sup>90</sup> The state legislature, having linked the imposition of mandatory probation with a mandatory suspended sentence, created a type of probation that, while automatic, reflected the traditional components of common law probation in Alaska. It ought to operate as such, unless and until the legislature makes a clear statement.

### C. The Rule of Lenity’s Application Would Have Avoided an Unwarranted Expansion of Probation and Its Consequences

The rule of lenity’s principle of judicial restraint comes through the dissent’s reading of section 12.55.125(o), which would have honored the concrete aspects of the legislature’s intent.<sup>91</sup> The legislature’s effort to increase the penalties and create a mandatory type of probation for sex offenders would have been respected, without extending the time convicted sex offenders must abide by “meaningless” probation conditions.<sup>92</sup> On the dissent’s reading, the probation imposed by subsection (o) could not be reduced, so long as the probationary period

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87. ALASKA STAT. § 12.55.080 (2020).

88. See *Chinuhuk v. State*, 472 P.3d 511, 516 (Alaska 2020) (quoting Appellants’ Brief at 9); *id.* (explaining that the State understood AS 12.55.125(o) to “require[] suspended imprisonment to provide an incentive to comply with the terms of probation”); *id.* at 519 (asserting that the legislature “[c]learly . . . contemplated imposition of portions of suspended imprisonment for probation violations”).

89. *Id.* at 525 (Carney, J., dissenting).

90. *Young v. Embley*, 143 P.3d 936, 945 (Alaska 2006) (“We presume that the legislature is aware of the common law when enacting statutes.”).

91. *Chinuhuk*, 472 P.3d at 523 (Carney, J., dissenting).

92. *Id.* at 522–23 (Carney, J., dissenting).

was in effect – i.e., so long as it was linked to a period of suspended time. Were this the outcome, the legislature would have had a chance to make a clearer statement. Now, however, the legislature may content itself with an unintended, severe though satisfactory, reading of the statute, absolving it of responsibility for the outcomes it produces.

It is difficult to outline those outcomes sufficiently due to probation's inherent flexibility and breadth, but they are many.<sup>93</sup> Probation's terms may impose fines and restrictions that go beyond the statutory maximum for those same penalties had they been imposed on a direct sentence rather than through probation.<sup>94</sup> So long as the terms reasonably relate to a sentencing court's perspective on the probationer's rehabilitation and the public's protection, the court may impose "special conditions" that limit an individual's liberty beyond the norm.<sup>95</sup> Courts aside, probation officers occasionally have the discretion to impose additional requirements on those they supervise.<sup>96</sup>

Whether a court or probation officer imposes conditions that are particularly onerous or run-of-the-mill, their imposition is rife with policy judgments related to rehabilitation, public safety, and individual liberty. In cases where, as in *Chinuhuk*, the question is whether the legislature has provided for the imposition of probation's restrictions and obligations beyond what the common law provides, courts should go no further than the statute's text allows. Here, the rule of lenity's application would have preserved the legislature's clear intent to impose probation as a mandatory feature of a sex offender's sentence but would not have required that this probation outlast its associated suspended sentence, a cornerstone of common law probation.

## V. CONCLUSION

The *Chinuhuk* petitioners presented the Alaska Supreme Court with two key issues: (1) whether the trial court had discretion to discharge the petitioners from probation once they had exhausted their suspended time

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93. See *Roman v. State*, 570 P.2d 1235, 1240 (Alaska 1977) (noting that a court has broad authority to tailor a probation term's conditions to the case before it).

94. See *Baum v. State*, 24 P.3d 577, 582 (Alaska Ct. App. 2001) ("Probation conditions often restrict a defendant's activities beyond the limits of what a sentencing court might impose as a direct component of the defendant's sentence.").

95. *Thomas v. State*, 710 P.2d 1017, 1019 (Alaska Ct. App. 1985) (affirming the courts' power to impose such conditions, while finding the condition at issue too restrictive of the petitioner's liberty to be permissible).

96. ALASKA STAT. § 12.55.100(a)(2)(E), (H) (2020) (defining a probation officer's authority (1) to require participation in rehabilitation programs and (2) impose sanctions for violations of probation conditions); *Diorec v. State*, 295 P.3d 409, 414–15 (Alaska Ct. App. 2013).

and (2) whether the repeal of section 12.55.125(o) restored the petitioners' right to refuse probation.<sup>97</sup> The majority answered each in the negative, and the former based on a strained reading of the statute's text and legislative history.<sup>98</sup> Because the legislature did not clearly indicate its intent to override Alaska's traditional probation, Justice Carney found the statute ambiguous and dissented.<sup>99</sup> Between two possible constructions – one sweeping, the other narrow – the court committed to the former.

The imposition of probation and its attendant conditions is no insignificant act. Given the state of Alaska's probation and parole systems,<sup>100</sup> an expansion of those serving probationary terms ought to derive from a clear legislative statement. There may be compelling reasons to subject a certain class of sex offenders to ongoing surveillance and polygraphs without the threat of future imprisonment. However, until the legislature as a whole, rather than select individuals with a stake in the legislative process, expressly says so in a statute, courts should heed the rule of lenity and refrain from interpreting ambiguous criminal statutes to increase their punitive reach. Because of the profound impact probation's supervisory conditions have on probationers' lives, and the sheer number of people subject to such conditions in Alaska, the extension of probation and its attendant conditions should come from carefully considered legislative enactments, not the courts.

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97. *Chinuhuk*, 472 P.3d at 512-13.

98. *Id.* at 516-20.

99. *Id.* at 522-23 (Carney, J., dissenting).

100. *Fraser*, *supra* note 5.