As part of its comprehensive revision of the Criminal Code in 1978, the Alaska legislature adopted a sweeping revision of the state's sentencing laws. The most significant aspect of the sentencing revision was the enactment of a presumptive sentencing system. Presumptive sentencing substantially restricts judicial sentencing discretion by specifying in advance the presumptive term of imprisonment that the typical defendant convicted of an offense should receive. Legislative

The assistance of Bart W. Heemskerk and Michael J. Martino, law students at Western New England College School of Law, in the preparation of this article is gratefully acknowledged.


2. The presumptive term of imprisonment is set by the legislature, or other body designated by the legislature, and may be varied by the trial court within a designated range if the presence of aggravating or mitigating factors is established at sentencing. Other features of a presumptive sentencing scheme include: the specification of increasingly severe presumptive terms of imprisonment based on the prior criminal history of the defendant; provisions allowing deviation from the presumptive term of imprisonment in extraordinary and unanticipated circumstances; and significant restrictions on the authority of a parole board or other administrative agency to release a prisoner before the expiration of his sentence. See generally TASK FORCE ON CRIMINAL SENTENCING, TWENTIETH CENTURY FUND, FAIR AND CERTAIN PUNISHMENT 19-22 (1976) [hereinafter cited as TASK FORCE REPORT].


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commentary makes it clear that the purpose of the presumptive sentencing system is "the elimination of unjustified disparity in sentences imposed on defendants convicted of similar offenses — disparity which is not related to legally relevant sentencing criteria." 

Studies of felony sentencing practices published by the Alaska Judicial Council dramatically brought the problem of unjustified disparity in sentencing to the attention of the state legislature. The studies' most disturbing finding was that for some crimes, all other factors being equal, the defendant's race was a significant factor affecting both


The task force recommended presumptive sentencing as an alternative to what it referred to as the then existing "dominant sentencing structure currently employed in the United States . . . based on the indeterminate sentence." Task Force Report, supra at 11. Additionally, the task force viewed presumptive sentencing as a preferable alternative to proposals for flat-time or mandatory minimum sentencing. Id. at 15-18.


the type of sentence imposed and its length.\(^6\) The studies also showed that the sentencing judge's character as a "strict" or "lenient" sentenced was another critical factor influencing sentence length for some crimes.\(^7\) Surprisingly, the studies showed that factors usually expected to play a significant role in determining sentence length were of little importance.\(^8\)

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6. The summary section of the council's 1975 study noted that:

A higher percentage of some groups of persons were convicted or sentenced more harshly than other groups, however. Even when many other factors were held equal, some groups of persons still appeared to receive disparate treatment. For example, two-thirds of all Blacks sentenced for robbery received sentences of five years or greater, while less the one-third of Caucasians did, even though twice as many Caucasians sentenced for robbery had prior felony records as Blacks.

SENTENCING IN ALASKA, supra note 5, at 175.

The council found that the incidence of probation sentences varied more by race than by any other factor. \(\text{Id.}\) at 139. "Statewide, only 23% of Blacks and only 25% of Alaska Natives received probation, while 43% of Caucasians received probation." \(\text{Id.}\) The council cautioned that the apparent disparities highlighted in its 1975 study could be "the correct result of differences in individual sentencing needs." \(\text{Id.}\) at 175-76. Nevertheless, it concluded that "disparities of such great proportion as noted [in the study], especially among racial groups, suggests strongly an anomalous influence in the sentencing process that warrants careful follow-up investigation." \(\text{Id.}\) at 176.

The "follow-up investigation" called for was conducted in the subsequent council study of statewide felony sentences in Alaska between August, 1974 and August, 1976. ALASKA FELONY SENTENCING, supra note 5. This report confirmed at least some of the fears first raised in the 1975 study.

One of the most disturbing findings of the study concerned the impact on sentence length of membership in the black race. After taking into account the independent contribution of all other factors in the study, being black in and of itself contributed an estimated 11.9 months to drug felony sentences and 6.5 months to sentences for crimes of theft or unlawful entry. This independent "blackness factor" survived both statistical tests and was shown to increase the severity of sentences entirely aside from such considerations as employment history, educational level, occupation, income, prior criminal history and probation or parole status. Blackness was not a factor, however, in crimes of violence or in frauds, forgeries or embezzlements.

\(\text{Id.}\) at v-vi.

The council noted that the average additional 11.9 months imposed upon blacks convicted of drug felonies "is more than the estimated contribution of a record of three or more prior misdemeanors, or that of being convicted of sale of narcotics (the most serious drug felony studied)." \(\text{Id.}\) at 43. The council further found that for those defendants convicted of burglary, larceny, and receiving and concealing stolen property, blacks received sentences averaging about 6.4 months longer than whites. \(\text{Id.}\) at 28. "This estimate takes all other factors recorded in the study into account. In other words, entirely apart from criminal record, type of offense charged, income, etc., being black was associated with a significantly higher sentence." \(\text{Id.}\) The council suggested that this "disturbing" finding may be interpreted either as a reflection of minority group disadvantages, or as evidence "that the criminal justice system in Alaska discriminates against blacks." \(\text{Id.}\) at 28-29.

7. ALASKA FELONY SENTENCING, supra note 5, at 20-22, 40-46.

8. The council found "that in the violent crime category, neither extent of physi-
Presumptive sentencing has now been in effect in Alaska for five years. During that period, the legislature has made several significant amendments to the statutory scheme and Alaska's appellate courts have decided numerous cases interpreting the scope of individual sections. This article examines Alaska's presumptive sentencing system in light of the legislative and judicial developments since enactment. The article is divided into three sections. The first section provides an overview of the presumptive sentencing system. The second section examines in greater detail two of its key components: the use of prior convictions to establish repeat felony offender status, and the aggravating and mitigating factors used by courts to adjust the presumptive term. The third section discusses how presumptive sentencing has affected appellate review of sentences imposed on first felony offenders not covered by presumptive sentencing.

I. AN OVERVIEW OF PRESUMPTIVE SENTENCING

A defendant is subject to presumptive sentencing if he is convicted of a crime classified as a class A felony, sexual assault in the


10. The term first felony offender will hereinafter be used to refer to a defendant who has no prior felony convictions that a court can consider for purposes of presumptive sentencing. The term second felony offender will hereinafter be used to refer to a defendant who has one prior felony conviction that can be considered for purposes of presumptive sentencing. See infra note 24 (defining the terms third felony offender and repeat felony offender for the purposes of this article).

11. ALASKA STAT. § 12.55.125(c) (1984). The Criminal Code classifies the overwhelming majority of offenses into six categories according to the seriousness of the conduct defined — class A, B, and C felonies; class A and B misdemeanors; and violations. Id. § 11.81.250(a)(1)-(6) (1983). A limited number of the most serious offenses defined in the Criminal Code are not classified under this structure, see id. § 11.81.250(a), and are referred to as unclassified felonies.

Class A felonies are the most serious classified offenses in the Criminal Code and "involve conduct resulting in serious physical injury or a substantial risk of serious physical injury to a person." Id. § 11.81.250(a)(1). See, e.g., id. § 11.41.120 (1983) (manslaughter); id. § 11.41.500 (1983) (robbery in the first degree).

When it enacted the Criminal Code, the legislature did not reclassify offenses defined outside the Criminal Code under the classification scheme specified in ALASKA STAT. § 11.81.250 (1983). In subsequent years, however, the legislature used the Criminal Code's classification scheme in authorizing penalties for crimes defined outside the Criminal Code. See, e.g., id. §§ 04.16.180–200 (1980 & Supp. 1984) (classifying crimes pertaining to the violation of Title 4 of the Alaska Statutes (concerning
first degree,\textsuperscript{12} or sexual abuse of a minor in the first degree.\textsuperscript{13} Presumptive sentencing also applies to defendants convicted of class B felonies\textsuperscript{14} or class C felonies,\textsuperscript{15} but as a general rule, only if the defendant has previously been convicted of another felony.\textsuperscript{16} The presumptive sentencing statutes, however, do not apply to sentencing for three categories of crimes: (1) misdemeanors;\textsuperscript{17} (2) felonies defined outside the Criminal Code that carry their own specified penalties and are not classified as class A, B, or C felonies;\textsuperscript{18} and (3) the unclassified felonies in the Criminal Code of murder in the first degree, murder in the second degree, kidnapping, and misconduct involving a controlled substance in the first degree.\textsuperscript{19}

A defendant subject to presumptive sentencing faces a term of imprisonment that varies according to the crime he committed and his alcoholic beverages) under the classification scheme of the Criminal Code. Once a felony is classified as a class A, B, or C felony, the terms of imprisonment specified in \textsc{Alaska Stat.} § 12.55.125 (1984), including any prescribed presumptive term of imprisonment, apply to persons convicted of that felony.

\textsc{Alaska Stat.} § 12.55.125(i) (1984). The crime of sexual assault in the first degree is defined in \textsc{id.} § 11.41.410 (1983).

\textsc{Alaska Stat.} § 12.55.125(i) (1984). The crime of sexual abuse of a minor in the first degree is defined in \textsc{id.} § 11.41.434 (1983).

Class B felonies "involve conduct resulting in less severe violence against a person than class A felonies, aggravated offenses against property interests, or aggravated offenses against public administration or order." \textsc{Alaska Stat.} § 11.81.250(a)(2). \textit{See, e.g.}, \textsc{id.} § 11.46.300 (1983) (burglary in the first degree); \textsc{id.} § 11.56.200 (1983) (perjury).

Class C felonies "involved conduct serious enough to deserve felony classification but not serious enough to be classified as A or B felonies." \textsc{Alaska Stat.} § 11.81.250(a)(3). \textit{See, e.g.,id.} § 11.41.530 (coercion); \textsc{id.} § 11.46.520 (criminal possession of a forgery device).

\textsc{See Alaska Stat.} § 12.55.125(d)-(e) (1984). A very limited category of class B and C felonies is also subject to presumptive sentencing, regardless of whether the defendant has previously been convicted of a felony. \textit{See infra} note 155 (discussion of \textsc{Alaska Stat.} § 12.55.125(d)(3), (e)(3) (1983). The type of prior felony conviction that can satisfy the previous felony conviction requirement is discussed \textit{infra} text accompanying notes 63-105.

\textsc{Alaska Stat.} § 11.81.250(a)(4)-(5) (1983). Class A misdemeanors are punishable by a maximum term of imprisonment of one year while class B misdemeanors are punishable by a maximum term of imprisonment of 90 days unless otherwise specified in the provision defining the offense. \textit{Id.} § 12.55.135(a)-(b) (1984).

Since presumptive terms of imprisonment are specified only for class A, B, and C felonies, and for the crimes of sexual assault in the first degree and sexual abuse of a minor in the first degree, unclassified crimes outside the Criminal Code are not subject to presumptive sentencing. \textit{See Alaska Stat.} § 12.55.125(c)-(e), (i) (1984). If, however, a felony defined outside the Criminal Code does not include a penalty provision, it is automatically classified as a class C felony, \textit{id.} § 11.81.250(b) (1983), and consequently, is subject to the presumptive terms of imprisonment specified in \textit{id.} § 12.55.125(e).

prior criminal history. The sentence length equals an amount "the average defendant convicted of an offense should be sentenced to, absent the presence of legislatively prescribed factors in aggravation or mitigation or extraordinary circumstances." For example, a defendant sentenced for a class C felony who has one prior felony conviction faces a presumptive term of imprisonment of two years. A defendant sentenced for the same felony but with two or more prior felony convictions faces a presumptive term of imprisonment of three years.

The trial court may increase or decrease a presumptive term of imprisonment depending on the presence of certain aggravating or mitigating factors. The legislature has identified twenty-six aggravating and fifteen mitigating factors. The trial court may consider only these forty-one factors in adjusting a presumptive term of imprisonment. The parties must establish the presence of any aggravating

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20. See id. § 12.55.125(c)-(e), (i). A defendant who is subject to presumptive sentencing but is sentenced without regard to the requirements of presumptive sentencing is sentenced illegally. On appeal, the sentence will be vacated. Kelly v. State, 663 P.2d 967, 974-75 (Alaska Ct. App. 1983).

21. ALASKA SENATE COMMENTARY, supra note 3, at 153.

22. The type of prior felony conviction that can be considered for purposes of presumptive sentencing is discussed infra text accompanying notes 63-105.


24. The term third felony offender will hereinafter be used to refer to a defendant who has two or more prior felony convictions that can be considered for purposes of presumptive sentencing. The terms first felony offender and second felony offender, see supra note 10, as well as the term third felony offender are frequently used by the Alaska Court of Appeals to describe the status of a defendant subject to presumptive sentencing. See, e.g., Shaw v. State, 673 P.2d 781, 785 (Alaska Ct. App. 1983); Fry v. State, 655 P.2d 789, 791 (Alaska Ct. App. 1983).

The term repeat felony offender will hereinafter be used to refer to a defendant who is a second or third felony offender, if, in the context in which the term is used, it is not necessary to distinguish between a second and third felony offender.


26. Id. § 12.55.155(a) (1984). If the trial court imposes a sentence different from the presumptive term of imprisonment without having found aggravating or mitigating factors, it has imposed an illegal sentence that will be vacated on appeal. See State v. LaPorte, 672 P.2d 466, 467-68 (Alaska Ct. App. 1983); see also McManners v. State, 650 P.2d 414, 416 (Alaska Ct. App. 1982) (irrelevant that sentence in excess of the presumptive term is suspended).

The inability of a trial court to reduce a presumptive term of imprisonment unless mitigating factors are established does not violate the separation of powers doctrine or the constitutional requirement that "[p]enal administration shall be based on the principle of reformation and upon the need for protecting the public." Koteles v. State, 660 P.2d 1199, 1200 n.1 (Alaska Ct. App. 1983) (citing ALASKA CONST. art. I, § 12).


and mitigating factors at the sentencing hearing by clear and convincing evidence.\textsuperscript{29} The court may rely on evidence presented at trial as well as additional information presented at the sentencing hearing in determining whether any aggravating and mitigating factors are present.\textsuperscript{30}

Voluntary drug or alcohol intoxication or addiction is specifically excluded from consideration as an aggravating or mitigating factor.\textsuperscript{31} Additionally, an aggravating factor may not be used to increase the presumptive term if the same factor was used previously to trigger presumptive sentencing or to require a higher presumptive term of imprisonment for the crime, or if the factor is a necessary element of the offense in question.\textsuperscript{32} Similarly, a mitigating factor may not be used to

or mitigating factors that have not been specified by the legislature, the sentence imposed will be vacated on appeal. \textit{See} Woods v. State, 667 P.2d 184, 186-87 (Alaska 1983).

\textsuperscript{29} \textit{ALASKA STAT.} § 12.55.155(f) (1984).


Since only the aggravating and mitigating factors listed in \textit{ALASKA STAT.} § 12.55.155(c)-(d) (1984) may be considered by the trial court in adjusting the presumptive term of imprisonment, \textit{see supra note 28 and accompanying text}, it might be argued that it was unnecessary to specifically exclude voluntary intoxication or addiction from consideration as an aggravating or mitigating factor. Nevertheless, the specific exclusion of intoxication or addiction as a sentencing consideration probably reflects the legislature's intent to prevent courts from using those factors as a basis for a finding of manifest injustice authorizing referral of a case to a three-judge sentencing panel under \textit{ALASKA STAT.} §§ 12.55.165-.175 (1984). \textit{See infra text accompanying notes 43-59}.

\textsuperscript{32} \textit{ALASKA STAT.} § 12.55.155(e) (1984). \textit{See} Woods v. State, 667 P.2d 184, 187-88 (Alaska 1983) (causing physical injury can be used to increase presumptive term for sexual assault in the first degree because physical injury is not a necessary element of sexual assault); Roberts v. State, 680 P.2d 503, 508 n.13 (Alaska Ct. App. 1984) (aggravating factor of causing physical injury can be used to increase presumptive term for robbery in the second degree because physical injury is not a necessary element of robbery).

The prohibition specified in section 12.55.155(e) does not “preclude the use of a prior conviction to invoke presumptive sentencing when that prior conviction is a necessary element of the present offense.” \textit{Fry}, 655 P.2d at 791.

In \textit{Juneby}, the court of appeals cited \textit{ALASKA STAT.} § 12.55.155(e) in support of its holding that conduct for which a defendant has been separately convicted and sentenced may not be considered to establish an aggravating factor to increase the presumptive term imposed for another crime. 641 P.2d at 842-43. The trial court had ruled that Juneby's unlawful entry into the victim's home "was among the most serious conduct included in the definition" of sexual assault. \textit{Id.} at 842. Juneby had also been convicted and sentenced for burglary for that same unlawful entry. \textit{Id.} The court of appeals ruled that it was improper to use the illegal entry to increase Juneby's presumptive term for sexual assault, \textit{id.} at 842-43, stating that the legislative policy of
decrease the presumptive term if previously used at trial to reduce the charge to a lesser included offense.\textsuperscript{33}

If the prosecution establishes an aggravating factor, the trial court may increase the presumptive term of imprisonment, provided that the sentence imposed does not exceed the statutory maximum sentence for the crime.\textsuperscript{34} If the defendant establishes a mitigating factor, the trial court may reduce the presumptive term of imprisonment by a maximum amount that depends upon the length of the presumptive term of imprisonment.\textsuperscript{35} A presumptive term of imprisonment of four years or less can be reduced by any amount.\textsuperscript{36} A court may reduce a presumptive term of greater than four years to no less than one-half the presumptive term.\textsuperscript{37}

In the vast majority of cases subject to presumptive sentencing, the trial court cannot suspend imposition of a sentence.\textsuperscript{38} Furthermore, the power of the trial court to suspend even a portion of the sentence or to place the defendant on probation is substantially re-

\textsuperscript{33} ALASKA STAT. § 12.55.155(e). \textsuperscript{34} Id. § 12.55.155(a) (1984). Guidelines that a trial court must use when varying a presumptive term to account for aggravating factors are discussed infra text accompanying notes 121-45.

\textsuperscript{35} ALASKA STAT. § 12.55.155(a).

\textsuperscript{36} Id. § 12.55.155(a)(1). Guidelines that a trial court must use when varying a presumptive term to account for mitigating factors are discussed infra text accompanying notes 129-41.

\textsuperscript{37} ALASKA STAT. § 12.55.155(a)(2).

\textsuperscript{38} Id. § 12.55.155(g)(2) (1984). The restrictions on the trial court's ability to vary the presumptive sentence discussed infra text accompanying notes 39-42, do not apply in the very limited number of cases where a first felony offender convicted of a class B or C felony is subject to presumptive sentencing. See infra note 155. When the legislature created this category of first felony offenders subject to presumptive sentencing in 1983, it neglected to make a conforming amendment to the statute which restricts a trial court's ability to suspend imposition of sentence, place a defendant on probation, or otherwise reduce a term of imprisonment when the defendant is subject to presumptive sentencing. ALASKA STAT. § 12.55.125(g). See Act of July 3, 1983, ch. 92, § 1-3, 1983 Alaska Sess. Laws 1, 1-2. This group of first felony offenders is apparently subject to presumptive sentencing but the trial court's ability to suspend imposition of sentence or place the defendant on probation for any or all of the sentence remains unrestricted. See infra note 60 (discussing the parole eligibility of these offenders). Furthermore, these restrictions only apply to the trial court's ability to suspend imposition of sentence or impose probation. If the trial court finds that manifest injustice would result from its inability to exercise one of these sentencing options, and the three-judge panel agrees with that finding, the panel may suspend imposition of sentence or impose probation. See infra text accompanying notes 43-59; see also ALASKA STAT. § 12.55.015(a)(2), (a)(7), (a)(8) (1984).
The extent of this restriction depends on whether the trial court used aggravating or mitigating factors to impose a sentence other than the presumptive term of imprisonment. If neither party established aggravating or mitigating factors, the presumptive term must be imposed and no portion of it may be suspended. If only aggravating factors are established and the court imposes a term of imprisonment in excess of the presumptive term, the court may suspend a portion of that sentence, but the unsuspended portion must be at least equal to the presumptive term of imprisonment. If mitigating factors are established, the court may suspend all or a portion of the term, provided that the remaining term is not less than the minimum sentence allowed by establishment of mitigating factors.

The following chart shows the presumptive terms of imprisonment in years (circled) authorized for defendants subject to presumptive sentencing classified according to the offense for which sentence is to be imposed and whether the defendant is a first, second, or third felony offender. The figure to the right of the presumptive term specifies the maximum term of imprisonment that a court can impose if factors in aggravation are established, and the figure to the left of the presumptive term specifies the minimum term of imprisonment a court can impose if factors in mitigation are established.

39. See ALASKA STAT. § 12.55.125(g)(1); see also Lacquement v. State, 644 P.2d 856, 862-64 (Alaska Ct. App. 1982).
40. Lacquement, 644 P.2d at 863.
41. Id. at 863, n.17.
42. Id. at 863. For example, a second felony offender convicted of a class B felony could possibly have the entire four-year presumptive term of imprisonment specified in ALASKA STAT. § 12.55.125(d)(1) (1984) suspended if mitigating factors are established, since the trial court may reduce a presumptive term of four years or less by an amount as great as the presumptive term for factors in mitigation. See supra note 36 and accompanying text. By contrast, if a third felony offender is convicted of a class B felony and factors in mitigation are established, the court may suspend a portion of the sentence that is imposed, provided that the offender would still be required to serve at least three years of imprisonment. The presumptive term of imprisonment for a third felony offender convicted of a class B felony is six years, ALASKA STAT. § 12.55.125(d)(2), and under section 12.55.155(a)(2) the court may not reduce that sentence below three years for factors in mitigation. See supra note 37 and accompanying text. A trial court's decision to suspend any portion of the sentence because of factors in mitigation is nevertheless subject to compliance with the Juneby guidelines discussed infra text accompanying notes 131-45.
### Sexual Assault or Sexual Abuse of a Minor in the First Degree

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<th>First Felony Offender</th>
<th>Second Felony Offender</th>
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<td>Class C Felony</td>
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**Explanatory Notes**

* Ten year presumptive term only applies if the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the offense. ALASKA STAT. § 12.55.125(i)(2) (1984). All other cases are subject to the eight year presumptive term.

** Seven year presumptive term only applies if the crime is other than manslaughter and the defendant possessed a firearm, used a dangerous instrument, caused serious physical injury or knowingly directed the conduct constituting the offense at a uniformed or otherwise identified peace or correctional officer, firefighter, ambulance attendant, or other emergency responder engaged in official duties. ALASKA STAT. § 12.55.125(c)(2) (1984). All other cases are subject to the five year presumptive term.

*** Presumptive term of imprisonment only applies if the defendant knowingly directed the conduct constituting the offense at a uniformed or otherwise identified peace or correctional officer, fire fighter, ambulance attendant, or other emergency responder engaged in official duties. ALASKA STAT. § 12.55.125(d)(3), (e)(3) (1984). All other cases are not subject to presumptive sentencing and the defendant faces a maximum term of imprisonment of ten years for a class B felony and five years for a class C felony. ALASKA STAT. § 12.55.125(d)-(e) (1984).

The presumptive sentencing system limits judicial sentencing discretion and minimizes the possibility that a sentence will reflect considerations other than the nature of the offense and the prior criminal history of the defendant. Since presumptive sentencing so significantly restricts a trial court's sentencing discretion, however, the possibility exists that the required sentence would be clearly inappropriate in a particular case. "Wisely, [the legislature] included a safety valve to deal with situations where the statute rigidly applied would work an
That "safety valve" is a panel of three superior court judges which may sentence the defendant without regard to the presumptive sentencing system. 43

In order for a defendant to be sentenced by the three judge panel, the trial court must first find by clear and convincing evidence that manifest injustice would result from imposing the sentence required by the presumptive sentencing statutes. 44 Injustice could result from the trial court's inability to consider a relevant circumstance at sentencing because it had not been included in the list of aggravating or mitigating factors. 45 Manifest injustice could also result if the presumptive term of imprisonment, even after it is adjusted for all relevant aggravating and mitigating factors, is clearly inappropriate considering the nature of the offense and the offender. 46

The legislature anticipated that only rarely would compliance with the presumptive sentencing statutes produce manifest injustice. 47 While the court of appeals has concluded that it would be inconsistent with the purpose of presumptive sentencing for trial courts to routinely send cases to the three-judge panel, 48 it also has stated that "where the issue of manifest injustice appears to be a close one, we would urge sentencing judges to resolve any doubt in favor of a referral" 50 to the panel. 51 If a party disagrees with the trial court's finding on manifest injustice, it may appeal that determination to the court of appeals, but that court will reverse only "clearly mistaken" decisions. 52

The three-judge panel may review the sentencing issue de novo and consider evidence that was not before the trial court. 53 If the

45. The term manifest injustice was not defined by the legislature. See id. It may, however, be equated with the concept of "shocking to the conscience" or "obvious unfairness." Lloyd v. State, 672 P.2d 152, 154 (Alaska Ct. App. 1983).
46. ALASKA STAT. § 12.55.165; see also Heathcock, 670 P.2d at 1156-57.
48. ALASKA STAT. § 12.55.165 (1984); see also Heathcock, 670 P.2d at 1157; LaPorte, 672 P.2d at 468 & n.4.
49. ALASKA SENATE COMMENTARY, supra note 3, at 162. The legislature, when it enacted section 12.55.165 (1984) "recognize[d] that in rare situations, imposition of a presumptive term of imprisonment, whether or not adjusted for aggravating or mitigating factors, [might] result in manifest injustice . . . . The legislature expect[ed], however, that the probability of such a result [would be] minimal." Id.
50. Walsh, 677 P.2d at 919.
51. Lloyd, 672 P.2d at 155.
52. Walsh, 677 P.2d at 918.
53. ALASKA STAT. § 12.55.175(b) (1984); see also Shaw, 673 P.2d at 784.
panel disagrees with the trial court's finding of manifest injustice, it must remand the case to the trial court for imposition of the sentence required by the presumptive sentencing system.\textsuperscript{54} If, however, the panel agrees with the trial court's finding of manifest injustice, the panel may sentence the defendant to any term authorized for the crime by statute.\textsuperscript{55} Consequently, if the trial court found that the requirements of presumptive sentencing would cause manifest injustice by mandating the imposition of too lenient a sentence, the panel, if it agrees with that finding, may sentence the defendant to any term of imprisonment up to the maximum sentence for the crime.\textsuperscript{56} On the other hand, if the trial court found that the requirements of presumptive sentencing would cause manifest injustice by requiring the imposition of too severe a sentence, the panel, if it agrees with that finding, may impose a less severe sentence.\textsuperscript{57} The sentence imposed by the panel may be less than that required by the presumptive sentencing system, or it may be any other available sentencing option including probation or a suspended imposition of sentence.\textsuperscript{58} The panel's findings may be appealed to the court of appeals, which again may reverse only "clearly mistaken" decisions.\textsuperscript{59}

Most defendants sentenced under presumptive sentencing are not eligible for parole.\textsuperscript{60} The length of a term of imprisonment imposed under presumptive sentencing can only be reduced for good behavior while in prison. For every three days of good conduct served, the defendant will receive a one day reduction in the sentence required to be

\textsuperscript{54} ALASKA STAT. § 12.55.175(b); see also Shaw, 673 P.2d at 786.
\textsuperscript{55} ALASKA STAT. § 12.55.175(b)-(c) (1984). The panel may not sentence the defendant if it merely finds that manifest injustice would result from imposition of the sentence required under the presumptive sentencing statutes. It must also agree with the trial court's finding on why manifest injustice would result. For example, if the trial court finds that manifest injustice would result because the required sentence is too high, a finding by the panel that manifest injustice would result because the sentence is too low would not constitute an agreement with the trial court's finding of manifest injustice. Under such circumstances, the panel must remand the case to the trial court for sentencing consistent with the presumptive sentencing scheme. See Heathcock, 670 P.2d at 1158; see also Winfree v. State, 683 P.2d 284, 286 (Alaska Ct. App. 1984).
\textsuperscript{56} ALASKA STAT. § 12.55.175(c); see also ALASKA SENATE COMMENTARY, supra note 3, at 162.
\textsuperscript{57} ALASKA STAT. §§ 12.55.015, 175(c) (1984).
\textsuperscript{58} Id.
\textsuperscript{59} Shaw, 673 P.2d at 784.
\textsuperscript{60} See ALASKA STAT. § 33.15.180 (1982). This restriction does not apply in the very limited number of cases where a first felony offender convicted of a class B or C felony is subject to presumptive sentencing. See infra note 155 and accompanying text. When the legislature created this category of first felony offenders subject to presumptive sentencing, it neglected to make a conforming amendment to the parole eligibility statute, ALASKA STAT. § 33.15.180 (1982), to preclude parole for this category of offenders. See Act of July 3, 1983, ch. 92, 1983 Alaska Sess. Laws 1, 1-2.
II. Two Key Features of Presumptive Sentencing

Two components of the presumptive sentencing system proposed by the Criminal Code Revision Subcommission were the subject of substantial scrutiny when the legislature adopted the Criminal Code. Not surprisingly, these areas have also been subject to considerable legislative amendment and judicial review since enactment.

A. Prior Felony Convictions Used to Establish Status as a Repeat Felony Offender

Proof that the defendant has previously been convicted of a felony is critically important under the presumptive sentencing system. The length of the presumptive sentence varies directly with the number of the defendant's previous felony convictions. Additionally, most class B and C felony convictions are not even subject to presumptive sentencing unless the defendant is a repeat felony offender.

The Alaska legislature specified the type of prior convictions that can be used to establish the defendant's status as a repeat felony offender. The legislature also specified the procedures for establishing prior convictions at sentencing.

64. See supra notes 14-16 and accompanying text.
quently interpreted these specifications and the Alaska legislature amended some of them in 1982.67

1. **Type of Prior Conviction a Court May Consider.** As originally proposed by the Criminal Code Revision Subcommission, a prior conviction could not be used to establish the defendant’s status as a repeat felony offender unless it was of the same or more serious class of crime than the crime for which sentence was to be imposed.68 For example, a defendant to be sentenced for a class B felony would be considered a second felony offender only if previously convicted of a class B or class A felony. The subcommission’s proposal, however, was rejected by the legislature, which decided that the classification of the prior conviction under the Criminal Code was irrelevant.69 Instead, the legislature merely required that the prior conviction, whether it occurred in Alaska or in another jurisdiction, be for an offense “having elements similar to those of a felony defined as such under Alaska law.”70

One of the first issues to arise in applying the legislature’s standard for identifying prior convictions was whether the elements of the

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67. See ALASKA CRIMINAL CODE REVISION, supra note 2, at 8, 71-72.
68. See ALASKA STAT. § 12.55.145(a)(2).
69. Id. The statutory definition of a prior conviction does not require that the prior conviction be for a felony. Id. Indeed, one judge on the court of appeals has concluded that the definition should be read “literally so that conviction of any offense, whether classified as a misdemeanor or a felony in another jurisdiction, which had elements substantially identical to those of a felony defined as such under Alaska law, would qualify as a prior felony conviction.” Wells v. State, 687 P.2d 346, 352 n.5 (Alaska Ct. App. 1984). While the court of appeals left this issue unresolved in Wells, id. at 352, and despite the absence of the requirement within the statute, the legislature clearly intended to require that the prior conviction be a felony conviction. See, e.g., ALASKA STAT. § 12.55.125(d)(1) (1984) (specifying a four year presumptive term “if the offense is a second felony conviction” (emphasis added); id. § 12.55.185(7) (1984) (defining second felony conviction to mean “that the defendant previously has been convicted of a felony” (emphasis added)).
prior offense were to be compared to the elements of a felony in existing law or in the law that existed when the prior offense was committed. In Wasson v. State, the defendant argued that his prior Alaska felony conviction for the theft of $387 under the repealed grand larceny statute could not be used to establish that he was a third felony offender. The repealed statute set a dividing line between felony and misdemeanor larceny at $250. The present Criminal Code, effective at the time Wasson was sentenced, sets the dividing line at $500. Since the theft of $387 is only a misdemeanor under current law, Wasson argued that he had not been convicted of an offense that had "elements substantially identical to those of a felony defined as such under Alaska law," and that, therefore, the grand larceny conviction could not be used to establish that he was a third felony offender.

Relying in part on the legislative commentary to the Criminal Code, the court of appeals ruled that Wasson's grand larceny conviction was improperly used to establish that he was a third felony offender. Its holding, however, does not appear to be based on the fact that the theft of $387 is a misdemeanor and not a felony under existing law. Instead, after comparing the elements of Wasson's offense under the former and current codes, the court of appeals concluded that the value of the stolen property was an element of the prior offense and, therefore, "it necessarily follows that a former statute providing a lesser value for . . . felony grand larceny does not 'have [elements] substantially identical to those of a felony defined as such under [current] Alaska law.'" Subsequent cases emphasized that the court must examine the specific elements of the prior felony for which the defendant was convicted, and not the defendant's actual conduct in committing that crime. If the specific elements were substantially

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72. Id. at 118. Wasson conceded that another prior felony conviction could be used to establish that he was a second felony offender. Id.
73. ALASKA STAT. § 11.20.400 (1976) repealed by ALASKA STAT. § 11.46.130 (effective Jan. 1, 1980).
74. See ALASKA STAT. §§ 11.46.130-.140 (1983).
75. See id. § 11.46.140.
76. Id. § 12.55.145(a)(2).
77. Wasson, 652 P.2d at 118.
78. Id. at 119. The court of appeals cited the legislature's commentary that a conviction "will be considered a prior felony conviction if the crime is defined by elements substantially identical to a felony under the Code." Id. (quoting ALASKA SENATE COMMENTARY, supra note 3, at 157 (emphasis added by the court)). The court of appeals concluded that "[i]n context, it is clear that it is the revised code to which the comment refers." Id.; see also Wright v. State, 656 P.2d 1226, 1228 (Alaska Ct. App. 1983).
79. 652 P.2d at 119.
identical to an existing Alaska felony, the prior conviction would be considered a prior felony conviction under presumptive sentencing. 80

While the holding in Wasson may have been a correct interpretation of the legislature's intent when it adopted presumptive sentencing in 1978, the holding did not reflect the intent of a subsequent legislature. In 1982, the prior conviction definition was amended to require only that the prior offense have "elements similar to those of a felony defined as such under Alaska law at the time the offense was committed." 81 In the commentary that accompanied the amendment, the legislature clarified the type of prior conviction that could be used to establish repeat felony status under presumptive sentencing:

[A] prior offense will be considered a prior felony conviction for purposes of presumptive sentencing if the conduct was similar to a felony in Alaska at the time the offense was committed, regardless of whether the offense is classified as a felony under existing law. For example, if the defendant was convicted of the felony offense of grand larceny in Oregon in 1962 for stealing $400, and that conduct would have been a felony in Alaska in 1962, that offense may be counted as a prior felony conviction under [ALASKA STAT. § ] 12.55.145 even though the revised Criminal Code now requires that a felony theft involve property in an amount of $500 or more. 82

Under this definition then, Wasson's prior conviction would make him a third felony offender since it was for an offense that was a felony under Alaska law at the time it was committed. 83

2. When a Conviction is Obtained "Prior" to the Current Offense. Assuming that a conviction can otherwise be used to establish the defendant's status as a repeat felony offender, the requirement that it be obtained prior to the offense for which sentence is to be imposed would not seem to present difficult interpretative questions for the sen-

80. See, e.g., Wells, 687 P.2d at 351 ("We have consistently interpreted ALASKA STAT. § 12.55.145(a)(2) to apply to the statute establishing the elements of the offense for which the defendant was previously convicted."); Garroude v. State, 683 P.2d 262, 268-69 (Alaska Ct. App. 1984) (prior Alaska conviction for the felony of receiving stolen property cannot be used to establish that the defendant was a second felony offender since statute under which defendant was convicted did not require proof of value of property involved, while comparable current statute requires that the property have value of $500 or more; trial court had found value of property stolen to exceed $500).


82. ALASKA SENATE COMM. ON THE JUDICIARY, COMMENTARY ON THE ALASKA REVISED CRIMINAL CODE, ALASKA SENATE J. SUPP. NO. 64, 21-22 (June 2, 1982).

83. See supra text accompanying note 72.
tencing court. Indeed, the terms first, second, and third felony conviction are defined in a manner that appears to state the obvious. A second felony conviction, for example, "means that the defendant previously has been convicted of a felony." Nonetheless, the meanings of the terms first, second, and third felony convictions are not free from ambiguity.

In *State v. Rastopsoff*, the defendant argued that a conviction could not be used to establish repeat felony offender status if he was convicted after he committed the offense for which sentence was to be imposed. Rastopsoff faced sentencing for four crimes at a time when he had already been convicted of a felony. That conviction, however, was not entered until after Rastopsoff had committed the four crimes for which he currently faced sentencing.

Despite the apparently unambiguous definition of repeat felony offender status, which both the superior court and the three-judge sentencing panel had held applied to Rastopsoff, the court of appeals agreed with Rastopsoff's argument. Relying in part on a decision by the Alaska Supreme Court interpreting the scope of Alaska's repealed habitual criminal statute, the court of appeals held that Rastopsoff

85. *Id.* § 12.55.185(7).
87. *Id.* at 633.
88. In June of 1980, Rastopsoff committed forgery in the second degree, a class C felony. *Id.* at 631-32. On August 26, 1980, he committed a burglary in the first degree and a robbery in the second degree, both class B felonies. *Id.* Rastopsoff committed another burglary in the first degree on September 13, 1980, during which he also committed assault in the third degree, a class C felony. *Id.* Indicted for all five crimes, he pleaded guilty to the June forgery in October, 1980, and was sentenced. *Id.* at 632. On February 24, 1981, he pleaded *nolo contendere* to the remaining four charges. *Id.*

In sentencing Rastopsoff for the August and September crimes, the superior court found that the October conviction for the June forgery was Rastopsoff's first felony conviction, the August offenses constituted his second felony conviction, and the September offenses his third felony conviction. *Id.* The court, however, found that it would be manifestly unjust to sentence Rastopsoff as a repeat felony offender on the August and September crimes and referred the case to the three-judge panel. *Id.* The panel agreed with the superior court's classification of the August and September convictions, and held that this application of presumptive sentencing violated the equal protection clause of the Alaska Constitution. *Id.* The state subsequently appealed the three-judge panel's constitutional holding to the court of appeals. *Id.* at 633.

89. See *supra* note 88.
90. See *supra* notes 83-85 and accompanying text.
91. See *supra* note 88.
92. In *State v. Carlson*, 560 P.2d 26 (Alaska 1977), the Alaska Supreme Court held that a defendant could not be sentenced under the provision of Alaska's former habitual criminal statute, *Alaska Stat.* § 12.55.050 (1976) (repealed 1978), when he was convicted of two felonies on the same day. 560 P.2d at 28-29. The former statute
must be treated as a first felony offender for each of the four crimes that occurred before he was convicted of his previous felony. In a subsequent case, the court of appeals held that a defendant is not convicted of a prior offense until sentenced for that offense. Consequently, a conviction cannot be used to establish repeat felony offender status unless the defendant was sentenced for that conviction before committing the offense for which sentence is to be imposed.

3. Miscellaneous Issues Pertaining to Prior Convictions.

a. Statute of limitations for use of prior convictions. In 1978, the legislature provided that a prior conviction could not be used to establish that the defendant is a repeat felony offender “if a period of seven or more years has elapsed between the date of the defendant's unconditional discharge on the immediately preceding offense and commission of the present offense.” The seven-year period did not begin to run until the defendant completed all of the requirements of the prior sentence, including any probationary or parole period. Under this standard, for example, a defendant sentenced in 1985 would be a second felony offender if he had been convicted of a felony in 1970 but did not complete the parole period for that felony until 1979. Additionally, so long as the most recent prior conviction falls within the seven year period, any conviction otherwise eligible as a prior conviction, no matter how old, can be used to establish third felony offender status.

In 1982, the legislature made two amendments to the statute of

specified an increased sentence for a defendant who is convicted of felony and “who has been previously convicted of a felony.” Id. at 27 n.2 (emphasis added). As the court of appeals noted in Rastopsoff, the highlighted language in the former habitual criminal statute is virtually identical to the definition of “second felony conviction” in the Criminal Code. Rastopsoff, 659 P.2d at 634.

The court of appeals placed significant emphasis on the rule of statutory construction that “when a legislature adopts specific statutory language that has previously been interpreted by the high court of the state in connection with other statutes involving a similar subject matter, the legislature is presumed to have intended to adopt the court’s interpretation of that language, unless otherwise expressly indicated.” Id. at 635 (citation omitted). The court of appeals dismissed the state's argument that an intent to reverse the Carlson approach to the use of prior convictions was apparent from the “just deserts” sentencing philosophy in the Criminal Code, id. at 637-40, and the legislative commentary to the prior conviction statute. Id. at 635-37.

93. 659 P.2d at 641.
96. Id. § 12.55.185(10) (1984).
limitations provision that expand the category of prior convictions that can be used to establish repeat felony offender status. First, the legislature increased the seven year limitations period to ten years. Second, the legislature provided that a court must consider an unclassified felony or a class A felony conviction as a prior conviction no matter when it occurred.

b. **Significance of the pendency of an appeal from a prior conviction.** The legislature has never addressed the issue of whether a prior conviction on appeal can be used to establish that the defendant is a repeat felony offender. The court of appeals, however, held that the pendency of an appeal does not prevent the court from using the conviction to establish repeat felony offender status.

c. **Prior suspended imposition of sentence.** In *Shaw v. State*, the court of appeals held that a conviction resulting in a suspended imposition of sentence can be used to establish repeat felony offender status. In a subsequent case, however, the court of appeals held that a prior conviction that was subsequently set aside cannot be used to establish repeat felony offender status.

d. **Juvenile status at time of prior conviction.** The fact that the defendant was convicted of a prior offense in another jurisdiction as an adult is irrelevant even if, at the time he committed that offense, he would have been treated as a juvenile under Alaska law. Under such circumstances, an otherwise eligible prior conviction can be used to establish repeat felony offender status.


100. Id.

101. *Wright*, 656 P.2d at 1229; see also *Bell v. State*, 658 P.2d 787, 789 (Alaska Ct. App. 1983). Of course, if the prior conviction is reversed on appeal, the sentence imposed in the case where the prior conviction was used to establish repeat felony status could be challenged as an illegal sentence. *See Wright*, 656 P.2d at 1229.


103. Id. at 786.


B. Aggravating and Mitigating Factors: Adjustments to the Presumptive Term

In its tentative draft of the Criminal Code, the Criminal Code Revision Subcommission proposed the establishment of an Advisory Commission on Prison Terms and Parole Standards to specify the factors for adjusting a presumptive term of imprisonment. The subcommission, of course, recognized the importance of aggravating and mitigating factors under its proposed presumptive sentencing system. The commentary to the tentative draft, for example, even included a list of the aggravating and mitigating factors that the subcommission had considered adopting. However, the subcommission decided that aggravating and mitigating factors should not be statutorily prescribed, and the bill introduced in the legislature did not list any of these factors. The legislature disagreed with the subcommission and decided to statutorily prescribe aggravating and mitigating factors.

As enacted in 1978, the Criminal Code included a list of eighteen aggravating and thirteen mitigating factors. In subsequent years, as the number of crimes subject to presumptive sentencing increased and oversights in the original lists were noted, the list of aggravating and mitigating factors grew. The statute now recognizes twenty-

106. ALASKA CRIMINAL CODE REVISION, supra note 2, at 72.
107. See PROPOSED ALASKA STAT. § 11.36.270(b)-(j), ALASKA CRIMINAL CODE REVISION, supra note 2, at 61-64.
108. See ALASKA CRIMINAL CODE REVISION, supra note 2, at 72-74.
109. See H.R. 661, 10th Leg., 2d Sess. (Alaska 1978). The Subcommission concluded "that by their nature [aggravating and mitigating factors] were susceptible to change and that a legislatively prescribed list was too inflexible." ALASKA CRIMINAL CODE REVISION, supra note 2, at 72; see also von Hirsch & Hanrahan, Determinate Penalty System in America: An Overview, 27 CRIME & DELINQ. 289, 300 (1981) ("A legislature, given the other demands on its time, will seldom be able or willing to devote much effort to . . . revising, and fine tuning a sentencing code approved in recent session."). But see infra notes 111-14 and accompanying text.
113. See, e.g., Heathcock v. State, 670 P.2d 1155, 1160 n.2 (Alaska Ct. App. 1983) (Singleton, J., concurring and dissenting), in which Judge Singleton noted that it was an oversight not to include the commission of an offense while on probation in the
six aggravating factors and fifteen mitigating factors. These factors frequently have been used to adjust presumptive terms of imprisonment, and Alaska appellate courts have had numerous opportunities to determine whether particular aggravating and mitigating factors were present and properly applied at sentencing.

original list of aggravating factors. The legislature subsequently rectified this oversight. See ALASKA STAT. § 12.55.155(c)(20) (1984).


115. Alaska's appellate courts have applied the following aggravating factors:

"(1) a person, other than an accomplice, sustained physical injury as a direct result of the defendant's conduct;" ALASKA STAT. § 12.55.155(c)(1) (1984). In Juneby v. State, 641 P.2d 823 (Alaska Ct. App. 1982), modified, 665 P.2d 30 (Alaska Ct. App. 1983), the court of appeals held that in a prosecution of sexual assault in the first degree under ALASKA STAT. § 11.41.410(a)(1) (1983) "the mere fact of some physical injury to the victim as a result of the defendant's conduct, though technically an aggravating factor . . . , will not justify a significant increase in the presumptive term." Id. at 839. More substantial increases in presumptive terms are reserved for cases where serious physical injury is inflicted. Id. However, "where the crime charged is one that does not ordinarily involve the use of force or violence in its perpetration, the fact that a person sustains injury — even if the injury is relatively slight — assumes considerable importance as an aggravating factor." Id. at 838.

The continued validity of the court of appeals' conclusions in Juneby is questionable after the decision of the Alaska Supreme Court in Woods v. State, 667 P.2d 184 (Alaska 1983). In Woods, the court stated that in a prosecution for sexual assault in the first degree, the trial court may properly consider physical injury to the victim as an aggravating factor and that "[t]he weight to be assigned to this aggravating factor is a question which is committed to the sentencing court's discretion." Id. at 187-88.

The court noted that to the extent that this holding "is inconsistent with Juneby, 641 P.2d at 837-40, and Juneby II, 665 P.2d 30 at 34-37 (Alaska Ct. App. 1983), those opinions of the court of appeals are hereby modified." Id. at 188 n.13. On rehearing in Juneby, the state had argued that the court of appeals' "treatment of the aggravating factor of physical injury is inconsistent with the basic holding of the Juneby opinion that the amount by which presumptive sentences should be increased or decreased in light of aggravating or mitigating factors must be determined by applying the Cha-ney criteria, as stated in ALASKA STAT. § 12.55.005, to the specific factors established in each case." Juneby, 665 P.2d at 36-37. See also infra notes 131-34 and accompanying text.

"(2) the defendant's conduct . . . manifested deliberate cruelty to another person;" ALASKA STAT. § 12.55.155(c)(2) (1984). In Juneby, the court of appeals stated that

the term 'deliberate cruelty,' as used in ALASKA STAT. § 12.55.155(c)(2) must be restricted to instances in which pain — whether physical, psychological, or emotional — is inflicted gratuitously or as an end in itself. Conversely, when the infliction of pain or injury is merely a direct means to accomplish the crime charged, the test for establishing the aggravating factor of deliberate cruelty will not be met.

Id. at 840.

For a particularly appropriate application of this factor, see Larson v. State, 688 P.2d 592 (Alaska Ct. App. 1984); see also Peetook v. State, 655 P.2d 1308, 1311 (Alaska Ct. App. 1982).

"(3) The defendant was the leader of a group of three or more persons who participated in the offense;" ALASKA STAT. § 12.55.155(c)(3) (1984). See Willard v. State,
When the legislature adopted the original list of aggravating and


“(5) the defendant knew or reasonably should have known that the victim of the offense was particularly vulnerable or incapable of resistance due to advanced age, disability, ill health, or extreme youth or was for any other reason substantially incapable of exercising normal physical or mental powers of resistance;” ALASKA STAT. § 12.55.155(c)(5) (1984). See Carlson v. State, 696 P.2d 178, 179 (Alaska Ct. App. 1985); Goenett v. State, 695 P.2d 243, 245 (Alaska Ct. App. 1985); Depp v. State, 686 P.2d 712, 721 (Alaska Ct. App. 1984) (factor established in prosecution of defendant not subject to presumptive sentencing convicted of sexual assault of a ten-year old boy); Hasslen v. State, 667 P.2d 732, 732-33 (Alaska Ct. App. 1983); State v. Coats, 669 P.2d 1329, 1332-33 (Alaska Ct. App. 1983) (in case where presumptive sentencing did not apply, court of appeals cited this factor in discussing appropriate sentence for defendant who had sexually abused twelve-year old step-daughter); Peetook, 655 P.2d at 1311 (factor established in prosecution for sexual assault in the first degree of defendant not subject to presumptive sentencing who attacked victim while she was sleeping); Koganaluk v. State, 655 P.2d 339, 341 & n.4 (Alaska Ct. App. 1982).

“(8) the defendant's prior criminal history includes conduct involving aggravated or repeated instances of assaultive behavior;” ALASKA STAT. § 12.55.155(c)(8) (1984). In Larson, 688 P.2d at 597, the court of appeals held that it was proper to consider prior conduct resulting in an assault conviction under this factor even though the conviction had been set aside. Larson was decided under a prior enactment of this factor, but the court of appeals viewed the current version as a clarification of the prior version. Id. In Larson, the court of appeals also confronted the issue of the appropriate relation of juvenile adjudications to this factor. While the court of appeals left open the issue of whether prior juvenile adjudications can be used to initially establish this factor, it did hold that once the factor is otherwise established, prior juvenile adjudications can be used in determining the weight to be given to the factor. Id. at 598.

“(10) the conduct constituting the offense was among the most serious conduct included in the definition of the offense;” ALASKA STAT. § 12.55.155(c)(10) (1984). In Juneby, 641 P.2d at 841, the court of appeals interpreted legislative intent to require that a finding of this factor “be based on an assessment of the specific facts of each case, viewed in relation to the most serious potential conduct constituting the offense charged.” (footnote omitted).

In Brezenoff v. State, 658 P.2d 1359 (Alaska Ct. App. 1983), this factor was established in a prosecution for theft in the first degree of a defendant not subject to presumptive sentencing who stole $140,000 in 133 separate thefts during approximately one year. Id. at 1362. The court of appeals noted that this aggravating factor “stresses the conduct involved in the specific offense under consideration rather than the personal characteristics of the offender and requires comparison of the conduct constituting the crime in question with other conduct which would satisfy the elements of the offense.” Id. at 1363.

The court of appeals has had many opportunities to apply this factor in sexual assault cases. See Bolthouse v. State, 687 P.2d 1166, 1174 (Alaska Ct. App. 1984) (factor established in prosecution for attempted sexual assault in the first degree, when attempt “came very close to constituting a completed rape.”); Hasslen, 667 P.2d at
mitigating factors, it also included a formula for determining the extent to which a presumptive term could be varied once the presence of

732-33 (factor established in prosecution for sexual assault in the first degree and assault in the first degree where victim was assaulted in her own home, entry into house was premeditated, victim's dog was killed, telephone was rendered inoperable and victim was shot while attempting to escape); Langton v. State, 662 P.2d 954, 955-56 (Alaska Ct. App. 1983) (factor established where defendant, not subject to presumptive sentencing, convicted of sexual assault in the first degree on his eight-year old step-daughter); Hansen v. State, 657 P.2d 862, 864 (Alaska Ct. App. 1983); Peetook, 655 P.2d at 1311; Koganaluk, 655 P.2d at 341 n.4; Ecker v. State, 656 P.2d 577, 577-78 (Alaska Ct. App. 1982); see also Goennett, 695 P.2d at 245 n.2; Theodore v. State, 692 P.2d 987, 988 (Alaska Ct. App. 1985) (Singleton, J., concurring); Walsh, 677 P.2d at 917-18; Shaw, 677 P.2d at 260; Larson, 688 P.2d at 598; Lee, 673 P.2d at 896; Gilbreath v. State, 668 P.2d 1354, 1358 (Alaska Ct. App. 1983); Karr v. State, 660 P.2d 450, 452 & n.4 (Alaska Ct. App. 1983); Kimbrell v. State, 647 P.2d 618, 622-23 (Alaska Ct. App. 1982) (Coats, J., concurring).

“(12) the defendant was on release under [ALASKA STAT. § 12.30.020 or 12.30.040 for another felony charge or conviction or for a misdemeanor charge or conviction having assault as a necessary element;” ALASKA STAT. § 12.55.155(c)(12) (1984). See Roberts v. State, 680 P.2d 503, 508 n.13 (Alaska Ct. App. 1984), where the court of appeals held that the requirement that the prior offense have assault as a necessary element applies only when the defendant was on release for a misdemeanor. This factor is also established when a defendant commits an offense while on release on a charge of attempted sexual assault even though assault was not a necessary element of the sexual assault.

“(13) the defendant knowingly directed the conduct constituting the offense at an active officer of the court or at an active or former judicial officer, prosecuting attorney, law enforcement officer, correctional employee, fire fighter, emergency medical technician, paramedic, ambulance attendant, or other emergency responder during or because of the exercise of official duties;” ALASKA STAT. § 12.55.155(c)(13) (1984). In Gilbreath, 668 P.2d at 1354, this factor was established in the prosecution of a defendant for misconduct involving weapons in the first degree. Id. at 1357. The defendant argued that even though he had pointed a gun at a police officer, the aggravating factor did not apply because his offense was “one of possession” and, therefore, could not have been “directed at” a law enforcement officer. Id. The court of appeals rejected this characterization, holding that the factor applied because the defendant’s “conduct” during the possessory offense was directed at a police officer. Id. at 1357-58. The court of appeals noted that the defendant’s conduct harmed the public interest in “having the duties of public safety officers carried out efficiently and free from hindrance” and avoiding the “possibility of public danger generated wherever a public safety officer is challenged or hindered in the execution of his duties.” Id. at 1358.

“(18) the offense was a crime specified in [ALASKA STAT. § 11.41 and was committed against a spouse, a former spouse, or a member of the social unit comprised of those living together in the same dwelling as the defendant;” ALASKA STAT. § 12.55.155(c)(18) (1984). In Carlson, the court of appeals held that in a prosecution for sexual assault in the first degree under former ALASKA STAT. § 11.41.410(a)(4) “the fact that Carlson’s victim was a member of his family is typical of the specific crime for which he was convicted and therefore did not warrant an increase in the presumptive term.” Id. at 179 (footnote omitted). But see Woods, discussed supra in this footnote under aggravating factor (1), where the Alaska Supreme Court emphasized that the amount by which a presumptive term should be increased once an ag-
gravating factor is established, "is a question which is committed to the sentencing court's discretion." 667 P.2d at 187-88.

"(20) the defendant was on furlough under [ALASKA STAT. § ] 33.30 or on parole or probation for another felony charge or conviction;" ALASKA STAT. § 12.55.155(c)(20) (1984). See Kuvaas v. State, 696 P.2d 684, 684-85 (Alaska Ct. App. 1985), in which a defendant was convicted of robbery in the first degree. At the time he committed the robbery in question, the defendant was on felony probation from Oregon for offenses that were not felonies under Alaska law at the time the defendant committed them. Id. at 684. The court of appeals accepted the defendant's argument that this factor should "apply only to defendants who were on probation for a charge or conviction which would have been a felony charge in Alaska." Id. The court applied the definition of "felony conviction" set out in ALASKA STAT. § 12.55.145(a)(2), defining those felony convictions the trial court may consider for purposes of presumptive sentencing. Id. at 685; see supra text accompanying notes 81-83.

"(22) the defendant knowingly directed the conduct constituting the offense at a victim because of that person's race, sex, color, creed, ancestry, or national origin;" ALASKA STAT. § 12.55.155(c)(22) (1984). See Gregory v. State, 689 P.2d 508, 509 (Alaska Ct. App. 1984) (factor found in prosecution for murder in the second degree, ALASKA STAT. § 11.41.110 (1983), a crime not subject to presumptive sentencing).

"(25) the defendant is convicted of an offense specified in [ALASKA STAT. § ] 1L71 [any offense involving controlled substances] and the offense involved large quantities of a controlled substance;" ALASKA STAT. § 12.55.155(c)(25) (1984). See Lausterer v. State, 693 P.2d 887, 890-92 (Alaska Ct. App. 1985) ("It would ordinarily be appropriate to regard eight ounces or more of cocaine as a large quantity — one that is indicative of commercial activity at the wholesale level.").

116. The following mitigating factors have been applied by Alaska's appellate courts:

"(3) the defendant committed the offense under some degree of duress, coercion, threat, or compulsion insufficient to constitute a complete defense, but which significantly affected his conduct;" ALASKA STAT. § 12.55.155(d)(3) (1984). In Bell, the court of appeals found that the legislature intended that duress under this factor be interpreted more broadly than the defense of duress. 658 P.2d at 790. "Evidence the defendant in good faith subjectively believed facts which if true would have established one of the defenses justifying his conduct under the revised code, but which the judge or jury concludes would have been unreasonable under the circumstances, may warrant mitigation of a presumptive sentence." Id. at 791; see also Langton, 622 P.2d at 960 ("We apply a subjective standard in interpreting [this factor] and do not require that the person allegedly 'coerced' act reasonably." (citation omitted)); Whitmore v. State, 657 P.2d 859, 860-61 (Alaska Ct. App. 1983) (factor not established in prosecution for escape); Lee. 673 P.2d at 896 (factor not established by "behavior that is merely impulsive or the result of situational stress"; there must be evidence that the defendant acted under "a good faith but unreasonable belief" that conduct was necessary).

"(9) the conduct constituting the offense was among the least serious conduct included in the definition of the offense;" ALASKA STAT. § 13.55.155(d)(9) (1984). See Woods, 680 P.2d at 1198 (a single incident of sexual abuse is not a mitigated offense); Walsh, 677 P.2d at 916-18. In Walsh, the court of appeals rejected the argument of a defendant convicted of manslaughter that because his conduct was only reckless, as opposed to intentional or knowing, the mitigating factor of least serious conduct should apply. The court of appeals noted that there is no indication that the legislature intended to treat manslaughter committed recklessly any less severely than man-
one or more of those factors was established. That formula apparently leaves substantial discretion to the trial court. For example, if both aggravating and mitigating factors are established for a second felony offender convicted of a class B felony, the court can reduce the four-year presumptive term by any amount or can increase it by any amount up to the maximum sentence of ten years. Aside from the general direction that "[s]entence increments and decrements . . . shall be based on the totality of the aggravating and mitigating factors," the legislature has provided little guidance on the specific amount a presumptive term of imprisonment should be modified once these factors are established.

In Juneby v. State, the court of appeals adopted general guidelines for adjusting a presumptive term of imprisonment for factors in aggravation and mitigation. In doing so, the court helped insure

slaughterc committed intentionally or knowingly. The court of appeals, however, did discuss how this factor, or its opposite aggravating factor, ALASKA STAT. § 12.55.155(c)(10) (1984), see supra note 115, might be established in driving-while-intoxicated manslaughter cases; Shaw, 677 P.2d at 160 (in prosecution for misconduct involving weapons in the first degree for possessing a firearm capable of being concealed on one's person and where defendant had previously been convicted of a felony, court of appeals noted that "examples of the least serious conduct contemplated by the statute might include a case in which a defendant finds a weapon and possesses it briefly before returning it to its owner or turning it over to the police, or one in which a defendant, without illegal purpose, briefly acts as caretaker of a weapon on behalf of its owner." Id.; see also Dunlop v. State, 696 P.2d 687, 691-92 (Alaska Ct. App. 1983); Carlson, 696 P.2d at 179; Koteles v. State, 660 P.2d 1199, 1201 (Alaska Ct. App. 1983) (factor not established in prosecution for burglary in the second degree); Bell, 658 P.2d at 789-90 (factor not found in escape case); Fry, 655 P.2d 789, 793 (Alaska Ct. App. 1983); Born v. State, 633 P.2d 1021, 1026 n.5 (Alaska Ct. App. 1981).

"(13) the harm caused by the defendant's conduct is consistently minor and inconsistent with the imposition of a substantial period of imprisonment;" ALASKA STAT. § 12.55.155(d)(13) (1984). In Shaw the court of appeals stated that this factor is not established when the defendant's conduct "exhibits contempt for the law and law enforcement warranting a substantial sanction." 673 P.2d 781, 785 (Alaska Ct. App. 1983). See also Gilbreath, 668 P.2d at 1358-59 (factor not established in prosecution of defendant for misconduct involving weapons in the first degree, "[g]iven the circumstances of the instant offense and the nature of Gilbreath's original felony, an assault with a dangerous weapon," trial court's refusal to find this factor not clearly mistaken); Koteles, 660 P.2d at 1201 (factor not found in prosecution for burglary in the second degree).

120. Id. § 12.55.155(b) (1984).
122. 641 P.2d at 833.
that the discretion permitted under the presumptive sentencing system once aggravating and mitigating factors are established does not defeat the purpose of the 1978 sentencing revisions — the elimination of unjustified disparity in sentencing.\(^{123}\)

Juneby was convicted of sexual assault in the first degree, which at that time was a class A felony, and burglary in the first degree, a class B felony.\(^{124}\) Since Juneby was a second felony offender, he faced a presumptive term of imprisonment of ten years for the sexual assault.\(^{125}\) At sentencing, the trial court found several aggravating factors to be present and increased the ten year presumptive term to twenty years, the maximum sentence for a class A felony.\(^{126}\) Juneby appealed his sentence for the sexual assault, arguing that the trial court gave too much weight to the aggravating factors and that his twenty year sentence was excessive.\(^{127}\)

The court of appeals conducted a comprehensive review of the structure and purpose of presumptive sentencing.\(^{128}\) It found that "[t]he presumptive sentencing provisions . . . reflect the legislature's intent to assure predictability and uniformity in sentencing by the use of fixed and relatively inflexible sentences, statutorily prescribed, for persons convicted of second and subsequent felony offenses."\(^{129}\) Based on this interpretation of the legislative intent, the court adopted general guidelines for modifying a presumptive term of imprisonment for factors in aggravation and mitigation. The court stated it expected that sentences equalling or varying only slightly from the presumptive terms will generally be suitable when presumptive sentencing applies. Minor adjustments for aggravating or mitigating circumstances might be appropriate in a significant number of cases; only in unusual cases, however, can it be anticipated that substantial deviation from the presumptive term will be called for.

. . . If sentencing courts were permitted, under the presumptive sentencing scheme, to deviate routinely and substantially from the presumptive terms prescribed by law, the fundamental purposes of eliminating disparity and establishing reasonable uniformity in sentencing would be completely undermined. Unless the provisions of ALASKA STAT. § 12.55.155 are adhered to strictly, and unless a

\(^{123}\) See supra text accompanying note 4.


\(^{125}\) 641 P.2d at 829.

\(^{126}\) Id.

\(^{127}\) Id. at 828-29. Juneby had also been sentenced to eight years imprisonment on the burglary conviction but did not appeal that sentence. Id. at 828.

\(^{128}\) Id. at 829-33.

\(^{129}\) Id. at 830.
measured and restrained approach is taken in the adjustment of presumptive sentences for both aggravating and mitigating factors, then the prospect of attaining the statutory goal of uniform treatment for similarly situated offenders would quickly be eroded, the potential for irrational disparity in sentencing would threaten to become reality, and the revised code's carefully fashioned system of escalating penalties for repeat offenders would be rendered utterly ineffective.\textsuperscript{130}

While the court of appeals called for "a measured and restrained approach" to the adjustment of a presumptive term of imprisonment for aggravating and mitigating factors,\textsuperscript{131} it refused to adopt "a mechanistic approach toward determining the amount by which a presumptive sentence should be adjusted in light of aggravating or mitigating factors."\textsuperscript{132} Instead, it held that once aggravating or mitigating factors are properly established, the sentencing criteria set out in \textit{State v. Chaney}\textsuperscript{133} should be applied to the "totality of the aggravating and mitigating factors" to determine the sentence to be imposed.\textsuperscript{134}

\textsuperscript{130} \textit{Id.} at 833. On rehearing, the court of appeals phrased these guidelines somewhat differently, but the general thrust remained the same:

It can thus be expected that, in the great majority of cases, the appropriate sentence will be one that does not depart significantly from the specified presumptive term. The process of adjusting presumptive sentences for aggravating or mitigating factors is one that, while procedurally complex, must not be applied inflexibly or mechanistically. In each case, a realistic assessment of the totality of the evidence relating to aggravating and mitigating factors must be made in order to determine the extent to which the case may fairly be said to be more aggravated or more mitigated than the average for the particular offense. Increasingly larger adjustments to presumptive terms will be justified as cases deviate farther from the norm for a given offense. The most significant upward or downward adjustments must be reserved for those cases that are truly atypical or unusual in severity or lack of severity.

\textsuperscript{131} See \textit{Juneby,} 641 P.2d at 847; see also supra text accompanying note 130.

\textsuperscript{132} 641 P.2d at 835 n.21.

\textsuperscript{133} For a discussion of the \textit{Chaney} sentencing criteria, see infra text accompanying notes 178-81. See also \textit{ALASKA STAT.} § 12.55.005(2)-(6) (1984), which sets out the factors that a court should consider in imposing a sentence. In its commentary to the Criminal Code the legislature noted that these legislative guidelines are "largely a restatement of the Alaska Supreme Court's interpretation of the mandate of article 1, section 12 of the Alaska Constitution which provides that '[p]enal administration shall be based on the principle of reformation and upon the need for protecting the public.' \textit{State v. Chaney,} 447 P.2d 441 (Alaska 1970)." \textit{ALASKA SENATE COMMENTARY, supra} note 3, at 148. See also Nell v. State, 642 P.2d 1361, 1369 (Alaska Ct. App. 1982) (noting that the \textit{Chaney} criteria have essentially been incorporated into the Criminal Code as \textit{ALASKA STAT.} § 12.55.005).

\textsuperscript{134} 641 P.2d at 835 & n.21. The court of appeals, however, added the following caution:

When applied to the adjustment of a presumptive sentence, however, the \textit{Chaney} analysis should not be broadened into a consideration of all the circumstances of the offense, as if the sentence were being imposed anew, with-
Turning to Juneby’s sentencing proceeding, the court of appeals noted that both the state and Juneby had given the required notice of an intent to raise aggravating and mitigating factors at sentencing. The trial court had found that three aggravating factors and one mitigating factor were established. The trial court “then engaged in an extensive consideration of the Chaney sentencing criteria,” after which it followed the recommendation of the presentence report and sentenced Juneby to twenty years in prison. The court of appeals found this sentencing proceeding improper because the trial court had never referred to the ten year presumptive term that applied to Juneby nor did it explain why the established aggravating and mitigating factors

out regard for the presumptive term. Instead, consideration of the Chaney criteria should focus specifically on the aggravating or mitigating conduct in the particular case. The presumptive term should remain as the starting point of the analysis, and the Chaney criteria should be employed for the limited purpose of determining the extent to which the totality of the aggravating and mitigating factors will justify deviation from the presumptive term.

Id. at 835 n.21.

An example of a proper application of the Chaney criteria to adjust a presumptive term appears in Nell, 642 P.2d at 1371 n.18; see also Lloyd, 672 P.2d at 155 (trial court can consider defendant’s lack of criminal record in determining extent of deviation from presumptive term once mitigating factors are established since “lack of any prior record is highly relevant to a proper application of the Chaney sentencing criteria” (footnote omitted)).

One option available to the trial court is to decide that the particular factors established, after considering the Chaney criteria, do not justify adjustment of the presumptive term. See ALASKA STAT. § 12.55.155(c), (d) (1984) (emphasis added), which provides that aggravating and mitigating factors “shall be considered by the sentencing court and may” aggravate or mitigate the presumptive term of imprisonment. In Juneby, the court stated that “[t]he mere proof of an aggravating or mitigating factor cannot be deemed sufficient, in and of itself, to justify an increase or decrease of a presumptive term.” 641 P.2d at 838; see also Staael v. State, 697 P.2d 1050, 1058 (Alaska Ct. App. 1985); Heathcock, 670 P.2d at 1158 n.1 (Singleton, J., concurring and dissenting).

135. Juneby, 641 P.2d at 836. ALASKA STAT. § 12.55.155(f) (1984) provides that “[i]f the state seeks to establish a factor in aggravation at sentencing or if the defendant seeks to establish a factor in mitigation at sentencing, written notice must be served on the opposing party and filed with the court not later than 10 days before the date set for imposition of sentence.” See Nukapigak v. State, 645 P.2d 215, 218-19 (Alaska Ct. App. 1982) (presentence report does not provide the required notice); Hartley v. State, 653 P.2d 1052, 1056 (Alaska Ct. App. 1982) (trial court may sua sponte consider an aggravating factor or mitigating factor in imposing sentence so long as it provides the required notice to the parties); see also Hasslen, 667 P.2d at 733 (upholding trial court’s sua sponte finding of an aggravating factor without notice to the parties when the defendant did not claim surprise or prejudice as a result of the lack of notice).

136. 641 P.2d at 836.

137. Id.

138. Id. at 836-37.
tors justified an increase in the presumptive term to the maximum sentence of twenty years.\textsuperscript{139} The court of appeals cited the statutory requirement that all findings of aggravating and mitigating factors "must be set out with specificity,"\textsuperscript{140} and held that specificity requires sentencing judges to include, in their remarks on the record, the following specific information: (1) the specific factors in aggravation and in mitigation found to have been established by clear and convincing evidence; (2) the evidence upon which the court has relied in finding the existence of aggravating or mitigating factors; (3) an explanation of the weight given by the court to each aggravating or mitigating factor, and the relative importance of each factor in comparison with other aggravating or mitigating factors established; and (4) an evaluation of the totality of the aggravating and mitigating factors in light of the \textit{Chaney} criteria, as expressed in [\textsc{Alaska Stat.} § ] 12.55.005, in order to determine the amount by which the presumptive sentence for the particular offense should be adjusted.\textsuperscript{141}

Of the many appellate decisions interpreting the presumptive sentencing statutes, \textit{Juneby} is the most significant. Faced with a sentencing system designed to eliminate unjustified sentencing disparity by limiting judicial sentencing discretion,\textsuperscript{142} the court of appeals instead found a statutory scheme that still left substantial discretion to a trial court once aggravating or mitigating factors were established.\textsuperscript{143} In calling for a measured and restrained approach to adjustment of presumptive terms,\textsuperscript{144} and by requiring trial courts to articulate their reasons for modifying the presumptive terms,\textsuperscript{145} the court of appeals insured that the discretion permitted under presumptive sentencing could not be used to subvert the purpose of presumptive sentencing.

\section*{III. Sentence Review of First Felony Offenders Not Covered by Presumptive Sentencing}

The legislature in 1978 decided to apply presumptive sentencing only in cases where the defendant was a repeat felony offender.\textsuperscript{146} The

\begin{itemize}
  \item \textsuperscript{139} Id. at 837.
  \item \textsuperscript{140} \textsc{Alaska Stat.} § 12.55.155(f) (1984).
  \item \textsuperscript{141} 641 P.2d at 846 (footnote omitted). In subsequent cases brought before the court on appeal, all of which involved sentences imposed before \textit{Juneby} was published, the court of appeals found that the sentencing proceedings failed to comply with the \textit{Juneby} requirements and were thus unlawful. \textit{See} Linn, 658 P.2d at 153; Fry, 655 P.2d at 793; Dunn \textit{v.} State 653 P.2d 1071, 1091 (Alaska Ct. App. 1982); Nukapigak, 645 P.2d at 218.
  \item \textsuperscript{142} \textit{See supra} text accompanying note 4.
  \item \textsuperscript{143} \textit{See supra} notes 117-20 and accompanying text.
  \item \textsuperscript{144} \textit{See supra} text accompanying note 130.
  \item \textsuperscript{145} \textit{See supra} text accompanying note 141.
  \item \textsuperscript{146} \textit{See} Act of July 17, 1978, ch. 166, 1978 Alaska Sess. Laws 107 (amended 1982 & 1983). The type of prior felony conviction that can be used to establish that the
single exception was for a first felony offender convicted of a class A felony other than manslaughter, who had possessed or used a firearm or caused serious physical injury during the commission of the offense.\textsuperscript{147} Except in these limited circumstances, first felony offenders were not covered by the presumptive sentencing system enacted in 1978.\textsuperscript{148}

At first glance, it might seem surprising that the legislature, which specifically found "that the elimination of unjustified disparity in sentences and the attainment of reasonable uniformity in sentences can best be achieved through a sentencing framework fixed by statute,"\textsuperscript{149} would have exempted the vast majority of first felony offenders from presumptive sentencing. On the other hand, the institution of presumptive sentencing was a sharp break from the existing sentencing practices.\textsuperscript{150} The legislature was thus somewhat cautious in applying this new sentencing system.

defendant is a repeat felony offender is discussed \textit{supra} text accompanying notes 63-105.


\textsuperscript{148} The court of appeals has rejected and termed as frivolous the contention that the distinction between first and second felony offenders under the presumptive sentencing system violates a second felony offender's constitutional rights of equal protection and due process. Koteles v. State, 660 P.2d 1199, 1200 (Alaska Ct. App. 1983).

\textsuperscript{149} ALASKA STAT. § 12.55.005 (1984).

\textsuperscript{150} In its report proposing a presumptive sentencing system, the Task Force on Criminal Sentencing observed that:

The dominant sentencing structure currently employed in the United States is based on the indeterminate sentence, so called because it is characterized by wide separations between the legislatively authorized minimum and maximum sentences for generally defined crimes. There is an absence of articulated criteria for determining sentences. Judges are given vast discretion in sentencing offenders, and parole boards have like discretion in releasing them . . . .

. . . Generally, there are few if any rules, standards, or guidelines, formally established through mandatory legislation, rule making, or regulation, to guide the exercise of judicial or administrative sentencing discretion. Nor are discretionary decisions on sentencing generally subject to judicial review, except in cases of clear abuse, which reviewing courts are reluctant to find. Similarly, the courts or administrative agencies generally have not articulated guidelines for sentencing typical offenders. Every judge and parole board member has his own notion of what a fairly typical crime "deserves" — and these notions are of course disparate in the extreme.


The task force's characterization of the "dominant sentencing structure in the United States" also describes the indeterminate sentencing system that existed in Alaska before the enactment of the Criminal Code. Surveying the penalty provisions under the former Criminal Code, the Criminal Code Revision Subcommission highlighted the wide range of judicial sentencing discretion authorized by the legislature.

While many substantive offenses appear to carry mandatory minimum prison terms and fines, [\textit{Alaska Stat. \S\ }] 11.05.150 nonetheless permits a
When it decided to exempt most first felony offenders from pre-

judge to suspend all or part of the minimum prison term and impose a lesser sentence, either of a fine or imprisonment or both.

Prison terms in existing law evidence a wide variety of minimum and maximum sentences, ranging from 20 years to life for first degree murder ([ALASKA STAT. § 11.15.010]), 10 years to 20 years for assault on an officer in jail ([ALASKA STAT. § 11.30.160]), to 0 to 25 years for a second conviction on use of firearms during the commission of certain crimes ([ALASKA STAT. § 11.15.295]). Sentences in the range of 1-20, 1-10 and 1-5 appear more frequently than do other combinations but no particular combination of minimum and maximum prison terms and fines is common to title 11. The variety is endless.

ALASKA CRIMINAL CODE REVISION, supra note 2, at 4.

In addition to the courts' considerable discretion in imposing sentences, the parole board had substantial flexibility in determining the length of the sentence that a defendant would actually serve. Except when the court required a defendant to serve a specified portion of a sentence before being eligible for parole, the parole board had the authority to release a prisoner at any time after one-third of a sentence had been served. ALASKA STAT. §§ 33.15.080, .180, .230(a) (1982). The parole board frequently exercised its discretionary release authority.

The task force's observations on the lack of sentencing criteria and guidelines limiting judicial sentencing discretion, and the absence of effective judicial review of sentencing practices accurately described the sentencing structure existing in Alaska before 1969. Indeed, until it enacted the Criminal Code, the legislature had never specified the factors that should be considered by a court in imposing sentence. Additionally, in Bear v. State, 439 P.2d 432 (Alaska 1968), the Alaska Supreme Court had held that absent statutory authority, it lacked "jurisdiction to review and remand or to review and revise a criminal sentence for abuse of discretion." Id. at 435. Absent that authority, the court could not hope to specify the criteria that should be considered at sentencing.

In 1969, the legislature responded to Bear by authorizing appellate review of sentences on the ground that the sentence was either too lenient or too excessive. ALASKA STAT. § 12.55.120 (1984). The Alaska Supreme Court articulated guidelines for determining whether a sentence is too strict or too lenient in State v. Chaney, 477 P.2d 441 (Alaska 1970). For a discussion of what became known as the Chaney criteria, see infra text accompanying notes 177-81.

The judicial effort to articulate sentencing criteria and guidelines through appellate review of sentences under Chaney was insufficient to address all of the problems inherent in Alaska's indeterminate sentencing system for several reasons. First, since a "clearly mistaken" standard of review applied in sentence appeals, only the most serious sentencing errors could be corrected through the appellate process. Second, while a defendant's successful appeal would result in the imposition of a less severe sentence, if the state brought a successful appeal, and the defendant had not also appealed, the appellate court could only express its disapproval of the sentence. See ALASKA STAT. § 12.55.120(a)-(b) (1984). Thus, while appellate review of sentences offered some protection to a defendant who received an excessive sentence, it offered no protection to the public in insuring that a defendant who had been sentenced too leniently would receive an appropriate sentence. For example, upon application of the Chaney criteria, the courts found eight clearly mistaken lenient sentences imposed in prosecutions for crimes under the former Criminal Code. In each case, however, the appellate court was unable to impose an appropriate sentence. See Putnam v. State, 629 P.2d 35, 44-45 (Alaska 1980); State v. Wassilie, 578 P.2d 971, 972-75 (Alaska 1978); State v. Abraham, 566 P.2d 267, 270-71 (Alaska 1977); State v. Lancaster, 550
sumptive sentencing, the legislature largely followed the recommenda-
tion of the Criminal Code Revision Subcommission which proposed
that presumptive sentencing only apply to repeat felony offenders.\footnote{151}
The subcommission, however, had been divided on this issue. The
competing viewpoints were summarized in its Tentative Draft of the
Criminal Code:

A closely divided Subcommission then agreed to limit the application
of presumptive sentencing to those defendants with prior felony
convictions. While aware that this decision could result in some
continued amount of sentencing disparity, those who favored the
majority position were of the opinion that a new program as radical
in concept as presumptive sentencing ought to be implemented
slowly. They reasoned that if presumptive sentencing presented no
problems in its areas of application, then the legislature could al-
ways later move to expand its applicability to all offenders.

Those in the minority argued that the concept was not so radi-
cal or complex, that it could eliminate a greater amount of potential
or real disparity if applied across the board to all felony offenders,
and that the failure to apply presumptive sentencing to those with
no prior convictions could result in first time felony offenders re-
ceiving longer sentences than second or subsequent offenders.\footnote{152}

When it adopted the Criminal Code in 1978, the legislature de-
parted from the majority view of the subcommission by applying pre-
sumptive sentencing to a limited category of first felony offenders
convicted of class A felonies.\footnote{153} In 1982 the legislature expanded
the category of first felony offenders subject to presumptive sentencing to
include all first felony offenders convicted of class A felonies.\footnote{154}

\footnote{151. ALASKA CRIMINAL CODE REVISION, supra note 2, at 70.}
\footnote{152. Id.}
\footnote{153. See supra text accompanying notes 146-47.}
\footnote{154. Act of July 3, 1982, ch. 143, 1982 Alaska Sess. Laws 1 (effective October 1,
1982). The Act provides a five-year presumptive term of imprisonment for a first
felony offender convicted of manslaughter. See id. § 28, at 24. Any other first felony
offender convicted of a class A felony is subject to a five-year presumptive term unless
"the defendant possessed a firearm, used a dangerous instrument, or caused serious

P.2d 1257, 1258-60 (Alaska 1976); State v. Wortham, 537 P.2d 1117, 1118-19 & n.4
(Alaska 1975); Chaney, 477 P.2d at 445 & n.19, 446; State v. Jensen, 650 P.2d 422,
App. 1982).

Finally, the process of appellate sentence review failed to correct the disparities
that can arise in an indeterminate sentencing system where the trial court is given
substantial unguided discretion in imposing sentence. Indeed, little significance was
placed on uniformity as a goal of sentence review. Laquement v. State, 644 P.2d 856,
ity in sentencing was not an important goal of appellate sentence review and also that
only "clearly mistaken" sentencing errors would be corrected on appeal, it is not sur-
prising that the appellate process did not correct the types of sentencing disparities
noted by the judicial council, see supra notes 6-8 and accompanying text.
tionally, during that same 1982 session, the legislature further expanded the scope of presumptive sentencing to include first felony offenders convicted of class B or class C felonies, provided that the felony was knowingly directed at a limited category of public officials or emergency personnel engaged in the performance of their duties.\(^\text{155}\)

In support of the view that presumptive sentencing should apply to first felony offenders, a minority on the Criminal Code Revision Subcommission argued that the failure to do so could result in a first felony offender being sentenced more severely than a second felony offender.\(^\text{156}\) Theoretically, at least, this result is possible under the statutory scheme.\(^\text{157}\) In *Austin v. State*,\(^\text{158}\) the Alaska Court of Appeals considered whether a first felony offender should ever receive a harsher sentence than a second felony offender. The *Austin* decision insured that the sentencing of first felony offenders who were not covered by presumptive sentencing would nevertheless be directly affected by the presumptive sentencing scheme.

Austin was convicted of second degree criminal mischief, a class...
C felony. Since he was a first felony offender, Austin faced a maximum term of imprisonment of five years but was not subject to presumptive sentencing. Austin was sentenced to three years imprisonment and appealed his sentence as excessive on the ground that the presumptive term of imprisonment for a second felony offender convicted of a class C felony was only two years. The court of appeals held that Austin’s sentence was not excessive. The court stated 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. However, it is also clear that the legislature did not intend to say that a first offender could never receive more time to serve than the presumptive sentence for a second offender, since the statute easily could have been written to accomplish that result.

The court of appeals cited several reasons why Austin’s situation presented an exceptional case under its new sentencing guideline. Austin’s extensive and continuous series of juvenile offenses, his numerous probation violations, and the aggravated nature of his crime led the court of appeals to conclude that Austin’s three year sentence was appropriate even though it was greater than the presumptive term of imprisonment for a second felony offender convicted of the same felony.

The court of appeals made two important clarifications of the Austin sentencing guideline in subsequent cases. First, in Tazruk v. State, it held that for purposes of comparing the sentence received by a first felony offender with the presumptive sentence for a second felony offender, a court should focus primarily on the period of imprisonment.
prisonment actually imposed on the first felony offender.\textsuperscript{169} Tazruk, as a first felony offender convicted of a class B felony, had been sentenced to eight years imprisonment but had five years of that sentence suspended.\textsuperscript{170} Since the presumptive term for a second felony offender convicted of a class B felony is four years,\textsuperscript{171} the court of appeals held that Tazruk's sentence of three years of actual confinement complied with the requirements of \textit{Austin}.\textsuperscript{172}

The second clarification of the \textit{Austin} guideline concerned the standard for determining whether a first felony offender's conduct presented an exceptional case justifying the imposition of a more lengthy sentence than the presumptive sentence for the second felony offender. In \textit{Neakok v. State},\textsuperscript{173} the court of appeals held that an exceptional case finding "must be justified either by specific aggravating factors under the criminal code, . . . or else by aggravating factors which would . . . justify a repeat offender receiving an enhanced sen-

\begin{itemize}
\item\textsuperscript{169} 655 P.2d at 789; see also Pickens v. State, 675 P.2d 665, 671-72 (Alaska Ct. App. 1984); \textit{Nashoalook}, 663 P.2d at 980.
\item\textsuperscript{170} \textit{Tazruk}, 655 P.2d at 789.
\item\textsuperscript{171} \textit{ALASKA STAT.} \S 12.55.125(d)(1) (1984).
\item\textsuperscript{172} 655 P.2d at 789. In \textit{Brezenoff}, however, the court of appeals restated the \textit{Austin} guideline as clarified in \textit{Tazruk} as follows:
\begin{quote}
Where the total sentence received by a first offender exceeds the presumptive sentence for a second offender but the period of actual imprisonment is \textit{substantially less}, we will conclude that the total sentence meets the \textit{Austin} requirement of a \textit{substantially more favorable} sentence for the first offender.
\end{quote}

658 P.2d at 1362 (emphasis added). Neither \textit{Austin} nor \textit{Tazruk}, however, requires that the term of imprisonment imposed on a first felony offender be \textit{substantially less} than the presumptive sentence for a second felony offender. \textit{Austin}, 627 P.2d at 657-58; \textit{Tazruk}, 655 P.2d at 789. \textit{Austin} merely required that the sentence normally be "more favorable" for the first offender, see supra text accompanying note 162, while in \textit{Tazruk} the court held that the sentence for a first felony offender complied with \textit{Austin} because it was "less" than the presumptive term of imprisonment for a second offender. \textit{Tazruk}, 655 P.2d at 789.

The courts have generally not used the "\textit{substantially less}" language in subsequent applications of \textit{Austin}. See, e.g., \textit{Short v. State}, 676 P.2d 612, 614 (Alaska Ct. App. 1984); \textit{Nashoalook}, 663 P.2d at 980. But see \textit{Shaisnikoff}, 690 P.2d at 28 (unsuspended sentence for a first felony offender "should be \textit{substantially more favorable}" than presumptive term for second felony offender).
\item\textsuperscript{173} 653 P.2d 658 (Alaska Ct. App. 1982).
entence by a three-judge panel.”

Alaska’s appellate courts have had many opportunities to review a sentence for a first felony offender that was more severe than the presumptive sentence for a second felony offender. In some cases, the appellate court explicitly determined whether aggravating factors or extraordinary circumstances were present which rendered the case exceptional under Neakok and Austin. In other cases, the appellate court simply cited Austin and decided whether the case was exceptional without specifically finding that aggravating factors were present or that the case could have been sent to the three-judge panel if presumptive sentencing had applied to that case.

The inconsistent application of the Neakok exceptional case standard may be explained by the fact that the “sentencing of first felony offenders to whom presumptive sentencing does not directly apply must be accomplished, primarily, by a careful balancing of the sentencing goals set out in State v. Chaney.” In Chaney, the court adopted a “clearly mistaken” standard for determining whether an im-

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174. Id. at 662 (citation omitted). Actually, the court of appeals first applied this standard less than two weeks before Neakok was published. Sears v. State, 653 P.2d 349, 350 (Alaska Ct. App. 1982). However, in Sears, the court of appeals did not state the exceptional case standard with the same clarity as it did two weeks later in Neakok.

If the Neakok clarification of exceptional cases under the Austin guideline were applied to the facts in Austin, the particularly aggravated nature of Austin's crime, see supra note 165, most likely would have established the aggravating factor that “the conduct constituting the offense was among the most serious conduct included in the definition of the offense.” ALASKA STAT. § 12.55.155(c)(10) (1984). Additionally, the court of appeals has noted that “[i]mplicit in our decision in Austin was the recognition that a particularly bad juvenile or misdemeanor record characterized by offenses similar to the offense currently under consideration might warrant referral to a three-judge panel.” Erhart v. State, 656 P.2d 1199, 1201 (Alaska Ct. App. 1982).


177. Peetook, 655 P.2d at 1310; see also Karr, 686 P.2d at 1194 (“The standards under which sentences are to be reviewed were established in State v. Chaney.” (citation omitted)). But see Maal, 670 P.2d at 711-12 (in light of “just deserts” theory of punishment adopted by the Criminal Code, “inordinate emphasis must not be placed on predictions of possible future misconduct” in imposing sentence).

posed sentence was either too excessive or too lenient. The court also articulated sentencing goals to be used in evaluating whether a sentence was clearly mistaken. These goals became known as the Chaney criteria. The court stated that:

[Under Alaska's Constitution, the principles of reformation and necessity of protecting the public constitute the touchstones of penal administration. Multiple goals are encompassed within these broad constitutional standards. Within the ambit of this constitutional phraseology are found the objectives of rehabilitation of the offender into a noncriminal member of society, isolation of the offender from society to prevent criminal conduct during the period of confinement, deterrence of the offender himself after his release from confinement or other penological treatment, as well as deterrence of other members of the community who might possess tendencies toward criminal conduct similar to that of the offender, and community condemnation of the individual offender, or in other words, reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves.]

While the Austin guideline has proven to be a useful device to alert an appellate court to sentences which may be clearly mistaken under the Chaney criteria, compliance with the Austin guideline does not automatically guarantee that the sentence will be affirmed on appeal. On the other hand, the court of appeals has never upheld a sentence for a first felony offender that violated the Austin guideline as clarified by Neakok and Tazruk. Consequently, it is necessary to consider whether the Austin guideline is an appropriate standard to highlight sentences that may be excessive under the Chaney criteria.

While comparing nonpresumptive sentences imposed on first felony offenders with presumptive sentences for second felony offenders is useful to highlight excessive sentences, the Austin guideline fails to take one significant factor into consideration: defendants subject to presumptive sentencing are not eligible for parole while other defend-

179. Id. at 443-44.
180. Id. at 443.
181. Id. at 444 (footnotes omitted).
183. See, e.g., Maal, 670 P.2d at 711 (Austin guideline satisfied but sentence nevertheless held to be clearly mistaken and vacated); Hansen v. State, 657 P.2d 862, 864 (Alaska Ct. App. 1983) (sentence clearly mistaken despite compliance with Austin guideline).
184. In Erhart, 656 P.2d at 1201, the court of appeals noted that it had never upheld a term of imprisonment for a first felony offender that exceeded the presumptive term of imprisonment for a second felony offender absent a finding of aggravating factors or extraordinary circumstances. Since Erhart, the court of appeals has vacated as excessive every sentence which it has found to be in violation of the Austin guideline as clarified by Neakok. See, e.g., Shaisnikoff, 690 P.2d at 27-28; Jacko, 689 P.2d at 507.
ants may generally be paroled after serving one-third of their sentences. Indeed, between 1970 and 1979, approximately two-thirds of felony offenders not sentenced to life terms were released by the board of parole before the expiration of their sentences, including eighty percent of those prisoners sentenced to terms of three years or more. The average prisoner released on parole during that period served slightly more than a third of the sentence imposed by the trial court.

The courts’ failure to consider parole eligibility in applying the Austin guideline is surprising since the court of appeals has acknowledged that “a prison sentence imposed prior to enactment of the [Criminal Code] is by no means equivalent to a sentence presumptively imposed.” Particularly in the case of “lengthy” sentences, the court of appeals noted that a sentence imposed presumptively “must be regarded as significantly more severe than [the identical sentence] imposed under prior law, when early parole in cases involving lengthy sentences was the order of the day.” Since first felony offenders who are exempt from presumptive sentencing have the same parole eligibility as defendants sentenced under prior law, these observations by the court of appeals appear equally applicable in comparing presumptive sentences with nonpresumptive sentences.

Consider, for example, a four year sentence for the same crime committed under identical circumstances imposed on both a first felony offender not subject to presumptive sentencing and a second felony offender sentenced presumptively. Assume further that no aggravating factors or extraordinary circumstances are present in either case. While the second felony offender is required to serve the entire four year sentence, minus a maximum good conduct credit of one-fourth of the sentence imposed, the first felony offender is eligible for release by the parole board after serving sixteen months, or one-third of the four year sentence. Although the court of appeals referred to a lengthy sentence imposed under presumptive sentencing as “significantly more severe” than the same sentence imposed on an

185. See Alaska Stat. §§ 33.15.180(a), .080 (1982); see also supra text accompanying note 60.
186. Juneby, 641 P.2d at 845 n.37 (citing Alaska Board of Parole, Parole Guidelines for Alaska, Supplemental Report, Time Served Component (September 1980)).
188. Though the court of appeals did not specifically define what constitutes a lengthy sentence, it cited parole statistics which equated “long terms of incarceration” with sentences in excess of three years. Id. at 845 n.37.
189. Id. at 845 (footnote omitted).
191. See supra text accompanying notes 60-61.
192. See Alaska Stat. § 33.15.080 (1982).
offender who is eligible for parole, the four year sentence imposed on the first felony offender violates the *Austin* guideline as currently applied because it is not more favorable in length. More significantly, the court of appeals has vacated, as excessive, every sentence which it has found to violate the *Austin* guideline.

The consequences of failing to consider parole eligibility in applying the *Austin* guideline were highlighted recently in *Shaisnikoff v. State*. Shaisnikoff was convicted of criminally negligent homicide committed during a drunken bar room fight and was sentenced to five years imprisonment with three years suspended. The presumptive term of imprisonment for a second felony offender convicted of criminally negligent homicide is two years. No aggravating factors or extraordinary circumstances were established at Shaisnikoff's sentencing hearing. The court of appeals held that Shaisnikoff's sentence violated the *Austin* guideline because it was less favorable to him than the presumptive sentence for a second felony offender and because Shaisnikoff's situation did not present an exceptional case. The court then found the sentence to be clearly mistaken and ordered that

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193. See supra text accompanying note 189.

194. This sentence would violate the *Austin* guideline since no aggravating factors or extraordinary circumstances had been established and the term of imprisonment the first felony offender would be required to serve is not more favorable than the presumptive sentence for the second felony offender. See supra text accompanying notes 162-76.

The court of appeals has recognized that a sentence imposed on a second felony offender subject to presumptive sentencing is not the equivalent of an identical sentence imposed on a first felony offender exempt from presumptive sentencing. It has not, however, taken this recognition into account in applying the *Austin* guideline. See *DeMan v. State*, 677 P.2d 903 (Alaska Ct. App. 1984). In *DeMan*, the court of appeals noted in applying the *Austin* guideline that the defendant, a first felony offender, received a sentence equal to the presumptive sentence for a second felony offender. *Id.* at 912. In the accompanying footnote, the court of appeals acknowledged that the defendant's sentence is "not the precise equivalent of" the presumptive sentence for a second felony offender since if the defendant had been subject "to presumptive sentencing, he would have been ineligible for parole." *Id.* at 912 n.5. The sentence was upheld because the defendant's situation presented an exceptional case. See also *Gibbs v. State*, 676 P.2d 606, 608 (Alaska Ct. App. 1984) (parole eligibility taken into consideration in determining whether sentence for first felony offender, which complied with *Austin*, was excessive); *Ecker v. State*, 656 P.2d 577, 578 (Alaska Ct. App. 1982) (nonpresumptive sentence is "potentially more lenient" than identical sentence imposed presumptively because of parole eligibility).

195. See supra notes 183-84 and accompanying text.


197. *Id.* at 26.


199. 690 P.2d at 27.

200. *Id.* at 27-28.
on remand it be reduced to three years imprisonment with two years of that suspended, thus requiring Shaisnikoff to serve only one year of imprisonment.

To the extent that the goal of the court of appeals is to insure an appropriate relationship between sentences for first felony offenders not subject to presumptive sentencing and presumptive sentences for second felony offenders, decisions such as Shaisnikoff are inconsistent with that goal. Not only did the court of appeals reduce Shaisnikoff's initial sentence to one-half the presumptive term for a second felony offender, but it failed to consider that Shaisnikoff would be eligible for parole after serving four months of his sentence. Acknowledging these circumstances, it is difficult to understand why the sentence imposed by the trial court was clearly mistaken and why the sentence imposed by the court of appeals was appropriate. Indeed, the only justification the court of appeals cited for its sentence reduction was that Shaisnikoff's sentence violated the Austin guideline.

Recognizing the effect of parole eligibility on the actual time served by an offender raises questions concerning the appropriateness of the court of appeals' reliance upon the Austin guideline as determining, at least in practice, when a sentence is excessive under Chaney. Of course, the courts could consider parole eligibility when applying the Austin guideline. This approach, however, would be subject to the criticism that, despite statistical data strongly indicating that eligible offenders are likely to receive an early parole, a case-by-case assumption of parole eligibility in applying the Austin guideline would render the comparisons speculative.

A more direct approach to ensure an appropriate relationship between sentences imposed on first and second felony offenders is to apply presumptive sentencing to all felony offenders. This uniform approach would eliminate the need for an increasingly complex and sometimes inaccurate comparison of sentence lengths imposed on defendants sentenced under two different sentencing systems. Moreover, applying presumptive sentencing to all felony offenders would allow courts to focus on the Chaney criteria in making appropriate adjustments of presumptive terms for aggravating and mitigating factors.

IV. CONCLUSION

The 1978 revision of the state's sentencing laws attempted to eliminate unjustified disparity in sentencing. This purpose has been
well served by legislative amendment and judicial interpretation of the presumptive sentencing statutes. The legislature has gradually increased the number of crimes and offenders subject to presumptive sentencing and has added to the list of the aggravating and mitigating factors that can be considered by a trial court in adjusting a presumptive term of imprisonment. These amendments guide judicial sentencing discretion in a greater number of cases and insure that appropriate factors are taken into account during sentencing. At the same time, the expansion of presumptive sentencing reduced the possibility that improper sentencing considerations, such as the race of the defendant or the sentencing attitude of a particular judge, will affect the sentence imposed. Appellate interpretations of ambiguous provisions in the presumptive sentencing statutes consistently rec-

206. See supra text accompanying notes 153-55.
207. See supra text accompanying notes 111-14.
208. See supra note 6 and accompanying text.
209. See supra text accompanying note 7.
210. Langton v. State, 662 P.2d 954 (Alaska Ct. App. 1983), provides a graphic illustration of the extreme sentence variations that can occur when defendants convicted of the same crime, committed under essentially identical circumstances, are not sentenced under the presumptive sentencing system. Langton involved three separate sentence appeals which were consolidated for review. Id. at 955-56. Each defendant had been convicted of a sexual assault in the first degree on a young child under former ALASKA STAT. § 11.41.410(a)(3) (repealed 1983). Id. at 955. At the time the offenses were committed, sexual assault in the first degree was a class A felony. Offenders who had not previously been convicted of a felony were exempt from presumptive sentencing and faced a sentence that could be as high as twenty years imprisonment. Id. at 961.

The three Langton defendants, Langton, Doe, and Joe, were first felony offenders and therefore not covered by presumptive sentencing. Id. at 955. Each was sentenced by a different judge. Id. Langton was sentenced to ten years imprisonment with four years suspended and appealed the sentence as excessive. Id. Doe was not required to serve a single day of imprisonment and the state appealed the sentence as too lenient. Id. Joe was required to serve a sentence of twenty years imprisonment and appealed the sentence as excessive. Id.

Langton had pleaded guilty to two counts of sexual assault in the first degree and was sentenced to two concurrent ten-year terms of imprisonment with four years of each term suspended. Id. at 955. The court of appeals affirmed Langton's sentence, characterizing Langton's conduct as "the most serious" conduct included in the definition of the offense, in light of his history of sexual abuse, his disregard of the court order to avoid contact with the victim, and his unwillingness to seek counseling. Id. at 956. The court of appeals concluded that the circumstances of the case justified a sentence of at least six years imprisonment. Id.

Unlike Langton's conduct, Doe's conduct appeared to be an isolated event. Id. at 957. After pleading guilty to the assault of his sons, Doe was sentenced to five years imprisonment, all of which was suspended. Id. Doe was placed on probation and ordered to seek psychological counseling. Id. at 955. The trial court justified this sentence by characterizing the assault as an isolated incident brought on by a stressful marital relationship, noting Doe's history as a steady worker and a good provider. Id. at 957. The court of appeals disapproved of Doe's sentence as being too lenient, but
ognize the legislature's purpose in enacting presumptive sentencing and attempt to apply the statutes to further the legislative goal of eliminating unjustified sentencing disparity.\textsuperscript{211}

In light of this background, presumptive sentencing may eventually apply to all felony offenders. Indeed, of the fourteen states which have adopted presumptive sentencing systems,\textsuperscript{212} Alaska is unique in exempting from presumptive sentencing first felony offenders who would be subject to presumptive sentencing if they were repeat felony offenders.\textsuperscript{213} Including all felony offenders under presumptive sen-

\textsuperscript{211} See, e.g., Maldonado v. State, 676 P.2d 1093, 1094 (Alaska Ct. App. 1984) ("A major purpose in enacting the revised Criminal Code was to eliminate unjustified disparity in sentencing."); Juneby v. State, 641 P.2d 823, 830 n.11 (Alaska Ct. App. 1982) ("[It is manifest that the legislature's focus on eliminating disparity and achieving uniformity in sentences was calculated to significantly restrict the trial court's traditionally broad sentencing discretion.").\textsuperscript{212} See supra note 2.\textsuperscript{213} See ARiz. REV. STAT. ANN § 13-701 (1978); CAL. PENAL CODE § 1170(a)(2) (West. Supp. 1985); COLO. REV. STAT. § 18-1-105(1)(a)(II)-(b) (Supp. 1984); FLA.
Sentencing will complete the effort begun in 1978 to establish a rational, predictable, and uniform sentencing system in Alaska.