Alaska's Plea Bargaining Ban Re-evaluated

Executive Summary
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1029 W. Third Avenue, Suite 201, Anchorage, Alaska 99501 (907) 279-2526 FAX (907) 276-5046

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EXECUTIVE SUMMARY

Teresa White Carns
Project Director
Alaska Judicial Council

Dr. John Kruse
Research Consultant
Institute for Social and Economic Research
University of Alaska Anchorage

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Plea Bargaining/Presumptive Sentencing Staff

William T. Cotton, Executive Director
Teresa W. Carns, Project Director
Susanne Di Pietro, Staff Attorney
Josefa M. Zywna, Administrative Assistant
Peggy Skeers, Executive Secretary

Dr. John Kruse, Research Consultant
University of Alaska Anchorage, ISER

Past Staff Members:
Harold M. Brown, former Executive Director
Gwen Byington Prewitt, Project Interviewer

DISCLAIMER

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ABSTRACT

This article summarizes the findings of the Alaska Judicial Council's most recent evaluation of Alaska's ban on plea bargaining. The study found several major differences between Alaska's pre-ban practices and current practices that could be directly attributed to the ban. First, the standard for screening of cases was tightened immediately after the ban was announced, resulting in an increase in the number of cases not accepted for prosecution. According to most persons interviewed, the present screening policy is a positive influence on the quality of cases and a useful tool for prosecutors. The Alaska Judicial Council recommends that the present high standard for screening be maintained. If extra time is needed for screening cases in some situations (especially in rural areas), that need could be formally recognized in the written policy guidelines.

A second major effect of Alaska's 1975 ban on plea bargaining involved a dramatic shift in responsibility for the sentencing of convicted defendants. Before the ban, the prosecutor and the defense attorney commonly agreed upon a specific sentence in exchange for the defendant's plea of guilty or nolo contendere. The judge would then be asked to approve the deal. The Judicial Council found that routine sentence recommendations for a specific sentence were virtually eliminated soon after the ban and have not returned. As a result, most defendants today are sentenced by a judge at an open hearing with participation by the prosecutor, defense, and presentence reporter. Thus, responsibility for determining the sentence rests primarily with the judge, who makes an independent decision, but also benefits from the participants' input.

A third major finding of the Judicial Council's study was that charge bargaining (charge reductions and dismissals) was substantially curtailed for several years after the original plea bargaining ban; but it has become steadily more prevalent since the mid-1980s. Attorneys and judges attribute the change to a combination of circumstances, including changes in personnel in the Attorney General's office and local District Attorney offices, the changes in the criminal code structure, and the reduced resources available for the prosecution of cases after the middle of 1986.

It appears that the legal community's perception of the current prosecutorial practices related to charge bargaining is substantially at odds with the Attorney General's written policy that prohibits charge bargaining. The Attorney General's current policy prohibits a prosecutor from agreeing to reduce or dismiss charges in exchange for the defendant's plea of guilty (an exception applies in some types of multiple count cases, where the prosecutor may dismiss some counts if the defendant pleads to the "'essence' of the conduct engaged in"). The Judicial Council takes no position with respect to the practice of charge bargaining, but recommends that the written policy and the actual practice be consistent to avoid confusion in the legal community and the public. Thus, the Attorney General may wish either to reiterate the present policy as written and encourage its application in practice, or he may prefer to incorporate the existing practices into his policy.

Fourth, the Judicial Council found that sentences increased substantially in length in the years after the ban, and that the likelihood of a jail sentence increased for most offenders. These increases probably resulted more from increased societal concern with crime and willingness to allocate significant resources to law enforcement, courts and corrections than from the ban on plea bargaining or presumptive sentencing alone. However, because it is apparent that presumptive sentencing is one of several factors that has led to overall longer sentences and a much larger prison population, the Judicial Council recommends that some aspects of the presumptive sentencing scheme be reconsidered.

Specifically, the Council recommends that the Legislature, through the Alaska Sentencing Commission, thoroughly evaluate existing and proposed sentencing provisions to compare the relative seriousness of offenses, and carefully consider the full range of costs associated with new sentencing proposals. By ranking the seriousness of each offense in relation to other offenses and possibly tying each sentence to a more narrowly-defined offense, legislators and practitioners will benefit from increased specificity in sentencing. By understanding the full range of costs associated with new sentences, Alaskan legislators may be able to avoid the virtually unsolvable prison overcrowding problems found in so many other states.

A fifth finding, related to sentencing, was that appellate review of sentencing by the Alaska Court of Appeals and Alaska Supreme Court has resulted in comprehensive case law guidelines for most offenses and benchmark sentences for several types and groups of offenses. The appellate courts' decisions reflect the legislative mandate for greater fairness and uniformity in sentencing, especially those decisions that use the principles of the presumptive sentencing structure to interpret non-presumptive sentencing statutes. The Judicial Council recommends that the Legislature, through the Alaska Sentencing Commission, examine the various benchmarks set by the appellate courts to determine first whether there is sentencing law in those decisions that would be more effectively addressed by statutes, and second, whether the benchmarks and sentencing criteria could be summarized in a form that would make them easily accessible to judges, attorneys and the public.

EXECUTIVE SUMMARY

In 1975, Alaska Attorney General Avrum Gross banned plea bargaining in Alaska.[1] The Judicial Council's initial evaluation of the ban found that plea bargaining, both charge and sentence bargaining, was substantially curtailed, and that despite the dire predictions of unmanageable caseloads and backlogged trials,[2] disposition times for criminal cases actually improved. Although few thought that the policy still would be in effect fifteen years later, the Alaska Judicial Council's most recent evaluation of the ban, completed in 1990, shows that the ban continues to affect virtually every important aspect of Alaska's criminal justice system.

The ban as it exists today in Alaska differs in several important respects from its original form. The changes in the ban can be linked to two major historical developments. In 1980, a new criminal code and presumptive sentencing went into effect in Alaska,[3] both reflecting societal changes in thinking about crime and punishment. In 1985 and 1986, changes in personnel and declines in state revenues[4]

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[1] In his original ban, Attorney General Gross used the term "plea bargaining" to include both sentence bargaining and charge bargaining. A sentence bargain is an arrangement in which the defendant pleads guilty or nolo contendere in exchange for a specific sentence agreed to by the defense attorney and the prosecutor; the judge is then asked to approve the deal. A charge bargain is an arrangement in which the prosecutor agrees to reduce the original charge or dismiss one or more charges in exchange for the defendant's plea of guilty or nolo contendere. Plea bargaining in general is governed by AK. R. CRIM. P. 11(e). This article uses the terms plea, sentence and charge bargaining in the same way that the attorney general used them.

[2] See, e.g., People v. Byrd, 162 N.W.2d 777, 782 (Mich. App. 1968) (Levin, J., concurring); see also U.S. NATIONAL ADVISORY COMMISSION ON STANDARDS AND GOALS, COURTS 45 (1973).

[3] Presumptive sentencing for all repeat offenders and a few first felony offenders convicted of violent crimes where a firearm was used or serious physical injury resulted was adopted in 1978 at the same time as the criminal code revision. It was revised by the legislature in 1982 and 1983 to include all first felony offenders convicted of Class A offenses, as well as the unclassified offenses of Sexual Assault I and Sexual Abuse of a Minor I. See Stern, "Presumptive Sentencing in Alaska," 2 ALASKA L. REV. 227 (1985) for a detailed discussion.

The revised criminal code was adopted in 1978 (Act of July 17, 1978, ch. 166, 1978 Alaska Sess. Laws 219 (effective Jan. 1, 1980)). For an overview of the Criminal Code Revision Commission and its work, see Stern, B., "The Proposed Alaska Revised Criminal Code," 7 U.C.L.A.-ALASKA L. REV., (1977). The code revision included all common offenses except drugs; those were re-codified in 1982.

[4] The state's economy has cycled through two boom/bust periods since 1975. During construction of the Alaska pipeline for transport of oil from the North Slope, the economy benefitted from increasing population and substantial construction money. That period started about 1974 and ended about 1978. The economy was relatively weak from 1978 until 1981 when oil prices worldwide increased, and the

combined to create new opportunities and impetus for charge bargaining. Thus, by 1990, the written guidelines for the policy prohibiting plea bargaining remained unchanged from their 1986 version, but attorneys and judges throughout the state agreed that charge bargaining had become fairly common in most courts.

I. THE SHAPE OF THE BAN

A. The Ban Initially

1. Goals and Objectives

Attorney General Gross had enunciated several purposes for his decision to ban plea bargaining, including the establishment of a system in which people could be fairly charged, tried, and sentenced, and restoration of public confidence in the justice system.[5] He intended to clarify the roles of each agency in the justice system, saying that police should investigate cases, prosecutors should try them and judges should impose sentence.[6] Finally, he had inherited a statewide system of prosecution in which few

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state's revenues soared. Population and construction increased rapidly again until late 1985/early 1986 when oil prices dropped suddenly. The state lost population in 1987 and 1988, but began to recover in 1989. The economic ups have contributed substantial resources for increased law enforcement and justice system agencies; the economic downs and subsequent limits on justice system funding have been used to argue for increased plea bargaining.

[5] RUBINSTEIN, WHITE AND CLARKE, THE EFFECT OF THE OFFICIAL PROHIBITION OF PLEA BARGAINING ON THE DISPOSITION OF FELONY CASES IN THE ALASKA CRIMINAL COURTS 14 (1978) [Re-published by the U. S. Government Printing Office as ALASKA BANS PLEA BARGAINING (1980)[hereinafter ALASKA BANS PLEA BARGAINING]]. This report contains the Judicial Council's original evaluation of the ban; it was funded by the National Institute of Justice.

[6] Id. at 16. Alaska's criminal justice system is characterized by highly-centralized, state-financed justice agencies. The Department of Law is headed by an Attorney General appointed by the governor. All of the state's district attorneys and assistant district attorneys are employed by the Department of Law. All courts are part of the state court system; there are no local or county courts, even for municipal offenses. The Department of Corrections controls most of the state's correctional facilities. Indigent defendants are represented by the state Public Defender. If a conflict arises within the Public Defender agency, most affected clients are then represented by another state agency, the Office of Public Advocacy. This high degree of centralization of criminal justice functions enabled the state's Attorney General to prohibit plea bargaining by all state prosecutors through use of a simple intra-office edict.

A few of the larger municipalities, such as Anchorage and Fairbanks, employ their own prosecutorial staffs to prosecute misdemeanors under city ordinances. The municipal prosecutors were

cases ever went to trial, and conviction rates were low.[7] He saw the policy prohibiting plea bargaining as a means of increasing the number of trials and improving the trial skills of his prosecutorial staff.[8]

2. Objections

In contrast to Mr. Gross's goals, most experts considered a ban on plea bargaining to be impossible, undesirable, or both.[9] Many attorneys and scholars predicted that banning plea bargaining would result in a flood of defendants exercising their right to trial, a flood that would jam the courts and create huge backlogs. Others suggested that it would be impossible to truly ban plea bargaining because it simply would be forced underground or changed in nature.[10] Some attorneys argued that plea bargaining was a more just and rational way to resolve cases because it enabled the parties with the best knowledge of the case--the prosecutor and defense attorney--to decide the outcome.[11]

3. Findings of Initial Evaluation

The Council's initial study found that the ban appeared to have had many of the Attorney General's desired effects without having most of the negative consequences that had been widely predicted. It found that although more trials occurred immediately after the ban, the system managed to accommodate them without major disruptions.

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not bound by the Attorney General's prohibition and have continued to plea bargain routinely.

[7] Id. at 15.

[8] Id. at 15-16.

[9] See Church, "In Defense of 'Bargain Justice,'" 13 LAW AND SOCIETY REVIEW 508 (Winter 1979); Brunk, "The Problem of Voluntariness and Coercion in the Negotiated Plea," Id. at 524; Hermann, "Adapting to Plea Bargaining: Prosecutors," in CRIMINAL JUSTICE: LAW AND POLITICS 153 (G. Cole, 4th ed. 1984).

[10] W. McDONALD, PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES 26 (1986); see also, Cohen and Tonry, "Sentencing Reforms and Their Impacts," in 2 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 316 (1983).

[11] ALASKA BANS PLEA BARGAINING, supra note 5, at 242.

Nor was there substantial evidence that plea bargaining went underground. Most attorneys and judges interviewed in the middle 1970s agreed that their opportunities to charge or sentence bargain had been greatly curtailed. In particular, sentence bargaining, which had been the preferred mode of case disposition,[12] came to virtual halt and most cases were sentenced at open hearings after the judge heard arguments from both defense and prosecution.[13] Some argued that longer sentences imposed on defendants whose cases had been tried as compared to those who had pled indicated implicit plea bargaining, and suggested that pleas were just as coerced as if they had been openly bargained. However, while some sentence differentials persisted after the ban, others disappeared. In short, the ban appeared to have had many of the Attorney General's desired effects without having most of the negative consequences that had been widely predicted.

In addition, public response was generally favorable. A stiff screening[14] policy for charges took back charging activities from the police agencies and returned them to prosecutors. Despite strong opposition from the police at first, most came to agree in

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[12] Id. at 4.

[13] Id. at 93.

[14] Screening as the term is used in this report, and in the original plea bargaining report, refers to the prosecutor's decision whether to file a complaint against a suspect between the time that the police officer makes allegations and the time of the suspect's first court appearance. In Alaska, a person who is arrested must be brought before a judge or magistrate within twenty-four hours of his arrest, including Sundays and holidays. AK. R. Crim. P. 5(a)(1). If there is no complaint in the file at arraignment, the judge will dismiss the case.

At the first court appearance, or arraignment, the defendant is informed of the charges against him and of his legal rights, and bail is typically set. Id. In addition, if the defendant was arrested without a warrant, the judge makes an initial determination of probable cause. Id. The defendant can request a preliminary hearing, at which evidence is presented by both the prosecution and defense. In Anchorage, a "pre-indictment" hearing is typical for most felony cases. At this hearing, any agreements that have been reached by the prosecutor and defense in the early stages of the case are acted on if necessary.

If the charges are not dismissed at the arraignment or at the preliminary hearing, the state must make a decision whether to take the case to the grand jury. In Alaska, an offense which may be punished by imprisonment for more than one year (felony) must be prosecuted by indictment. AK R. Crim. P. 7(a). Indictments are issued by the grand jury. If an agreement has been reached during the pre-indictment hearing or a similar proceeding, the case may proceed by information after the defendant waives indictment. The whole set of proceedings occurring during the early phase of case processing, from screening up to indictment, is often referred to as "intake" by the prosecutors and defense attorneys.

the long run they learned to investigate cases better and that the quality of police work had improved.

B. The Ban Re-evaluated

Alaska was the only state to answer the National Commission's call for a prohibition of plea bargaining. Although other local jurisdictions banned plea bargaining of some types or for some cases, few others attempted such a sweeping policy.[15] In 1988, the State Justice Institute asked the Alaska Judicial Council to re-evaluate the ban on plea bargaining, first to see whether the ban still existed, and second to see what the long-range effects of the policy had been.[16] The resulting study analyzed the interaction of the ban with presumptive sentencing and the revised criminal code, and reviewed other factors that helped re-shape Alaska's criminal justice system in the 1980s.[17]

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[15] Examples of jurisdictions that have tried total or partial bans on plea bargaining are New Orleans; Portland, Oregon; and El Paso, Texas. See also Cohen and Tonry, supra note 10, at 309 for studies of bans in Michigan and New York.

[16] The Council's report is entitled T. CARNS AND J. KRUSE, ALASKA'S PLEA BARGAINING BAN RE-EVALUATED (Jan. 1991) [hereinafter THE BAN RE-EVALUATED].

[17] The statistical analyses reported in the Council's report relied on data taken from the state's PROMIS (Prosecutor's Management and Information System), supplemented with data from the state Department of Public Safety's APSIN system (on prior criminal history and race) and from the state Department of Corrections's OBSCIS system (presumptive sentence and race verification). The information from the three databases was merged into a single file which was then analyzed on the University of Alaska Anchorage's VAX, using SPSSX for the majority of the analyses.

The second major component of the re-evaluation of the ban was a series of interviews conducted with experienced attorneys, judges, police, defendants and corrections personnel. The interviews were done in several distinct groups. The first set of interviews was conducted among 27 attorneys and judges, about 35 police officers and about 10 probation and parole officers, all of whom had handled criminal cases from 1975 or earlier through at least 1983. These interviews were partially structured and usually lasted 1 to 2 hours. The second set of interviews included about 100 judges and attorneys who were currently handling criminal cases. All had at least one year's experience, and most had substantially more. This groups include a few of the attorneys who had been interviewed earlier. The interviews were somewhat more structured and took about an hour each. Both sets of interviews included attorneys from a variety of communities; the second set covered all of the major rural areas as well as Anchorage, Fairbanks and Juneau. The attorneys included prosecutors, public defense attorneys and private attorneys experienced in criminal cases. Judges were drawn from both the trial and appellate courts. About 29 interviews were conducted with defendants; these are described in more detail infra note 70.

1. Findings of Re-evaluation

The Judicial Council's 1991 re-evaluation concluded that the ban remains the official policy, albeit somewhat modified, of the Attorney General's office.[18] In the prosecutors' offices, the ban caused increased attention to the screening and charging decisions for the acceptance of cases. The standard shifted from a "probable cause" standard to a "beyond a reasonable doubt" standard.[19] Charge bargaining became fairly common in most parts of the state during the latter half of the 1980s, although sentence bargaining remained infrequent.[20] Finally, the report found that over the past fifteen years the percentage of convicted offenders sentenced to some jail time increased substantially, and the mean active sentence length for those sentenced to jail lengthened.[21]

2. Current Policy

The Attorney General's current policy prohibits the use of plea bargaining in most situations. It differs in two major respects from that set forth in 1975. First, written guidelines were published in 1980 by then-Attorney General Wilson Condon.[22] The most important change made at that time allowed the defendant to plead to a charge or charges that reflected the "essence of the conduct engaged in," rather than requiring that the prosecutor "charge what you can prove and then do not deviate from it unless subsequent facts convince you that you were erroneous in your original conclusion."[23]

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[18] THE BAN RE-EVALUATED, supra note 16, at 1.

[19] Id.

[20] Id.

[21] Id. The report further concluded that these trends probably resulted as much from increased societal concerns about crime as from the ban on plea bargaining and presumptive sentencing. Id.

[22] ALASKA DEPARTMENT OF LAW, CRIMINAL DIVISION, STANDARDS APPLICABLE TO CASE SCREENING AND PLEA NEGOTIATIONS (effective July 1, 1980) (1980) [hereinafter 1980 STANDARDS].

[23] Memorandum from Attorney General Avrum Gross to District Attorneys, July 24, 1975. See THE BAN RE-EVALUATED, supra note 16, at Appendix A.

This change gave prosecutors considerably more latitude to reduce and dismiss charges after the initial filing. A second change made by the 1980 guidelines was decentralization of responsibility for exceptions to the policy, permitting exceptions to be handled by the District Attorney for each area.[24] The second change to the policy occurred in late 1986, when then-Attorney General Harold Brown[25] revised the policy again to allow prosecutors to recommend a specific sentence that would have been "reasonably foreseeable after a trial" if the defendant had been tried.[26]

3. Perceptions of Current Policy

Some attorneys today profess ignorance of any prohibitions on plea bargaining;[27] others contend that exceptions to the policy are rare and that most pleas occur without specific agreed-upon concessions from the prosecutor.[28] The most general understanding of the policy however, even among prosecutors, is that, despite the 1986 change, sentence bargains are prohibited, absent special circumstances, but that charge bargaining is allowed.

Attorneys who practiced in Alaska prior to the ban and who continue to do so, do not (with a few exceptions) see the 1990 system as resembling the pre-1975 system. The Judicial Council's earlier report evaluating the ban on plea bargaining concluded that:

> [P]lea bargaining as an institution was clearly curtailed. The routine expectation of a negotiated settlement was removed; for most practitioners justifiable reliance on negotiation to settle criminal cases greatly diminished in importance. There is less face-to-face discussion between adversaries, and when

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[24] Id. at 24-25.

[25] Memorandum from Attorney General Harold M. Brown to All District Attorney Offices (November 26, 1986).

[26] Id. at 1.

[27] THE BAN RE-EVALUATED, supra note 16, at 24.

[28] Id. at 15.

> meetings do occur, they are not usually as productive as they used to be. (emphasis in the original)[29]

Before the ban, sentence bargaining under Alaska Rule of Criminal Procedure 11(e) was the preferred mode of disposition of cases;[30] in 1990, a guilty or nolo contendere plea with bargained charge(s) and open sentencing appeared to be the most likely disposition of a case. The charging decisions that were made by police in 1975 were made by prosecutors in 1990, and a much higher percentage of police-referred felonies were rejected for prosecution.

Gross commented in 1988 that he had not expected the policy to remain as inflexible as it was during the first few years. He noted that it was rigid in the beginning to prevent attorneys from getting "through the loopholes," but that its experimental nature guaranteed that the policy would change over time.[31] An assistant public defender attributed the change after 1985 to a new awareness of costs of prosecution and of imprisoning offenders sentenced to long presumptive terms.[32] Another attorney commented that the ban was a tool in the prosecutors' arsenal: "I don't recall being encumbered by the ban [after 1980]. The ban was a device, like those used by car salesmen: 'I'll have to ask the manager.' Charge bargaining was commonplace."[33]

4. Differences Among Communities

One of the original study's most notable findings was that the ban was enforced differently in different areas of the state. The differences remained striking in the re-evaluation of the policy. A district attorney in Palmer said that he did not think the ban

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[29] ALASKA BANS PLEA BARGAINING, supra note 5, at 31.

[30] Id. at 1-12.

[31] THE BAN RE-EVALUATED, supra note 16, at 17.

[32] Id. at 21.

[33] Id.

was a clear one, merely that plea bargaining was "frowned on to some degree."[34] A public defender in Fairbanks perceived a much stricter policy, saying that there was "appreciably less negotiation in Fairbanks than in other parts of the state."[35] Most attorneys agreed that the Fairbanks District Attorney enforced the policy more stringently than any other office in the state.

The initial evaluation of the ban did not have the opportunity to assess the impact of the policy in the smaller communities and rural areas of the state. The present study included interviews of many of the attorneys and judges practicing in smaller communities. Although conventional wisdom held that the ban never was intended for those areas, and that no one in the Bush followed it, a fairly large number of the attorneys actually working there believed that there was a ban in effect. In Bethel, a public defender noted that the local prosecutors were "very careful not to show an appearance of plea bargaining."[36] Because he had worked in other communities, he added that in those other areas, there was not always the "sensitivity to the prohibition that there is in Bethel."[37]

5. Decay of the Policy

The interviews, taken together, strongly suggest that the policy has decayed somewhat, especially in the last five years. Prosecutors regularly engaged in charge bargaining, although most of these bargains were never formalized as Rule 11 agreements. Attorneys appeared to interpret Rule 11 only to require notice to the court of an agreement if a recommendation by the prosecutor of a specific sentence was involved. Some saw the charge bargaining that occurred as consistent with the existing Attorney General's guidelines that spelled out a prohibition of charge bargaining; others

[34] Id.

[35] Id. at 14.

[36] Id. at 15.

[37] Id. at 16.

believed that the situation was inconsistent with the policy but that bargaining was necessary or justified.

In contrast to the gap between practice and policy for charge bargaining, the opposite situation occurred in sentence bargaining. Sentencing practices were actually somewhat more restrictive than the policy, as modified in 1986, allowed. Most cases went to "open sentencing" at which both defense attorney and prosecutor presented arguments and recommendations, with the prosecutor stopping short of recommending a specific term of years. The formal plea bargains that were made seemed to be reserved for cases that traditionally would have been bargained, even under the policy at its strictest: sexual abuse or assault cases, drug cases, and those involving informants.[38]

II. LONG TERM EFFECTS OF THE BAN

The ban on plea bargaining had several important long-term effects that either were agreed upon by most attorneys, judges and police or were suggested by phenomena that could be measured statistically. Pre-filing screening of cases by prosecutors led to new standards for police investigations, resulting in increased police professionalism. Sentence recommendations were severely curtailed and were still very uncommon in 1990. Charge bargaining, which had been secondary to sentence recommendations as the mode of negotiations prior to the ban, was infrequent for a period of time after the ban, but during the 1980s became much more important as a means of case disposition. Table 1 shows an overall picture of case processing and dispositions using data from the original evaluation of the ban and the re-evaluation.

[38] ALASKA BANS PLEA BARGAINING, supra note 5, at 70. See also THE BAN RE-EVALUATED, supra note 16, at 25-26. Some defendants pled guilty or nolo contendere under Rule 11(e) as part of a Department of Law program that substituted for the Department's pre-trial diversion program that ended in 1987. Defendants under this program received a suspended imposition of sentence (ALASKA STAT. 12.55.085) ("SIS"). If they complied with the conditions of the SIS, the convictions were set aside at the end of the sentence. The program is used only for those convicted of relatively minor offenses.

TABLE 1

OUTCOME OF CASES REFERRED FOR PROSECUTION AS FELONIES
Number of Cases and Percentage Distributions
Anchorage, Fairbanks and Juneau

	1974-1975		1975-1976		1984		1985		1986		1987	
	N	%	N	%	N	%	N	%	N	%	N	%
All Charges Screened Out	94	8%	125	11%	630	31%	536	29%	535	30%	497	30%
All Charges Dismissed	449	39%	452	40%	443	22%	395	21%	314	18%	208	13%
Plea to Reduced Charge	271	24%	203	18%	385	19%	349	19%	356	20%	406	24%
Plea to Original Charge	254	22%	254	22%	439	23%	433	23%	465	26%	439	26%
Trial Conviction	44	4%	77	7%	122	6%	130	7%	105	6%	95	6%
Trial Acquittal	31	3%	29	3%	21	1%	25	1%	19	1%	20	1%
	1,143	100%	1,140	100%	2,040	100%	1,868	100%	1,794	100%	1,665	100%
Conviction Rate Per 100 Cases Referred and Completed*		50%		47%		46%		49%		52%		56%
Conviction Rate Per 100 Cases Filed and Completed*		55%		53%		65%		68%		74%		80%

* Cases open because of an outstanding warrant or for other reasons were not included in the database. This included about 7% of the 1987 cases that were in the database as of early 1989 when it was compiled.

The most notable aspects of the table are the striking changes in screening rates between the 1970s and the 1980s, the decline in dismissed cases between 1984 and 1987 and the concomitant increase in pleas to both reduced and original charges, and the relative stability of trial rates when calculated as a percentage of referred cases. The table clearly delineates two of the study's major findings, that screening of cases increased significantly between the two study periods from 11% in the year immediately following the ban to 30% throughout the mid-1980s; and that charge reductions increased after 1985, going from 19% in 1985 to 24% in 1987.

A. Screening

Because the range of possible sanctions against the defendant is determined by the charges, the screening decisions[39] set the tone for all of the subsequent actions in the case. The Attorney General saw screening of cases as the key to making his prohibition of plea bargaining work. He believed that if the prosecutors chose a provable charge at the beginning of the case, there would be substantially less impetus to reduce or dismiss charges later.

The screening policy, which adopted a "beyond a reasonable doubt" standard[40] for accepting cases, was implemented vigorously in Anchorage and Fairbanks, and was adopted in most other parts of the state. Attorneys and police interviewed agreed that the initial increase was bought at a high price. Because police had customarily perceived themselves as making the charging decision, the Attorney General's policy of claiming this function for prosecutors left police angry. They were concerned that criminals were not being prosecuted and that victims were not receiving redress. In the longer run, however, police opinion grew more positive. A veteran police officer described the effects of the policy on the Anchorage Police Department, saying that police work prior to 1975 was "very sloppy," and police rarely went to court. After the ban, the

[39] For an explanation of screening and other pre-trial procedures, see supra note 14.

[40] 1980 STANDARDS, supra note 22, at 9. Before the ban, individual prosecutors made their own decisions about criteria for accepting cases. See, THE BAN RE-EVALUATED, supra note 16, at 40-41.

prosecutorial demands for stronger cases "forced us to go back and become good investigators."[41]

The Judicial Council concluded that the changes in screening practices were among the most far-reaching and positive effects of the ban. It recommended that the present high standards for screening be maintained.

B. Charge Reductions and Dismissals

Although they occurred routinely prior to the ban on plea bargaining, charge bargains were secondary to sentence bargains in their importance. During the first year after the ban, some prosecutors were uncertain about the application of the new policy to charging practices. By mid-1976, however, most attorneys agreed that charge bargaining had been very substantially reduced. That situation changed during the mid- and late-1980s, however, when charge bargaining emerged as a significant influence on the disposition of cases, despite the Attorney General's prohibition.

Attorney General Gross recognized the difficulties of trying to distinguish between legitimate charge reductions or dismissals and those that violated the spirit of his policy.[42] In retrospect, it was relatively easy to change the sentence bargaining practices that had been the standard means of case disposition, because the sentence recommendation was an objectively verifiable action by the prosecutor. Implementing rigorous screening standards was more demanding, but was accomplished within a few years. Prohibiting charge bargaining however, appears to have been an overly ambitious goal in the long run.

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[41] THE BAN RE-EVALUATED, supra note 16, at 37.

[42] ALASKA BANS PLEA BARGAINING, supra note 5, at 24. Charge reductions and dismissals may be tangible evidence of charge bargaining or they may represent unilateral and legitimate decisions by prosecutors to change the charge in response to new information about the case.

1. Differences Among Communities

Immediately after the ban, charge bargaining appeared to decline somewhat in most parts of the state.[43] The exceptions were the rural areas, where most attorneys viewed charge negotiations as essential to the disposition of cases,[44] and Fairbanks. In Fairbanks, charge reductions and dismissals appeared to increase during the first year, but dropped thereafter.[45]

a) Fairbanks. The differences between Fairbanks and the rest of the state may have been a combination of the local culture and a new district attorney who was appointed in February of 1975. He immediately instituted his own ban on plea bargaining six months before the statewide ban took effect.[46] His initial interpretation of the Attorney General's ban was that it permitted the filing of multiple charges, some of which could then be dismissed.[47] Figure 1 shows that charge reductions and dismissals dropped substantially in Anchorage during the first year after the ban, but increased noticeably in Fairbanks. After the Attorney General's clarification of the policy in June of 1976, charge reductions and dismissals also dropped in Fairbanks.[48]

b) Anchorage. The policy evolved very differently in Anchorage than in Fairbanks. Attorneys emphasized the importance of the pre-indictment hearing in the disposition of Anchorage cases.[49] The head of the intake division estimated at one point that some of the charge reductions and dismissals he did were unilateral decisions on his part because of evidentiary issues, other case strength problems or his decision

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[43] Id. at 27; see also, THE BAN RE-EVALUATED, supra note 16, at 49.

[44] THE BAN RE-EVALUATED, supra note 16, at 49.

[45] Id. at 54, 57.

[46] ALASKA BANS PLEA BARGAINING, supra note 5, at 237.

[47] THE BAN RE-EVALUATED, supra note 16, at 49.

[48] ALASKA BANS PLEA BARGAINING, supra note 5, at 235.

[49] See supra note 14 for information about case processing steps. See also THE BAN RE-EVALUATED, supra note 16, at 70-74, and 162-164 for a more detailed discussion of pre-indictment hearings.

that the case was not "worth" the resources necessary to prosecute it at its original level. The other charge changes were negotiated; he commented that "the criminal justice system is well-served by this kind of negotiation."[50] Table 2 shows the timing of charge reductions by geographic area; it is clear that the pre-indictment phase accounts for far more charge reductions in Anchorage than most of the rest of the state.

TABLE 2
TIMING OF CHARGE REDUCTIONS WITH PLEA
(Percentage of Filed Cases, Except for Screening Phase)

	Screening	Before Indictment	Indictment & Before Final	Final Disposition
By Major Geographic Area				
Statewide	1%	17%	7%	6%
Anchorage	1%	23%	4%	7%
Fairbanks	0%	5%	5%	4%
Southeast	3%	13%	10%	4%
Southcentral	0%	0%	7%	7%
Bush	0%	23%	16%	8%

Alaska Judicial Council
Plea Bargaining Re-Evaluation, 1991

2. Increased Charge Reductions and Dismissals

Statistical analysis of data gathered for the Council's latest evaluation of the ban showed that charge reductions increased steadily between 1984 and 1987, from 19% of all cases to the pre-ban level of 24% of all cases (Table 1). Dismissal of some charges, associated with a plea to others, also increased. About 18% of filed cases in 1984, 1985 and 1986 fit into this category; the percentage increased to 25% in 1987.[51]

Data from interviews with attorneys and judges were consistent with the statistical findings. Most attorneys in Alaska agreed that charge reductions and

[50] THE BAN RE-EVALUATED, supra note 16, at 70.

[51] Id. at 54, Table 6.

dismissals occurred more frequently in the late 1980s than in the 1970s shortly after the ban on plea bargaining.[52] Many said that charge negotiations in the late 1980s were used to dispose of the great majority of their cases.[53] The statistical data indicated that in fact over half (56% to 60%) of the convicted defendants in the 1984 to 1987 database had pled guilty (or nolo contendere) and had at least one charge reduced or one or more charges against them dismissed.[54]

3. Benefits from Charge Negotiations

Charge discussions may have occurred in many cases, but negotiations that resulted in measurable benefit to the defendant apparently happened in about half of the cases.[55] The clearest benefit came either from reduction of a presumptive charge to a non-presumptive charge or from a felony to a misdemeanor. Dropping to a non-presumptive charge not only meant a good chance of a shorter sentence, but also that the defendant would be eligible for discretionary parole.[56] Reduction from a felony to a misdemeanor could also provide a shorter sentence; but more importantly it meant that any future conviction on a felony charge would not trigger the presumptive sentencing statutes.[57] On the other hand, some, especially prosecutors, perceived the

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[52] Id. at 54.

[53] Id. at 66.

[54] Id. at 69, Table 10.

[55] Id. at 69.

[56] Id. at 60. Non-presumptively-sentenced offenders are eligible for parole, at the discretion of the parole board, after serving one-quarter of their sentence, if sentenced to 180 days or more (ALASKA STAT. §§ 33.16.090(a) (1986) and 33.16.100(c) (1990). Presumptively-sentenced defendants are only eligible for parole after serving their entire presumptive term less "good time" (which accumulates at the rate of one day for every two served). Id. at § 33.16.090(b) and (c) (1986). Parole after a presumptive sentence is not discretionary with the parole board, but may be revoked for technical or other violations. Id. at §§ 33.16.090 - 100 (1990).

[57] THE BAN RE-EVALUATED, supra note 16, at 60. In general, presumptive sentencing applies to all offenders convicted of class A felonies, and to all class B and C offenders convicted of a second or subsequent felony. It also applies to the unclassified offenses of Sexual Assault I and Sexual Abuse of a Minor I, and in a limited number of other circumstances. ALASKA STAT. § 12.55.125 (1990).

primary benefits as flowing to the state, through cost savings, rather than to the defendant.[58]

While benefits from charge negotiations may have accrued to both the defendant and the state, the Judicial Council concluded that the discrepancy between the Attorney General's written policy and the actual practices could cause confusion in the legal community and among the public. The Judicial Council recommended that the Attorney General clarify the current policy on charge bargaining. The Council took no position with respect to the practice of charge bargaining, simply stating that the written policy and actual practice should be consistent.

C. Trials

The Attorney General expected that his new policy would create more trials; that was, in fact, one of the primary reasons for establishing it.[59] As Table 1 shows, trials did increase in the first year after the ban, from 7% of all cases to 10%.[60] Other Judicial Council studies found that the rate of trials increased again in 1977, and by 1978 had levelled off.[61] By 1980, the trial rate had dropped considerably,[62] and by 1984, the rate had dropped back to 7% of all cases arrested or referred to the prosecutors. It stayed at about that level through 1987. Most interviewees attributed the increase in trial rates

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[58] Id. at 60.

[59] Mr. Gross said in an interview in 1978 that "The major concern I had after I was appointed Attorney General was the general level of performance of prosecutors' offices. There were lots of lag times, the conviction rates were appalling, especially in one office." Other attorneys concurred that there were problems: "...[I]n 1973 one of the top trial men in this office...didn't try a single case....You can't tell me that every one of those cases had evidentiary problems." ALASKA BANS PLEA BARGAINING, supra note 5, at 15.

[60] Data from other Judicial Council studies shows that the percentage of charges (the unit of analysis in all of the Council studies conducted on cases filed between 1974 and 1981) convicted after trial rose from 8.5% in the year before the ban to 15.3% in the first year after the ban. In the second year after the ban, the rate was 22.4%. In 1978, it was 21.8%, and in 1979 it was 21.2%. In 1980, it dropped to 15.8%. See N. MAROULES AND T. WHITE, ALASKA FELONY SENTENCES: 1976-1979, at 15 (1980); and N. MAROULES, ALASKA FELONY SENTENCES: 1980, at 56 (1982).

[61] N. MAROULES AND T. WHITE, supra note 60, at 15.

[62] N. MAROULES, supra note 60, at 56.

immediately after the ban to the ban itself. The gradual decline in trial rates and their stability in the mid-1980s suggest that the justice system adjusted to the ban and to subsequent changes in the criminal code and sentencing structure without resorting to trials. Still, Alaska trial rates for filed and completed cases in 1986 were higher than other major jurisdictions in the United States during that year.[63] The continuing high trial rates were partially related to the ban and partially to the current presumptive sentencing laws.

1. Resources for Trials

The evidence, both statistical and interview, strongly supported the conclusion that while trials did increase for the first two to three years after the ban, the increase was handled by the system without significant new resources. Although a backup in civil cases was attributed to the ban at one point,[64] no new judges were added specifically because of the ban. Justice system resources did increase during the years after the ban. Between 1977 and 1980, justice system operating budgets for state agencies typically increased by 30% to 50%. Between 1980 and 1986, operating budgets increased by another 67% (courts and public safety) to as much as 300% (corrections).[65] However, the increases arguably were related to population growth and to substantially higher state revenues, primarily from oil, rather than to policy changes.

2. Differences in Sentences after Trial Conviction

One major issue related to trials was the persistent question of whether sentences imposed on those convicted at trial were harsher than those for defendants convicted by their plea of guilty or nolo contendere. The existence of a differential, or "tariff," related

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[63] THE BAN RE-EVALUATED, supra note 16, at 91.

[64] In an ANCHORAGE DAILY NEWS article dated May 22, 1978, the court's Administrative Director Arthur Snowden said resources had been diverted for the trying of criminal cases, due to the increase in trials related to the plea bargaining ban. He added that "It may take three or four months more time to process civil cases."

[65] THE BAN RE-EVALUATED, supra note 16, at 99. Data were provided by individual agencies.

to post-trial sentences has been taken by some as prima facie evidence of plea bargaining.[66] Past Judicial Council studies consistently showed evidence of trial/plea differentials in sentences for some types of offenses. Most attorneys and judges interviewed for the present study, however, said that even though a defendant might receive a longer sentence after trial, that there were no trial differentials. Instead, they insisted, longer sentences were justified either because of the facts about the case that became known at trial or because of the offender's denial of his acts in the face of overwhelming evidence of guilt. A judge suggested that it was the position that a defendant took at trial rather than the act of going to trial that was considered in determining sentence length.[67] Other judges and attorneys believed that defendants could receive shorter sentences after trial. An Anchorage judge thought that a sympathetic jury could help the defendant's cause.[68] An Anchorage defense attorney, however, attributed the benefit to the judge's opportunity to see the defendant as more human.[69]

Neither interviews with defendants nor substantial statistical analysis provided evidence to support or disprove the presence of trial tariffs. Only two of the defendants interviewed for the study had actually gone to trial,[70] but just over half thought they would have been better off had they gone because they believed that more facts in their favor would have come out.[71] Alternatively, they believed that they would have been able to tell their own story and that that would have worked in their favor.[72] However,

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[66] McDonald, "From Plea Negotiations to Coercive Justice: Notes on the Respecification of a Concept," 13 LAW AND SOCIETY REVIEW 385, 386 (1979).

[67] THE BAN RE-EVALUATED, supra note 16, at 108.

[68] Id. at 116.

[69] Id.

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

[71] Id.

[72] Id. at 104.

many said that their attorneys had advised them against going to trial. The primary reason given, according to the defendants, was that they would be sentenced to longer terms.[73] The statistical analysis of trial differentials[74] was separated into consideration of the "in/out" decision[75] and the mean active sentence length[76]. The results were inconclusive, partly because of the limited information available to include in the models. In short, there was no evidence of a widespread trial differential, although differences for individual offenses or defendants could be shown.

D. Sentencing and the Ban

Although the Attorney General insisted that it was his intent to return sentencing to the judiciary, not to affect it directly, the prohibition of plea bargaining had, and continues to have, profound consequences for sentencing practices in Alaska. The ban did result in longer sentences for some offenders, and sentences for most offenders increased in the late seventies. Prohibiting plea bargaining and the subsequent lengthier sentences did not stop the impetus in the legislature and public for a new approach to sentencing, however. A new criminal code and a presumptive sentencing scheme were adopted in 1980. Underlying the specific policy changes embodied in the ban, the new code and presumptive sentencing were the societal and academic trends to reconsider the usefulness of rehabilitation theories and to deal with crime and criminals more severely.[77]

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[73] Id. at 105.

[74] Id. at 109. Test analyses of groups of offenses tended to yield spurious results. Instead, eleven common specific offenses (e.g., Theft II, Burglary II, Sexual Abuse of a Minor I) were used in the analysis. Logit analysis (for the in/out decision) and multiple regression (for the sentence length) were used to test the interaction of plea/trial decisions with the variables or presumptive sentence status, number of prior felonies and number of convicted charges.

[75] The "in/out" decision is defined as the judge's decision whether to sentence the offender to some amount of jail time as compared to placing the offender directly on probation or suspending all jail time imposed.

[76] Mean active sentence length was defined as the net amount of time the offender was sentenced to serve, taking into account the total sentence and any suspended time.

[77] See A. BLUMSTEIN, 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 62 (1983).

1. Presumptive Sentencing

Presumptive sentencing was based on the Twentieth Century Fund's recommendations for a "just deserts" sentencing structure that allowed more judicial discretion than "flat time" proposals, and more legislative structure than mandatory minimums.[78] Alaska's presumptive sentencing statutes specify the exact sentence to be imposed on the typical offender for serious first offenses and for all repeat felony offenders. The sentence can be adjusted using statutory or non-statutory aggravating and mitigating factors; in cases where imposition of the presumptive sentence would result in manifest injustice the case can be referred to a three-judge panel which will decide the sentence. Discretionary parole is not available for offenders sentenced presumptively.[79]

Presumptive sentencing directly affects only a minority of the convicted offenders studied[80] and only a very small percentage of all offenders sentenced in Alaskan courts. The Court of Appeals, however, has used presumptive sentencing as a reference point in deciding appropriate sentences for non-presumptive offenses,[81] thus extending the influence of presumptive sentencing to all felony offenders.[82]

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[78] A. DERSHOWITZ, FAIR AND CERTAIN PUNISHMENT, REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING 15 (1976).

[79] Discretionary parole is not available during the presumptive portion of the offender's term. If the actual sentence is longer than the presumptive term because of aggravating factors or consecutive sentences, discretionary parole applies during the extended period of the jail term. The offender's sentence can be reduced from the presumptive term by the accumulation of good time, which accrues at a rate of one day for every two served. If the offender is released before the end of the presumptive term because of accumulated good time, "mandatory" parole applies during the remainder of his term. See ALASKA STATS. §§ 33.16.090 - 100 (1986) and .100 (1990) (parole), and 33.20.010 (1986) (good time).

[80] For example, 37% of all sentenced offenders incarcerated on November 5, 1986 had presumptive sentences. DEP'T. OF CORRECTIONS, ANNUAL REPORT, FY'87, at 59 (no date).

[81] See S. Di Pietro, "The Development of Appellate Sentencing Law in Alaska," 7 ALASKA L. REV. 265 (1990) for a complete discussion of appellate review of sentencing, and the Court of Appeals benchmarks and guidelines. The article was prepared under the same State Justice Institute grant that funded the remainder of this project.

Austin v. State, 627 P.2d 657 (Alaska Ct. App. 1981) (per curiam), held that "[n]ormally, a first offender should receive a more favorable sentence than the presumptive sentence for a second offender. It is clear that this rule should be violated only in an exceptional case."

[82] Di Pietro, supra note 81, at 281.

2. Criminal Code Revision

Alaska established its Criminal Code Revision Commission in 1975. At the time, Alaska's criminal code had not changed substantially since the early Territorial days when federal decision-makers had adopted Oregon's statutes with few revisions.[83] The Commission followed the Model Penal Code, choosing a system of categorizing offenses by levels of seriousness (e.g., A, B, C). It also broadened many of the grounds for conviction by liberalizing intent provisions and including recklessness, thus making convictions easier to obtain, and re-defined many offenses.[84] Most of the Commission's recommendations were adopted by the legislature in 1978.[85] The 1978 revisions did not address drug offenses, which were re-codified in 1982 into a structure consistent with other offenses. Sexual offenses also were re-codified in 1982 and 1983, with most behavior re-classified and made subject to more severe penalties.

Presumptive sentencing was of far greater interest to most attorneys and judges who were interviewed for this study than were the changes in the criminal code. Attorneys in Alaska saw the relatively broad provisions of the code, in combination with presumptive sentencing, as greatly increasing the power of the prosecutor, though they did not agree upon how the new code and sentencing scheme interacted with the policy prohibiting plea bargaining. No real consensus, even within individual communities, could be ascertained about the changes wrought on the ban by the introduction of presumptive sentencing.

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[83] Stern, "The Proposed Alaska Revised Criminal Code," UCLA-ALASKA L. REV. 4 (1977). The Commission also relied heavily on Oregon's 1973 revision of its criminal code in developing Alaska's new code, thus maintaining the historical connections between the two codes. Alaska's code revision commission also referred to New York, Arizona, Michigan and Missouri codes, among others. For a detailed history of the Criminal Code Revision Commission's work, see ALASKA DEPARTMENT OF LAW, CRIMINAL CODE MANUAL (June 1979).

[84] The judicial members of the Code Revision Commission formally objected to the structure of the revised code. In a February, 1977 letter to the Commission Chair, Rep. Terry Gardiner, the two judges said, "...the majority of the subcommission, in its proposed major revision of the Code, has proposed a maize (sic) of different types and degrees of crime which will create a colossal bureaucracy in the criminal justice system of the state...." They went on to predict that the new code would result in fewer convictions and more hearings and trials. (Letter available in Judicial Council library).

[85] The new criminal code completely re-wrote Titles 11 and 12 of Alaska Statutes. See Stern, "Presumptive Sentencing in Alaska," supra note 3, at 227.

3. Appellate Review of Sentencing

The role of Alaska's appellate courts in structuring sentencing also has been critical. A court of appeals was established in 1980, shortly after the new code took effect, with jurisdiction over criminal cases. The supreme court retained a discretionary right of appeal. The court of appeals, which had decided over 1,100 sentence appeals by 1989[86] in addition to its merit appeal decisions, adopted the role envisioned by the original proponents of appellate review of sentencing. It routinely reduces excessive sentences to bring them in line with sentences given in comparable cases. The court also created an extensive body of case law articulating appropriate sentencing principles, establishing benchmark terms for many types of offenses, and establishing standards for the extent to which sentences can be increased in aggravated cases. In addition, the court of appeals moved to close a major loophole in the presumptive sentencing scheme by regulating the total aggregate terms that may be imposed for offenders who are sentenced consecutively.[87]

4. Changes in Sentencing Patterns

Whatever factors were responsible, sentence lengths increased substantially in Alaska after the ban, and the defendants' chances of being sentenced to straight probation were substantially lessened. The likelihood of a jail sentence[88] increased for most offenses immediately after the ban, and was even higher in the mid-1980s than in 1975-76 for each major group of offenses.[89] Among individual offenses the likelihood

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[86] Di Pietro, supra note 81, at 295 (citation omitted).

[87] Id. at 294.

[88] Virtually all jails in Alaska are run by the state Department of Corrections, and no distinction is made between jail and prison. When a judge imposes a sentence of incarceration, the defendant is committed to the custody of the Department of Corrections, which then classifies the offender and determines the correctional facility to which he or she will be sent.

[89] Alaska's incarceration rates appeared to be about the same or lower for most offenses than the average for other state courts, according to a recent Department of Justice study. For example, in 1986, 31% of Alaska felons convicted of Burglary I received a sentence with no incarceration, as did 37% of those convicted of Burglary II. In other state courts, the average for no incarceration (i.e., no jail and no

of a jail term varied, with some decreases and some increases; but overall, three-quarters of the 1984 offenders were sentenced to some jail time. By 1987, the overall percentage of defendants incarcerated had dropped to 69%, influenced primarily by a large drop in the percentage of property offenders likely to go to jail (from 71% down to 57%).

Mean sentence lengths fluctuated more than did the in/out decisions between 1976 and 1984. Some differences may be due to lack of comparability among offenses, such as Robbery under the old code which included both armed robbery and "strongarm robbery." These are generally distinguished in the new code as Robbery I and Robbery II. The offenses that carried first felony offender presumptive sentences all experienced increases in sentence length. Robbery I rose from 56 months to 61 months. Sex Assault I rose from 82 to 101 months, and Sex Abuse I rose from 18 (there were fewer than 10 cases in the 1975-76 group) to 86 months. Sentences increased for all other offenses, reflecting the general tendency towards higher sentences.[90] The total months of active time sentenced in 1974 was 7,377 (569 convictions), and in 1975, was 8,922 months (534 convictions).[91] In 1984 through 1987, the average months of active time sentenced was 24,856 months/year for an average 931 convictions/year. The average active time per conviction in 1975 was 16.7 months; in 1984-1987, it was 26.7 months. Some of the

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prison) was 26%. For rape, compared to sexual assault I (Alaska), the rates of probation were 12%. Drug trafficking average probation rates for other states were 36%; Alaska's rate for drugs III and IV (Classes B and C) was 32%. Langan, "Felony Sentences in State Courts, 1986," BUREAU OF JUSTICE STATISTICS BULLETIN 2 (Feb. 1989); THE BAN RE-EVALUATED, supra note 16, at 140. It should be noted that Alaska's overall incarceration rates per 100,000 population, however, are substantially higher than the national averages. In October, 1990, Alaska had 354 persons incarcerated per 100,000 population, the fourth-highest rate in the country. See ALASKA SENTENCING COMMISSION, 1990 ANNUAL REPORT TO THE GOVERNOR AND THE ALASKA LEGISLATURE 2 (1990).

[90] See THE BAN RE-EVALUATED, supra note 16, at Appendix C, Tables C-2 to C-7 for sentences for each specific type of offense convicted in the 1984-1987 database. The misdemeanors included in the tables were the final most serious offense of conviction in cases where at least one original charge was a felony.

[91] No accurate data are available on the actual amount of time served -- as compared to actual time sentenced -- for the average offender. Parole guidelines determine to some extent the amount of time served by offenders eligible for parole; good time provisions structure the amount of time served by presumptively-sentenced offenders and also play a part in the sentence of other offenders.

increase is due to the increased number of offenders, but a substantial portion is due to the higher sentences.[92]

5. Sentencing Variables

One of the primary purposes of the presumptive sentencing laws was "the elimination of unjustified disparity in sentences."[93] Disparities of concern to the legislature in the mid- and late-1970s included racial disparity, and large variations in sentence length depending on the identity of the sentencing judge.[94] Disparity in sentence related to identity of length in judge was not found in the present study.[95] Preliminary analysis of the data in the present study found some evidence of disparity for Natives; however, more rigorous analysis showed no evidence of disparity when factors such as prior record, number of convicted charges, and presumptive sentence status were taken into account.[96] Some attorneys suggested that the ban on plea bargaining was responsible for the disappearance of racial disparity. Since the disparities had disappeared before the introduction of presumptive sentencing, it may

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[92] Attorney General Gross commented during the first evaluation of the ban: "I'm inclined to believe that if we hadn't done a thing in terms of plea bargaining, sentencing would still be higher today. I think the sentences are a reflection of the temper of the times." ALASKA BANS PLEA BARGAINING, supra note 5, at 13.

[93] ALASKA STAT. § 12.55.005 (1984). The legislature went on to say, in this section, that "the attainment of reasonable uniformity in sentences can best be achieved through a sentencing framework fixed by statute as provided in this chapter."

[94] These disparities had been identified in several Judicial Council studies during the mid-1970s, including ALASKA BANS PLEA BARGAINING, supra note 5, at 198, 201 (judge identity) and 201-204 (racial); S. CLARKE AND M. RUBINSTEIN, ALASKA FELONY SENTENCING PATTERNS: A MULTIVARIATE STATISTICAL ANALYSIS (1974-1976), at 41 (judge identity) and 43 (racial disparity) (1977); and N. MAROULES and T. WHITE, supra note 60, at 24, 35 (judge identity) and 40-41, 63 (racial disparity).

[95] THE BAN RE-EVALUATED, supra note 16, at 147. "The lack of importance of this variable may reflect the combined contributions of presumptive sentencing and the guidelines and benchmarks set by the appellate courts." Id.

[96] Id. at 148-149.

be that there was a relationship; however, no statistical analysis has been undertaken that could prove this hypothesis.[97]

6. Prosecutors' Role at Sentence Hearings

Prosecutors maintained some role at sentencing, offering information to the judge about the defendant's characteristics, suggesting a range of sentence or a cap, or mentioning dismissed charges or aggravating factors. All of these things were subject to discussion with the defense, although the discussions often took place only after a plea of guilty or nolo contendere had been entered.[98] One rural private defense attorney described several types of sentencing agreements, including a cap on the sentence requested by the prosecutor, a non-binding concurrence on sentence length between prosecutor and defense attorney, an open sentencing hearing, and last (and least common), a binding sentence agreement under criminal rule 11(e).[99]

7. Effects of Charge Bargaining on Sentence Length

An analysis of the mean sentence length for typical offenses suggested that charge reductions could be of great benefit to a defendant. Charge reductions had the potential of being beneficial both in terms of the sentence for the immediate offense and in terms of the offender's record of convictions to be considered in future sentencings. For example, the mean sentence for Assault I was 78.5 months. Because Assault I is a Class

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[97] Id. at 150.

[98] In a manual on criminal defense prepared for the Continuing Legal Education program of the Alaska Bar Association, assistant public defender Susan Orlansky noted that defense attorneys could "[t]ry to negotiate that the dismissed or reduced counts will not be considered at sentencing. Try to stipulate to a version of the facts both sides will accept. Get these concessions in writing or on the record....The state and the defense may agree not to file or not to contest reasonably debatable aggravators and mitigators. Connolly v. State, 758 P.2d 633, 638 (Alaska App. 1988). If that is part of the deal, make it explicit." Orlansky, "Presentencing Procedures, Particularly Challenges to Negative Information in the Presentence Report," in FEDERAL AND STATE SENTENCING PROCEDURES AND ISSUES, at 000012 (1989) (Prepared for Alaska Bar Association CLE Course).

[99] THE BAN RE-EVALUATED, supra note 16, at 157.

A offense, even first-time felony offenders were subject to a presumptive sentence.[100] If the charge was reduced to Assault II, for which the mean active sentence was 24.6 months, the offender had clearly received a substantial benefit. The reduction from Assault II to Assault III, which had a mean active sentence of 16.2 months was less dramatic. The most common reduction was from Assault III to the misdemeanor of Assault IV. Not only was the mean active sentence for Assault IV only 3.6 months, but presumptive sentences did not apply to repeat misdemeanor offenders. Most importantly, if the defendant was convicted of a subsequent felony, the misdemeanor conviction did not affect status as a first felony offender.

8. Relationship Between Charge Bargaining and Presumptive Sentencing

Various commentators have suggested that the structured sentencing systems comparable to Alaska's presumptive sentencing would encourage charge bargaining. Charge bargaining appeared to increase in Minnesota, for example, for some offenses after the introduction of sentencing guidelines.[101] In Omaha, Nebraska, passage of a law making third-offense drunk driving a felony resulted in 42% of the "third-offense" charges filed being plea bargained down to "second-offense" charges.[102]

The evidence in Alaska appears to suggest that the percentage of charge reductions did rise after the 1982-1983 amendments increased the severity of presumptive sentences for some offenses and greatly expanded the number of

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[100] The presumptive sentence for first felony offenders is 5 years, or 7 years if the victim was seriously harmed or a firearm was used. ALASKA STAT. § 12.55.125(c)(1)-(2) (1990). Since Assault I behavior by definition causes serious harm to the victim, the typical first felony offender sentence would be seven years. Offenders sentenced presumptively are not eligible for parole but may earn good time at a rate of one day for every two served. See supra notes 56 and 79.

[101] Cohen and Tonry, supra note 10, at 426. Cohen and Tonry cited the Minnesota Sentencing Guidelines Commission report that showed that "...the proportion of charge reductions increased for cases with low criminal history scores--fewer cases were actually convicted of aggravated robbery. There were apparently adjustments in case processing to avoid imposing the prescribed prison term for marginally serious defendants when prison was not deemed appropriate in every case by court personnel. With high criminal history scores, however, the proportion of charge reductions declined...."

[102] S. WALKER, SENSENSE AND NONSENSE ABOUT CRIME 110 (2d Ed. 1989).

defendants to whom presumptive sentencing would apply. However, the patterns of charge reductions do not clearly support a hypothesis that the increase in charge reductions was a direct result of the changes in presumptive sentencing.

For example, the definitions of sexual offenses were drastically revised in 1983, and penalties were increased for most sexual offenses. The rates of charge reductions for sexual offenses did not increase after 1984; they dropped in 1985 from 31% to 27%, increased in 1986 to 33%, and increased again in 1987 to 35%. The differences are not substantial in either direction, and do not suggest that the changes in either the code or the sentences played a role. The charge reduction rates for Robbery I, which became subject to a five-year presumptive sentence for first felony offenders in 1983 also declined, from 31% in 1984 to 6% in 1985. From there, they increased sharply, rising to 28% in 1986 and 46% in 1987.

9. Other Factors Affecting the Ban and Sentencing

Although some attorneys thought that the increasing amounts of charge bargaining after 1985 were related to the pressure of presumptive sentences for first felony offenders, it appeared likely that other factors were more important. Chief among these were the changes in personnel in the Attorney General's office,[103] and the budget constraints related to declining state revenues because of the drop in world oil prices.

The relationship between presumptive sentencing and the ban on plea bargaining is complicated by the striking demographic and economic changes taking place in Alaska throughout the 1980s. The state's revenues, in 1979 dollars, tripled by 1982 going from $1.5 billion to $4.5 billion. The increase was due to a combination of increased oil production at Prudhoe Bay and a tripling of world oil prices during the same period.[104] The state's economy plummeted in 1986, due to falling world oil prices, but began to

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[103] In mid-1985, Norman Gorsuch resigned as Attorney General and was succeeded by Harold M. Brown. Also in mid-1985, Dan Hickey who had held the position of Chief Prosecutor since the ban in 1975, and who had been largely responsible for enforcing the ban, returned to private practice. Mr. Brown commented later that "I was not a great believer in the ban." THE BAN RE-EVALUATED, supra note 16, at 31.

[104] Leask, Foster and Gorsuch, "Where Have All the Billions Gone?" ALASKA REVIEW OF SOCIAL AND ECONOMIC CONDITIONS 5 (Feb. 1987).

recover in 1988 and 1989.[105] The state's population increased over 30%, from 414,000 to around 542,000, between 1979 and 1986,[106] then dropped, but began increasing again in 1988 and 1989.[107] Some of the state's justice system problems that were commonly attributed to the plea bargaining ban, or to presumptive sentencing, or both, were often better explained by reference to the state's revenue ups and downs, or to the dramatically increased numbers of convictions resulting from increased enforcement efforts in the early 1980s.[108] Many attorneys believed that presumptive sentencing, especially for first offenders, encouraged or forced charge bargaining, but the statistical evidence did not provide any strong support for that hypothesis.

III. SUMMARY

The study found two major differences between Alaska's pre-ban practices and current practices that could be directly attributed to the ban. First, the standard for screening of cases was tightened, resulting in a dramatic increase in the number of cases not accepted for prosecution, with consequent improvements in case quality. According to most persons interviewed, the present screening policy is a positive influence on the quality of cases and a useful tool for prosecutors. If extra time is needed for screening cases in some situations (especially in rural areas), that need could be formally recognized in the written policy guidelines.

Second, routine sentence recommendations for a specific term were virtually eliminated soon after the ban and have not returned. As a result, most defendants are

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[105] Boucher, et al, "1989: Economic Revival Plus an Oil Spill Boom," ALASKA ECONOMIC TRENDS 3, Figure 1 (April 1990).

[106] Leask, Foster and Gorsuch, supra note 104, at 19.

[107] ALASKA POPULATION OVERVIEW: 1988 AND PROVISIONAL 1989 ESTIMATES 14 (1990).

[108] See T. CARNS, ALASKA FELONY SENTENCES: 1984, at 54-61 (1987), for a detailed discussion of these changes. The analysis shows that neither increased population (up by 30%), nor higher crime rate (reported crime increased by 16% between 1980 and 1984) explained the 100% increase in the number of convicted offenders between 1980 and 1984. Criminal justice agency operating budget increases appeared to be more closely related to the increase in convictions.

sentenced by the judge at an open hearing with participation by the prosecutor, defense, and presentence reporter.

A third major finding was that charge bargaining was substantially curtailed for some years, but has become steadily more prevalent since the mid-1980s. A combination of circumstances appears to be responsible, including changes in personnel in the Attorney General's office and local District Attorney offices, the changes in the criminal code structure, and the reduced resources available for the prosecution of cases after the middle of 1986. Most charge bargaining in Anchorage occurs, according to attorneys, at the pre-indictment phase. Charge bargaining is less frequent in Fairbanks than elsewhere in the state.

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

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

IV. RECOMMENDATIONS

The Judicial Council makes the following recommendations as a result of its findings from the re-evaluation of the ban on plea bargaining:

A. Screening

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

B. Charge Bargaining

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

It appears that the legal community's perception of the current prosecutorial practices related to charge reductions and dismissals are substantially at odds with the Attorney General's written policy that prohibits charge bargaining. The current policy is stated as:

> Unless specifically approved by the Attorney General or the Chief Prosecutor prior to the initiation of any negotiations, prosecuting attorneys will not enter into any agreement or understanding with a defendant or his attorney that is designed to lead to the entry of a plea of guilty...that in any way involves a concession with respect to the charge to be filed or which involves an agreement to dismiss or reduce a charge, except as provided under subsection (2) below."[109]

Subsection (2) permits the prosecutor, in multiple count cases (excluding felony violent offenses) to communicate to the defendant prior to the entry of a plea that counts may be dismissed if the defendant pleads to the "'essence' of the conduct engaged in," if the office supervisor approves the dismissals, and if the dismissed counts are mentioned at sentencing.

Despite this statement of policy prohibiting "charge bargaining," most prosecutors, defense attorneys and judges interviewed said that charge bargaining occurred fairly routinely in most parts of the state. In general, they perceived this as a different

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[109] See 1980 STANDARDS supra note 22, at 24.

situation than existed in the late 1970s and early 1980s. The statistical evidence also supported the hypothesis that charge bargaining increased substantially in the mid- to late-1980s.

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

C. Sentencing

1. Some aspects of presumptive sentencing should be re-considered.

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

Presumptive sentencing affects the entire criminal justice system, from influencing arrest and charging decisions made by prosecutors to affecting the numbers of offenders going to trial, and contributing to overcrowded prisons. Although the ideas underlying presumptive sentencing still appear useful, re-thinking the implementation of those ideas could be helpful. For example, in the original presumptive sentencing proposals made by Professor Alan Dershowitz, sentences were tied to narrowly-defined offenses. When presumptive sentencing was adopted in Alaska, it was combined with a criminal code in which the emphasis was on broader definitions of offenses, and in which sentences were imposed based on a system that classified all offenses into six general groups.

Presumptive sentencing in Alaska might better meet the needs of practitioners and legislators if sentences were more closely tied to specific offenses.

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

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

While the comparative contributions of presumptive sentencing, the plea bargaining ban and the changes in public attitudes in favor of tougher sentences are not necessarily clear, it is apparent that these factors in some combination (together with factors of population and resource increases) have led to overall longer sentences and a much larger prison population. Alaska ranked fourth among the states in 1987[110] in the percentage of its population that it incarcerated.

In spite of Alaska's relatively large prison population, prison overcrowding is much less of a problem in Alaska than in many other states. Abundant state resources, especially before 1986, allowed Alaska the flexibility to greatly increase funding for its criminal justice agencies. However, those substantial state resources are likely to decline,

[110] Austin and Brown, "Ranking the Nation's Most Punitive and Costly States," FOCUS 2 (National Council on Crime and Delinquency) (July 1989).

both as a result of decreasing oil production and as a result of public pressure for reduced government spending.

Alaska is not the only state that has adopted determinate sentencing laws that emphasize substantial prison terms. However, to the extent that the plea bargaining ban still exists in Alaska, prosecutors' flexibility to take into account economic realities in sentencing is constrained. There is substantially less chance of a reduced sentence in exchange for a plea in Alaska than in most other states. Further, it is likely that at least one reason for the increase in charge bargaining in Alaska is the perception of the actors in the criminal justice system that system resources are becoming more scarce.

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

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

The Alaska legislature has already taken the first step in this regard by establishing the Alaska Sentencing Commission.[111] The Commission is charged, among other duties, with considering the "seriousness of each offense in relation to other offenses," "alternatives to traditional forms of incarceration," and "the projected financial effect of changes in sentencing laws and practices." This Commission can go a long way towards solving problems in Alaska's sentencing structure before the structure becomes unmanageable.

[111] ALASKA STAT. § 44.19.561-577 (1989 and Supp. 1990).

D. Current Case Law on Sentencing

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

The legislature and the Sentencing Commission should examine the various benchmarks set by the courts to determine first whether there is sentencing law in those decisions that would be more effectively addressed by statutes, and second, whether the benchmarks and sentencing criteria could be summarized in a way that would make them easily accessible to judges, attorneys and the public.

The Supreme Court and Court of Appeals have established many benchmarks and criteria to guide the discretion of sentencing judges. The appellate courts' decisions have been extremely helpful in structuring sentencing activity in the trial courts. However, because the decisions have not been compiled in one place, it is not always easy to find the current law on sentencing of a particular offense. Summarizing the case law related to sentencing, and possibly codifying portions of it, would have two primary benefits. It would permit other factors (such as the state's resources) that are inappropriate considerations for the appellate court, to be taken into account in setting benchmarks and guidelines. The process also would encourage input from agencies and persons affected by sentencing decisions, thus increasing the opportunities for accountability.