IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT JUNEAU

STATE OF ALASKA	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
TY GRUSSENDORF,	)	Case No. 1JU-15-364 CR
	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR CONSTITUTIONAL VIOLATIONS AND PROSECUTORIAL FAILURE TO FOLLOW GUIDELINES

I. FACTS

Ty Grussendorf, 18 years old in 2013 when this case originated, is accused in the indictment of six counts of sexual abuse of a minor in the first degree and one count of attempted sexual abuse of a minor in the first degree. The counts charge that he, being over 16 years old (i.e., 18), sexually penetrated or attempted to sexually penetrate, M.M., a 12 year old girl.

M.M., the alleged victim in this case, saw Mr. Grussendorf at a basketball event. Grand jury transcript (GJ) p. 12, 13. M.M. testified that Mr. Grussendorf was 18. GJ p. 12. She knew who he was through her older sister and other people, GJ p. 12. M.M. had been hanging out with older teens -- her sister (two years older) and her friends. Children's Advocacy Center interview transcript (CAC) p. 14. She was trying to be cool. CAC p. 15.

M.M. and Mr. Grussendorf didn't talk face to face at the practice, they just saw each other. GJ p. 38. She initiated contact with him via "Kik" Messenger, GJ p. 14, and later on Facebook, Twitter, Instagram, or by text. GJ p. 14, 38. She says they really met online and followed each other. GJ p. 38. (The social media sites do not allow 12 year olds to open an account but she had apparently lied about her age.[1])

She and Mr. Grussendorf did not have idle social-media conversations; the talk was about sex. GJ p. 15. They agreed to meet for the purpose. M.M. had her mother take her to the Nugget Mall, saying that she was meeting with her friends. GJ p. 15, 16. Instead Mr. Grussendorf picked her up and parked at the airport trail. GJ p. 16. She proceeded to give him oral sex, and according to her testimony at grand jury he digitally penetrated her. GJ p. 17, 18. In her CAC interview she said she gave him oral sex and a "hand job" and he touched her "down there," fingered her. CAC p 20, 21. (The precise definition of "fingering" was not defined in the CAC interview).

A similar incident happened at Mr. Grussendof's house. GJ p. 18. However M.M. said in grand jury that they also attempted intercourse but were not successful. GJ p. 18, 19. There is nothing in the CAC or police interviews about attempting intercourse, so this information was a surprise. And M.M. in her grand jury testimony said she gave him oral sex at the house. GJ. p.19. In the CAC interview she stated she did not give him oral sex at the house. CAC p. 31.

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[1] See, e.g., https://www.facebook.com/help/210644045634222

A third incident occurred near Floyd Dryden about month later. GJ p. 25. She said she went there to give Mr. Grussendorf oral sex. GJ p. 20. He may have 'fingered" her, inside and out, CAC p. 23, but according to the police interview she did not remember him doing it. Report p. 10. In the grand jury she said he touched her down there, inside and out. GJ p. 21.

The incidents with Mr. Grussendorf were reported two years later only because a friend of M.M.'s, L., was being bullied. On behalf of her friend, M.M. confronted and yelled at the person who was doing the bullying. CAC p. 8. As a result she was sent to the school office where she and her friend had to tell "them" (counselors?) about bullying over the past two years. CAC p. 8. Apparently M.M. mentioned the relationship with Mr. Grussendorf because she had been bullied about her association with him. CAC p. 27-28. The bullying relating to Mr. Grussendorf had stopped; she said in the CAC interview that "last year" she was popular, in the popular girl group, but then she took herself out of it to stay with her real friends. CAC p. 5. She was kind of mad that the counselor called and reported the abuse. CAC p. 27.

> M.M.: But no, she [the counselor] had to like tell everyone, and this whole thing had to start. And it's like not even happening anymore." CAC p. 28

M.M. continued:

> "—like I didn't really want to get involved, because I'm like – with that, with like Ty's category, I'm fine with, because like we don't talk. We don't have communications. The only thing that like I wanted

to get out was like other people. CAC p. 28.

M.M. regarded the incidents simply as a mistake and said she learned from it. CAC p. 28. M.M. was fine about the interactions with Mr. Grussendorf---until other kids started to bully her. CAC p. 26. In other words, the bullying bothered her, not the incidents with Mr. Grussendorf. See, e.g., CAC interview p. 26, 28. She was still fine with her (lack of) relationship with Mr. Grussendorf at the time she talked to the CAC interviewer. CAC p. 28.

Mr. Grussendorf, who was interviewed by the police (subject of a pending Motion to Suppress), admitted to having had sexual interactions with M.M. but said he did not know her age. He did not remember the substance of any conversations with her, and in particular he did not remember any which would have indicated to him that she was 12 years old. GJ p. 26. He said to Detective Phelps that they had started talking over Facebook, GJ p. 24. He thought she was maybe in the eighth grade, probably 14 or 15 years old.[2] GJ p. 24, 25. He could not pinpoint the relationship in time – it was a "long time ago." GJ p. 26. He thought he was perhaps 17 or 18 when it occurred. GJ p. 26.

In the grand jury the prosecutor led M.M. to say that she told Mr. Grussendorf she was 12 and in the sixth grade. See below. She did not specify when she allegedly told him this information, nor did the prosecutor ask.

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[2] If M.M. had been 14 or 15, any sexual acts with Mr. Grussendorf may have been legal. AS 11.41.436.

The consequences of these charges to Mr. Grussendorf and society in general are drastic and dire. If Mr. Grussendorf were convicted on all charges the mandatory minimum sentence for Mr. Grussendorf would be something in the neighborhood of 55 years to serve. Currently Mr. Grussendorf is just 21 years old; he was 18 years old when these incidents occurred. If convicted as indicted and sentenced, he would be released, if at all, at age 76. Good time credit for good behavior might have cut his sentence by as much as one-third but he is not eligible for good time credit. Good time is not allowed for class A and unclassified sexual offenses. AS 33.20.010(a)(3)(B). Nor is discretionary parole normally allowed. AS 33.16.090(b)(2). Some adjustment to this 55 year sentence may be possible under AS 12.55.155 (factors in mitigation), AS 12.55.165 and AS 12.55.175 (referral to a three judge panel). He will be required to serve the minimum mandatory for each unclassified felony count, AS 12.55.127(c)(2)(B), but at least one-fourth the presumptive term. AS 12.55.127(c)(2)(E). Incarceration may not fall below the lower end of the presumptive range. AS 12.55.125(n).

Mr. Grussendorf's current life expectancy, at age 21, is approximately 79 years old.[3] But as the federal district court noted in connection with federal penitentiaries, his life expectancy in jail will be considerably shorter than it would be if he were not incarcerated.[4] Many of the same problems that exist in

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[3] U.S. Division of Vital Statistics, Vol. 63, #4, Nov. 6, 2014. http://www.cdc.gov/nchs/data/nvsr/nvsr63/nvsr63_07.pdf

[4] *United States v. Taveras*, 436 F.Supp. 493, 500 (N.Y.E.D. 2006).

federal penitentiaries occur in the Alaska jails: violence, crowded conditions making for the spread of disease, stress and poor medical care. Mr. Grussendorf's life expectancy, if convicted of all counts, will most likely be shorter than his current projected release date. In other words, he will die in jail.[5]

Using cost data current as of February 2015, taxpayers of Alaska will pay $3,190,000 or $58,000 per year[6] to incarcerate Mr. Grussendorf for 55 years. This figure does not take into account inflation or the medical expenses and accommodations that will likely be necessary due to his advancing years and declining health. Nor will the State of Alaska have the benefit of tax revenue from the income of this successful fisherman.

II. ARGUMENT

Normally sentencing and sentencing issues would be addressed after conviction of a defendant. However, because the sentences in this case, even if modified by mitigators and a three-judge panel, are so extraordinarily long, the issues must be addressed prior to conviction.

A sentence that is clearly excessive is clearly unreasonable, even if imposed as part of a plea bargain. Mr. Grussendorf is challenging the underlying factors that the state will use to compel him to plead, force him to

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[5] As a matter of interest, the United States Sentencing Commission Preliminary Quarterly Data Report (through June 30, 2012) reports that a life sentence is 470 months (just over 39 years), given the life expectancy of the average age of federal offenders.

[6] http://www.ajc.state.ak.us/acjc/recidivism/HB266-2015.pdf)

give up his rights to trial and constitutional issues of concern. Due process requires that Mr. Grussendorf not be forced, by the draconian sentencing scheme, to relinquish his rights without having the opportunity to litigate the pressing constitutional issues presented by this case.

Mr. Grussendorf urges the Court to look to empirical data when examining the charging and sentence statutes and to analyze them in a way that makes sense not only for Mr. Grussendorf but for the community and for the State of Alaska. And this Court, in this time of a severe budget crisis, after looking to the empirical data and the Chaney factors, may also wish to consider the extraordinary expense that the State of Alaska will have to pay to incarcerate a defendant who has little chance of recidivism and every possibility of continuing to be a valuable citizen.

A. The criminal sentencing statutes[7] as applied to this case are not in accord with criminal administration as specified by the Alaska Constitution.

The Alaska Constitution, Article 1 Sec. 12 - Criminal Administration states as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation.

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[7] AS 12.55.125(i)(1)(A)(i), (n), (o); AS 33.16.090 (b)(parole restrictions); AS 33.20.010(a)(3)(B)(restriction on good time credit), AS 12.63.010 (sex offender registry), AS 12.55 100(e)(conditions of probation).

The Alaska constitution specifically enumerates the several factors that are required of criminal administration. None of these factors are met by the sentencing scheme in this case.

Protection of the public

The Alaska Legislature expressed the objective of the sex offender sentencing and notification laws, finding that "sex offenders pose a high risk of reoffending," and identified "protecting the public from sex offenders" as the "primary governmental interest" of the law. 1994 Alaska Sess. Laws ch. 41, § 1. The Legislature's assumptions are partially incorrect.

The sex offender laws target all people classified as "sex offenders," who, it is assumed, compulsively commit horrendous violent and repetitive crimes against children. Those are the crimes that make the news, and the often hysterical reporting of them creates both public pressure and public misinformation. Politicians gain traction with their constituents for being "tough on crime" by passing draconian laws targeting sex offenders.

As illustrated by the attached report from Dr. McClung, Mr. Grussendorf does not pose an insignificant risk of re-offending.

Unfortunately, a measured, informed approach has not been applied to the formulation and passage of most sex-crime laws and sentences, including those passed in Alaska. No matter what the facts of the case and the circumstances of the offender, the highly restrictive laws apply to all types of

sex offenses (which are variously defined according to one's location[8]). Sex offender registries, severe social restrictions, area restrictions, notification requirements, employment restrictions, electronic monitoring, treatment, and restrictions on First Amendment and constitutional liberty are imposed on the "sex offender".[9] Often the measures designed to protect the public from sex offenders have been implemented without reference to the extensive research data showing that there are vast differences between types of sexual offenders and their relative danger to the public.[10] Research shows that the recidivism rate of sex offenders is much lower than commonly assumed,[11] yet even murder and assault offenders do not have the restrictions placed on them that a "sex offender" does. There is, for example, no universal murderer registry, no specific murderer treatment program.[12] Fear and revulsion stalks the legislative halls when the word "sex" or "sex offender" is mentioned.

The hysteria runs deep. Even the U.S. Supreme Court is not exempt. "Sex offenders are a serious threat in this Nation." *McKune v. Lile*, 536 U.S. 24, 32 (2002) (plurality opinion). "[T]he victims of sex assault are most often

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[8] In California a conviction for urinating in public is a sexual offense, and those convicted are required to register as a sex offender. Cal.PenCode Sec. 290, and former Sec. 647(a).

[9] See, e.g.,McGrath, Lasher, Cummings, "A Model of Static and Dynamic Sex Offender Risk Assessment" p. 14 https://www.ncjrs.gov/pdffiles1/nij/grants/236217.pdf p. 14

[10] *Id.* p. 1.

[11] *Id.* p. 16.

[12] *Id.* p. 1. Interestingly, this report published by the Department of Justice finds that offenders at low risk for reoffending should receive minimal or no treatment.

juveniles," and "[w]hen convicted sex offenders re-enter society, they are much more likely than any other type of offender to be re-arrested for a new rape or sexual assault." *Id.*, at 32-33. Therefore, when the Alaska notification laws came before the U.S. Supreme Court in *Smith v. Doe,* 538 U.S. 84, 123 S.Ct. 1140 (2003), it accepted the Alaska Legislature's position without further inquiry into its validity. "The [Alaska} legislature's findings are consistent with grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class. The risk of recidivism posed by sex offenders is "frightening and high" and sex offenders are much more likely than any other offender to be arrested for a new sexual crime. [citation omitted] (citing U.S. Dept. of Justice, Bureau of Justice Statistics, Sex Offenses and Offenders 27 (1997); U.S. Dept. of Justice, Bureau of Justice Statistics, Recidivism of Prisoners Released in 1983, p. 6 (1997)). *Smith v. Doe* at 103.

The Supreme Court is as guilty as the public in its ignorance of certain facts.[13] In reality the studies cited by the Supreme Court in *Smith v. Doe,* 538 U.S. 84 (2003) do not specifically hold that the risk of recidivism is "frightening and high" as the Court stated. The 1997 Bureau of Justice studies did not compare conviction/arrest/recidivism rates of sex offenders to other types of offenders, and so the "frightening and high" label is misleading. Nor did the study parse out the dangerous, repeat offenders with those who are of low risk.

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13 See, e.g., Criminology: U.S. Supreme court decisions and sex offender legislation: evidence of evidence-based policy?, 103 J. Crim. L. & Criminology 1115, http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7465&context=jclc.

The Supreme Court misread the study and apparently adopted, without further consideration, the common perception of the "sex offender." Yet most sex offenders do not conform to this image of the uncontrolled incurable monster, and their recidivism rates are much lower than the public perceives them to be.

Among the class of "sex offenders" there are distinct differences between the recidivism rates. Not all sex offenders are the same, nor do they present the same threat of danger to the public. Contrary to popular belief, some sex offenders are among the least likely law-breakers to reoffend. For example,

*An Alaska Judicial Council report in 2007[14] said 3 percent of sex offenders had committed a new sex crime in their first three years after release from prison compared to 22% of those persons who were convicted of a violent offense had committed a new violent offense, and 28% of those convicted for driving offense had a new driving offense conviction. In the time period studied no sexual offenders were convicted of any offense more serious than their previous offense.

*A follow-up report from the Alaska Judicial Council[15] also reports that sexual offenders, who were charged with all types of sexual assaults and abuse, plus felony indecent exposure, pornography and similar offenses, had substantially lower rates of recidivism than other felony offenders, 18% for sexual offenders vs. 36% for violent offenders. (Recidivism in this report

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14 Anchorage, AK: Alaska Judicial Council, 20 Criminal Recidivism in Alaska, 2008 and 2009 p. 11, 33.

15 Recidivism in Alaska, 2008-2008 p. 9, Alaska Judicial Council, November 2011.

included not only convictions for new crimes but also probation violations and other arrests.) Reconviction rates for violent offenders was 23%; for sexual offenders, 10%.[16]

The legislature did not properly weigh research data when it passed the draconian sentencing statutes. Crimes other than sexual offenses have higher recidivism rates. And the legislature did not separate out the sex offenders who have a very low chance of reoffending from those who need to be subject to lengthy incarceration. The balance between a defendant's liberty interest and public safety was not properly considered when the legislature, in 2006, greatly increased the penalties for sex offenses.

Mr. Grussendorf falls into a category of defendants that had apparently not been considered and separately addressed by the statutory scheme. No one wants to contemplate 12 year olds having sex, including intercourse, but sex among sexually mature, middle or high school students takes place at an astonishing rate; study after study shows that middle school children have sexual intercourse (vaginal, oral or anal) at a reported rate of from 10-15%.[17] While some protection of the younger group of students may well be warranted, the legislature has lumped high school seniors having recreational sex with other school children into the same category as middle-aged predators of pre-pubescent children.

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16 Anchorage, AK: Alaska Judicial Council, 20 Criminal Recidivism in Alaska, 2008 and 200911. p. 3, 20.

17 See, e.g., http://pediatrics.aappublications.org/content/pediatrics/134/1/e21.full.pdf,

An 18- year- old male, Mr. Grussendorf was offered sex by M.M., and allegedly he took her up on her offer. They have not seen each other since. Mr. Grussendorf is no more likely to commit a criminal offense than any other 21-year- old male. Protection of the public is not a concern. Isolation is not warranted.

Rehabilitation

In passing the current sentencing scheme, the legislature assumed that all sex crimes are alike, that anyone who commits a sex crime has committed many uncharged offenses, that a sexual offender is a sexual predator. See Letter of Intent to Senate Bill 218, Attachment I. The sentencing statute is a one-size-fits-all-sexual-predators. Yet according to scientific research, many sex offenders are not compulsively-driven sexual predators and often can be rehabilitated, if rehabilitation is needed at all. Contrary to the Supreme Court and Alaska Legislature's opinion, treatment may significantly reduce the risk of recidivism.[18]

Legislatures in other states have recognized that sexual offenders are not all alike. For example, Washington State uses a sentencing grid for sexual offenders that takes into account various empirically based factors unique to the individual defendant. The court has the option to suspend the execution of a sentence. See Rev.Code Wash. Sec. 9.94A.515 (rape of a child second is level XI), Rev.Code Wash 9.94A 510 & 670.

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Rehabilitation is a constitutionally mandated sentencing goal in Alaska. Without taking notice of the distinctions between sexual offenders and their chances for rehabilitation, the Alaska constitution is offended. The extraordinary sentences that are imposed for many sex crimes make a mockery of the constitutionally mandated factor of rehabilitation. Rehabilitation of the offender is essentially rendered moot; for many sex crimes a young man is incarcerated, only to be released, if at all, into middle or old age. That person is habituated to a jail life and will be unable to function adequately or productively in society. Nor is he encouraged to do so. He will be subject to all the restrictions imposed only on sex offenders, reminded daily that he is an offender (as opposed to a citizen), isolated in society and often existing without social support – a social pariah.

Nor does a defendant necessarily benefit from sex offender treatment work while incarcerated. For "low level" sex offenders, the protection of the public and rehabilitation is much better served by having the defendant do sex offender treatment outside a jail setting. Research shows that when a low level sex offender does treatment with medium or high level sex offenders, he gets worse, not better.

The constitutional factor of rehabilitation is not served by the draconian sentences prescribed by the legislature. The legislature made no allowance for the rehabilitation potential for some sex offenders.

Community condemnation

Certainly community condemnation of men who abuse children is warranted. And the community should be allowed to extract its pound of flesh for predators and rapists. But what, really, does the community think about incarcerating a young man, no threat to public safety, for the rest of his life (or for his productive adult years) for having consensual sex with a girl 6 years younger?

The community also might be interested in the cost of incarcerating him. years. If he were sentenced to the statutory amount, 55 years, the cost would double under current cost analysis, to $3,190,000. This $3 million would provide the community nothing more than isolating a young man for no reason other than retribution and economically supporting a now-thriving system of prisons. In this age of budget deficits the cost of incarcerating individuals who have little chance of reoffending should be considered as part of the analysis of "community condemnation."

Right of the victim

The victim in this case consented to sexual acts, she did not report the acts to anyone. Nor did she want to report. This case does not represent a fearful victim, a person who was unable to defend herself. She solicited the acts, and she herself said that she was fine with Mr. Gruessendorf. She now regards her sexual acts with Mr. Gruessendorf a mistake, but says that she learned from her experience. What bothered her was not the sexual contact but the bullying that occurred when her fellow students found out about the

relationship. Her feelings about these incidents should not be ignored.[19] Nor have she and Mr. Grussendorf had any significant contact since these events allegedly occurred.

Restitution

If there is any claim of restitution by M.M., she will certainly not be compensated if Mr. Gruessendorf is not allowed to earn money for decades.

Reformation

Closely connected to rehabilitation as a constitutional principle, reformation should be a major factor when determining a sentence. Under the current sentencing scheme reformation is ignored.

Those defendants who have a real chance to conform their conduct to what society expects will not have a chance to do so. When released, even if they have not been brutalized mentally and sometimes physically in jail, even if not habituated to jail society, routine and structure, even if they have not lost their health or their life because of poor medical care, defendants will be handicapped because they will be subject to stressors which would crush most people (inability to find employment, housing, social isolation and public scorn of both the defendant and his family, for example). Because of the sentencing scheme, reformation for many sex offenders is not a factor. A sentence without reformation violates the Alaska Constitution.

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19 Defense believes that M.M. may have had a troubled childhood, which is separate from any alleged difficulties from her consensual sexual acts with Mr. Grussendorf. Mr. Grussendorf fears that he might be made the scapegoat for M.M.'s trauma from other life events.

Not a single factor stated in the Alaska Constitution is fulfilled by the charges and sentencing scheme in this case. The sentencing statutes are unconstitutional.

A. The criminal sentencing statutes as applied to this case are not in accord with the recent Alaska Criminal Justice Commission, Justice Reinvestment Report of December, 2015.

The Alaska Criminal Justice Commission was charged by the 2014 Alaska Legislature to "conduct[] a comprehensive review of Alaska's criminal justice system and provid[e] recommendations for legislative and administrative action." Report p. 4. Consistent with the Alaska Constitution's mandates regarding criminal administration, the Commission made certain recommendations that weigh heavily toward a finding that the criminal sentencing statutes are currently unconstitutional.

Some of the Commission's findings apply directly to this case. With respect to sex offenders at the B and C felony level, the recommendation is to roll back the current long sentences to a pre-2006 level. Report p. 31, 32. The Commission did not have a recommendation regarding sentences on A and unclassified offenses. Nor did the Commission address situations like Mr. Grussendorf's, where there was consensual sex, solicited by the victim, between school students. But it is significant that the Commission recognized that some of the sentences for sexual crimes were too severe.

The Commission recommended that the maximum length of time an offender spends on probation or parole be greatly reduced, up to a maximum of 5 years for felony sex offenders and unclassified felony offenders. Mr.

Grussendorf is currently subject to a minimum of 15 years of probation, or 10 years if he is convicted of only the A felony. AS 12.55.125(o).

The Commission noted that research shows that longer stays in prison do not reduce the risk of recidivism, Report p. 32. Research also shows that mixing low and high-risk offenders leads to greater rates of recidivism for the low-risk offenders. Report p. 26.

The Commission reviewed both Alaska and national studies showing that sex offenders have a lower rate of recidivism than other types of offenders. Contrary to popular belief, the Commission's research also showed that sex offender treatment can be successful. Report p. 22. The Commission recommends an "earned time policy," where sex offenders can receive up to one-third off their sentence for completion of sex offender treatment. Report p. 22. Currently high-level sex offenders have no way of reducing their sentence, being ineligible for either good-time credit or parole.

The Commission recommended concentrating the state's resources on offenders who are high risk to offend. Report p. 18 ff. Public safety is a principal concern. Many sex offenders are not high risk. According to all the Commission's recommendations, the state's limited resources should not be spent on low-risk defendants. Mr. Grussendorf, for example, is no more likely to reoffend that the average 22 year old male. The state's resources will be spent on Mr. Grussendorf for no empirically based reason.

B. The statutes, AS 11.41.434(a)(1), AS 12.25.125 and AS 33.20.010 are in violation of the Fifth Amendment of the United States

Constitution and Article I, Sec. 7 of the Alaska Constitution; due process.

Due process is closely related to the Eighth Amendment in the United States Constitution as well as in the Alaska Constitution Article I, Sec. 7, in that it relates to fairness and justice and the protection of the individual from arbitrary governmental action. The Alaska Supreme Court has interpreted the due process guarantee under the Alaska Constitution as broader than that of the United States Constitution. *See, e.g., Doe v. Dep't of Pub. Safety,* 92 P.3d 398, 404 (Alaska 2004). If there is a violation under the 8th amendment, then there is a violation under the Alaska Constitution.

As the Court stated in *Green v. State,* 462 P.2d 994, 996-7, the concept of "due process" cannot be precisely defined. But over time it has come to express a basic concept of justice under the law, such as "our traditional conception of fair play and substantial justice" and "the protection of the individual from arbitrary action". [citations omitted], *Green,* 462 P.2d at 997 A legislatively specified sentence may violate due process if it is "so disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice." *Maeckle v. State,* 792 P.2d 686, 690 (Alaska Ct. App. 1990), citing *Dancer v. State,* 715 P.2d 1174, 1180 (Alaska App. 1986).

Due process as well as equal protection is offended when a case with facts such as that presented by Mr. Grussendorf's is subject to arbitrary and shocking prosecution. Lumping him together with compulsive predators and rapists is shocking to the sense of justice, and violates due process. In

addition, the sentence to which he is subject with their mandatory minimums, and the limits placed on the court which would have allowed it to act as a safety valve, are arbitrary, not empirically based and violate due process.

The federal government has now abandoned the strict sentencing guidelines, which are somewhat analogous to Alaska's current sentencing scheme, that were in effect prior to 2005. The Guidelines are now advisory, *United States v. Booker*, 543 U.S. 220, 226, 245 (2005). District courts, while giving careful consideration to the Guidelines, may vary from the suggested sentences, tailoring a sentence in accordance with other statutory concerns and the individual characteristics of the offense and defendant before them. The court in *United States v. Phinney*, 599 F.Supp.2d 1037, 1038-9 (Wis.E.D. 2009) and *United States v. Diaz*, 720 F.Supp.2d 1039, 1042 (Wis.E.D. 2010) noted that district courts around the country have discounted guidelines based on both their flaws and lack of empirical support. The *Phinney* court, in a child pornography case, stated:

> ... Congress has consistently raised penalties in these types of cases based on the perception that the [Federal Sentencing] Commission's original approach was too lenient to smut peddlers, pedophiles and those who sexually exploited children for profit. It was therefore entirely appropriate to point out that this defendant did not fall into any of these categories. Because he was not the type of person Congress appeared to have in mind in raising the penalties, he did not require more severe punishment." *United States v. Phinney*, 599 F. Supp. 2d at 1043 n.8.

The Guidelines would have required the court to sentence the defendant to 37-46 months. However, the court, weighing the sentencing factors enumerated in

18 U.S. C Sec. 3553(a), sentenced the defendant to six months imprisonment, with 10 years of supervised release.

In 2006 the Alaska legislature took the same approach when increasing the presumptive sentences for sex offenders as the United States Congress did when passing the then-mandatory Guidelines. The Letter of Intent attached to the Senate Bill 218 shows that the Legislature was extremely concerned about the high rate of sexual assault in Alaska. The Letter details some of the serious harm that results when a sexual offender rapes or preys on young children, noted that these types of offenders have abused many children prior to being caught, and that assumed they have a relatively high rate of recidivism.

Although the thrust of the Letter (and the statutes) addresses predators and rapists, the Legislature also made passing reference to the fact that there would be exceptions to the statutory scheme, cases that "cr[y] out for mercy," presumably for relief from the draconian sentences the Legislature was in the process of enacting. The Letter did not specify what types of cases might qualify for exceptional treatment. The Letter confidently and naively states that

> The criminal justice system often weeds these cases out in the referral and plea bargaining process. However, by application of existing statutory mitigating factors under AS 12.55.155, or by referral to the three-judge panel "safety net" under AS 12.55.175, the courts of Alaska will be able to avoid manifestly unjust sentences in appropriate cases. Letter of Intent p. 2212.

In Mr. Grussendorf's case the safety net is not working. No plea bargain has been offered (nor is it likely to reflect the exceptional circumstances present in this case.)

Mr. Grussendorf does not fall into the categories that the Legislature addressed in the sentencing statute, yet no mercy is available to him. If Mr. Grussendorf is sentenced to 55 years, he will be a fifty- or sixty-year-old man still being punished for a sexual adventure that an 18-year-old boy committed decades earlier. That indefinable sense of justice and fair play, a basic concept due process, is violated by such an absurd result.

Mr. Grussendorf also asserts that his due process rights are violated because the sentencing statutes deprive him of the right to have the superior court and the three-judge panel use their discretion to independently consider the nature of his offenses.

Alaska Stat. § 12.55.005, incorporating the *State v. Chaney* decision,[20] states that "imposing sentence, the court shall consider...." the various factors, yet this statute conflicts with the sentencing laws. By imposing inflexible statutory minimums, the legislature has denied the exceptional case that "cries for mercy" the option to be sentenced by a judge who can weigh the *Chaney* factors to arrive at a fair and just result outside the minimum mandatory required for sexual predators.

Finding that the statutes violate due process would be consistent with the various governmental sentencing commissions that call for a length of

[20] 477 P.2d 441 (Alaska 1970).

incarceration no longer than is necessary to meet sentencing goals. Federal Sentencing Guidelines, 18 U.S.C. Sec. 3553(a)(2)(The court should impose a sentence sufficient but not greater than necessary to satisfy the goals of sentencing.) Accord, Standards Relating to Sentencing Alternatives and Procedures, American Bar Association Project on Minimum Standards for Criminal Justice, Approved Draft, 1968, § 2.2, at 14). "(The sentence imposed in each case should call for the minimum amount of custody or confinement which is consistent with the protection of the public, the gravity of the offense and the rehabilitative needs of the defendant.'" Cited by *State v. Taylor*, 710 N.W.2d 466, 472 (Wis. 2006).

Mr. Grussendorf's case is among the least serious possible for the class of offense. He engaged in consensual sex with a sexually mature girl/woman, not a prepubescent, innocent child. He has no significant prior criminal history and there is no need for rehabilitation or to isolate him. He did not harm the alleged victim; M.M. herself was not upset or bothered by the contact; she thought it was "fine." Nor will he endanger public safety. No restoration of the victim or community is needed.

Mr. Grussendorf may warrant some limited punishment to affirm community standards and, perhaps, to deter others in his situation (but how many 18 year old boys who are offered sex are likely to be deterred by any sentence given to Mr. Grussendorf?)[21]

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[21] An 18-year-old male does not have the same capacity to make adult decisions until his early twenties. See, e.g., The Teen Brain Still Under Construction,

The sentencing scheme is unconstitutional because it denies this Court the ability to evaluate Mr. Grussendorf using the constitutionally and statutorily mandated factors of protection of the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation. The sentencing scheme is arbitrary, ill-considered, and inhumane; therefore it violates due process. The law should not needlessly destroy lives; the law should be rational and merciful as well as punitive.

C. The sentencing scheme is completely out of proportion to sentences for other offenses, violating the 8th Amendment to the United States Constitution, and the Alaska Constitution, article. 1, §7, and §12; cruel and unusual punishment.

The Eighth Amendment forbids sentences that are grossly disproportionate to the crime." *Ewing v. California,* 538 U.S. 11, 30, (2003).

In the *Ewing* dissent, Justice Breyer, wrote,

> I think it clear that the Eighth Amendment's prohibition of "cruel and unusual punishments" expresses a broad and basic proportionality principle that takes into account all of the justifications for penal sanctions. It is this broad proportionality principle that would preclude reliance on any of the justifications for punishment to support, for example, a life sentence for overtime parking. *Ewing* 538 U.S. at 35.

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http://www.nimh.nih.gov/health/publications/the-teen-brain-still-under-construction/index.shtml?utm_source=LifeSiteNews.com+Daily+Newsletter&utm_campaign=2c0fa9560b-LifeSiteNews_com_Intl_Full_Text_12_18_2012

See also, e.g. Roper v. Simmons, 543 U.S.441, 469 (2005) (Youth are impetuous; "[a} lack of maturity and an underdeveloped sense of responsibility are found in youth more often than adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions. Citation omitted.

> Three kinds of sentence-related characteristics define the relevant comparative spectrum: (a) the length of the prison term in real time, i.e., the time that the offender is likely actually to spend in prison; (b) the sentence-triggering criminal conduct, i.e., the offender's actual behavior or other offense-related circumstances; and (c) the offender's criminal history. [citations omitted] *Ewing,* 538 U.S. at 37.

In *Green v. State*, 390 P.2d 433, 435 (Alaska 1964), the court articulated the test for determining whether a particular punishment constitutes cruel and unusual punishment:

> Only those punishments which are cruel and unusual in the sense that they are inhuman or barbarous, or so disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice may be stricken as violating the due process [and cruel and unusual punishment] clauses . . .

Such punishments violate not only a cruel and unusual standard but due process well. *Id at* 435. The punishment that Mr. Grussendorf is facing is shocking to the sense of justice.[22]

In this case the time Mr. Grussendorf is actually going to spend in jail, if convicted on all counts, is 55 years, with a minimum of 27.5 years if a mitigator is found and the case is not sent to, or accepted by to the three judge panel. His actual behavior was at the very low end of the scale for the offense charged, and he has no criminal history. While his alleged offenses are not as minor as the one described by Justice Breyer (a parking violation), he in

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[22] *But see Dancer v. State,* 715 P.2d 1174, ** (Alaska App. 1986). In *Dancer,* the court found that imposition of an 8 year sentence for genital intercourse with an eleven-year-old child does not warrant a finding of cruel and unusual punishment. *Id.* p. 1181. Of course the sentence that was approved in Dancer is approximately seven times shorter than that Mr. Grussendorf will, if convicted on all counts, have to serve.

essence will be spending the rest of his life in jail for three incidents of a mutually satisfying sexual adventure. M.M. was too young and for that Mr. Grussendorf may be condemned. But for no other reason.

While it is a legal fiction that a 12 year old cannot consent to sex, never-the-less the harm to a 12 year old who has not been forced to have sex, and indeed solicited Mr. Grussendorf's attentions, is considerably less than if he had forced himself upon her in a rape-like situation. The irony is that if he had severely maimed M.M. rather than had consensual sex with her, he would not be sentenced to anything like 55 years and subject to the range of restrictions and social scorn heaped on a sex offender. He would have been charged with a class A felony, and likely sentenced in the range of 4-8 years, with a maximum of 20 years and a minimum of 2 years. AS 12,55,125(c); AS 12.55.155(a). The question must be asked; is the emotional trauma of a maiming so significantly less than that of a consenting sexual assault victim that it warrants such a disparity in sentences?

If Mr. Grussendorf had committed a second-degree murder he would have been subject to a range of 20-99 years, the 20-year maximum is 35 years less than the sentence to which Mr. Grussendorf is currently facing. For a murder victim the social and emotional trauma does not accrue to the victim of course, but the act has a deep emotional ripple effect on the victim's loved ones and society. And, to state the obvious, it deprives the victim of his or her life.

The Letter of Intent specifically addresses the fact that the low range for presumptive sentences for sex offenses may be higher than the low end of

presumptive sentences for some offenses that result in death. The legislature justifies this result because, it states, that sex offenses are at the least "knowing" and often "intentional," while some offenses resulting in death are merely "reckless". These distinctions beg the question. The Letter of Intent addresses only sexual predators, calling sex offenses "rape" and citing such statistics the rate of 'forcible rapes per 100,000 residents), the rate of re-arrest, the number of victims a sex offender averages prior to arrest (110), and so forth. The numbers are startling and disturbing. The legislature cannot be faulted for attempting to remedy this situation. However, the shock that the legislators must have felt when hearing these statistics led to an ill-considered, cruel and arbitrary statutory scheme as applied to some defendants. The Legislature did not delve into the empirical data to find out the real facts relating to sexual offenders.

The sentencing scheme violates the prohibition against cruel and unusual punishment under both the Alaska and United States Constitutions.

D. AS 11.41.434(a)(1) violates the United States Constitution, Amendment XIV, and the Alaska Constitution, Article I , Sec. 1, equal protection, in that it is over-inclusive, sweeping up school students engaged in exploratory sex into the same category as sexual predators and rapists.

The statute, AS 11.41.434(a)(1) is over-inclusive because it assumes that all sexual activity between two people who are more than 4 years different in age is the result of an older person compulsively preying on younger, sexually unaware children. Nothing in the legislative history indicates that the

legislature considered anything other than sexual predators and rapists when it increased the penalties for sexual offenses in 2006.

The Legislature, in its Letter of Intent, made a passing reference to exceptional cases which presumably would not warrant the extraordinary sentences, cases would "cry out for mercy" (quoted in concurrence, *Luckart v. State*, 270 P.3d 816 (Alaska App. 2012). The Letter of Intent stated that those cases would be weeded out in the charging and plea-bargaining process,[23] as well as by the application of statutory mitigators and a referral to the three-judge panel. The Letter indicated that "it was counting on the court system to prove a safety valve in such cases." *Luckart,* 270 P.3d at 823. But the statutory scheme failed in to exclude defendants who were not the target group of the statutes who are the sexual predators, the repeat offenders, the rapists.

The classification of this type of case into the sexual-predator-category, where the defendant was 18 years old, 6 years older than the alleged victim and not a sexual predator, violates equal protection because it is arbitrary and irrational with respect to him and those similarly situated. While the legislative goal overall is laudable, protecting children and young teens from predators and women from rapists, the same statute also criminalizes normal, if sometimes not desirable, sexual activity which is occurring in both middle school and high school to a great degree. Data from the Journal of School

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23 The Legislature seems to place great faith in a prosecutorial system that recognizes these exceptional cases and seeks justice for those exceptional defendants. However,perhaps individual prosecutors do not always show the restraint and respect for justice that the Legislature attributes to them.

Health shows that 5-20% of sixth graders and 14-42% of eighth graders have had sexual intercourse.[24] In one study 12% of children in one school have engaged in vaginal sex by age 12 (i.e., before age 13), 7.9 percent in oral sex, 6.5 percent in anal sex, and 4% in all three types. Markham, April issue, 2009, of Journal of School Health. See Attachment 2.[25] Another study reported 5.6% of youth having sexual intercourse before age 13. Among girls it was 3.1%.[26] Attachment 3. Another study found that 5-20% of sixth graders have engaged in sexual intercourse.[27] Attachment 4. Children, like M.M., who sext have an even higher rate of sexual engagement.[28] Attachment 5.

However these statistics may vary according to methodology, location, socio-economic class, culture or race, the fact remains that a small but significant percentage of pre-13 year olds are having sexual intercourse, and a large percentage of high school students are also sexually active. "The law

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[24] 2013 January 83(1) 61-8; http://www.ncbi.nlm.nih.gov/pubmed/23253292

[25] https://sph.uth.edu/tprc/files/2011/12/Patterns-of-vaginal-oral-and-anal-sexual-intercourse-in-an-urban-seventh-grade-population.pdf. Abstract.

[26] Kann, L., Kinchen, S., Shanklin, S. L., Flint, K. H., Hawkins, J., Harris, W. A., & Zaza, S. (2014). Youth risk behavior surveillance—United States, 2013. MMWR Surveill Summ, 63(4). Retrieved from http://www.cdc.gov/mmwr/pdf/ss/ss6304.pdf p. 24.

A summary of these statistics is attached for the convenience of the Court as. The entire report is 175 pages long.

[27] Moore, Barr and Johnson, Sexual behaviors of middle school students; 2009 Youth Risk Behavior Survey results from 16 locations, J.Sch.Health, 2013 Jan 83(1) 61-68.

[28] http://www.usnews.com/news/articles/2014/06/30/study-middle-schoolers-who-sext-are-more-likely-to-report-sexual-activity.
http://pediatrics.aappublications.org/content/pediatrics/early/2012/09/12/peds.2012-0021.full.pdf

need not ignore the practical realities of the world." *United States v. Taveras*, 436 F.Supp.2d 493, 500 (E.D.N.Y. 2006). The Legislature ignored reality. By applying the 2006 amendments to our youth – to those who are not sexual predators-- it is penalizing teenage behavior in the same way it is penalizing the compulsive sex offenders.

One legal scholar writes, "Today, public outrage and political risk-aversion have driven these [sex offender] laws to the outer boundaries of constitutionality".[29] While some of the statutes on their face seem logical, when subject to scrutiny they do not work to reduce sexual crimes, and do not fulfill their stated purpose. For example, most research concludes that sex offender registration and notification (SORN) laws have not reduced sex offender recidivism.[30] Even some legislators who have passed sex offender policies are concerned. As the Council of State Governments states in its 2010 report on sex offender management, "Some state leaders have expressed concern that the urgency of efforts to strengthen sex offender management policy is prohibiting lawmakers from fully considering the range of long-term impacts such policies will have."[31]

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[29] Northwestern University Law Review, Vol. 102, No. 307, 2008. Sarah E. Agudo. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103692

[30] International Perspectives on the Assessment and Treatment of Sexual Offenders; Theory, Practice and Research. Eher, Craig, Miner, Pfaffin. 2011.
(Preview):
https://books.google.com/books?id=kvJJz2KzVUUC&pg=PT358&dq=that+show+that+Sorn+policies+appear&hl=en&sa=X&ved=0ahUKEwjrrOji2rbJAhUKpYgKHd_1Bc0QuwUIITAA#v=onepage&q=that%20show%20that%20Sorn%20policies%20appear&f=false

[31] http://www.csg.org/knowledgecenter/docs/pubsafety/sexoffenderbrief1.pdf

States other than Alaska have recognized that all sex offenders are not alike, that only those who need to be isolated, should be. In Washington State Mr. Grussendorf would almost certainly qualify for a special sex offender sentencing alternative. Rev.Code Wash. (ARCW) § 9.94A.670. Colorado also allows for deferred sentencing for a sex offender in Mr. Grussendorf's position. C.R.S. 18-1.3-102.

Interestingly, even the National Alliance to End Sexual Violence did not support minimum mandatory sentences when the Violence Against Women Act, S. 47, came up for reauthorization, citing unintended consequences for victims. It advocates that judges be allowed to sentence defendants according to individualized criteria.[32]

The goal of the statute is not fulfilled by punishing youth with the sentences formulated for sexual predators and rapists. It violates equal protection by being over-inclusive.

> "It must be determined [by the court] that [the statute's] purpose is legitimate, that it falls within the police power of the state. Examining the means used to accomplish the legislative objectives and the reasons advanced therefore, the court must then determine whether the means chosen substantially further the goals of the enactment. Finally, the state interest in the chosen means must be balanced against the nature of the constitutional right involved. *State v. Erickson*, 574 P.2d 1, 12 (Alaska 1978)(footnotes omitted).

The test is flexible and dependent upon the importance of the rights involved.

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[32] http://famm.org/wp-content/uploads/2014/01/Final-NTF-Mandatory-Minimums-ltr.pdf

> Based on the nature of the right, a greater or lesser burden is placed on the state to show that the classification has a fair and substantial relation to a legitimate governmental objective." *Griffith v. State*, 641 P.2d 228, 233 (Alaska Ct. App. 1982, citing *Commercial Fisheries Entry Commission v. Apokedak*, 606 P.2d 1255, 1264 (Alaska 1980).

Of constitutional importance is the fundamental right to life and liberty under both the Alaska and United States Constitutions. Alaska Const. Art. I, Sec. 7; United States Const. Amend. V. The sentencing statutes must be evaluated using the highest standard; there must be a compelling state interest to uphold this draconian sentencing statute for the category of youths who do not fall into the sexual predator/rapist designation.

There can be no compelling state interest in incarcerating high school boys for the decades of their life, boys who are not violent, engaged in no predatory-type grooming behavior, are not at risk for further offenses, and who were solicited for sex rather than the reverse. The chance of Mr. Grussendorf committing another offense is negligible, the cost to the state just for incarceration alone is staggering, and the loss to the state of a productive, tax-paying boat-owning gillnetter is significant. M.M. herself is not disturbed by what she and Mr. Grussendorf did together (that is unless she was instructed that she was a "survivor" and made into a "victim" by other people.) No sentencing goal, and certainly not the goal of the statute, will be served by such a result. A young man's life is about to be ruined because the Legislature failed to consider either exceptional cases or the reality of children having sex. The statute, AS 11.41.434(a)(1) is unconstitutional because it violates equal

protection by being over-inclusive under both the Alaska and United States constitutions.

E. The stated purpose of the sentencing statutes conflict with the commentary to AS 12.55.005 and the reality of criminal practice.

AS 12.55.005[33] provides, among other factors, that in sentencing "the seriousness of the defendant's present offense in relation to other offenses" will be a primary factor emphasized by the presumptive sentencing provisions. The relative seriousness of various offenses was ignored by the sentencing scheme. The Legislature failed to consider that there may be sexual offenses that are not inherently as serious as sexual predation or rape, offending AS 12.55.005. The other factors were likewise ignored, such as the need to confine the defendant, and whether any sentence given to Mr. Grussendorf will deter similarly situated 18-year old boys.

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[33] Sec. 12.55.005. Declaration of purpose

The purpose of this chapter is to provide the means for determining the appropriate sentence to be imposed upon conviction of an offense. The legislature finds that the elimination of unjustified disparity in sentences and the attainment of reasonable uniformity in sentences can best be achieved through a sentencing framework fixed by statute as provided in this chapter. In imposing sentence, the court shall consider

(1) the seriousness of the defendant's present offense in relation to other offenses;

(2) the prior criminal history of the defendant and the likelihood of rehabilitation;

(3) the need to confine the defendant to prevent further harm to the public;

(4) the circumstances of the offense and the extent to which the offense harmed the victim or endangered the public safety or order;

(5) the effect of the sentence to be imposed in deterring the defendant or other members of society from future criminal conduct;

(6) the effect of the sentence to be imposed as a community condemnation of the criminal act and as a reaffirmation of societal norms; and

(7) the restoration of the victim and the community.

The Legislature also had the goal to promote uniformity of sentencing. The legislature failed to take prosecutorial discretion into account. Because of prosecutorial discretion, the sentences for sexual offenses vary widely, depending in large part on a particular prosecutor's policy and prejudices. Charges may be dismissed, plea bargains offered, and sentences negotiated. The stated aim of the sentencing statutes is not being fulfilled. AS 12.55.005 should control. The court should have the discretion to fashion a fair and just sentence.

F. The sentencing statute, AS 12.55.125(i), is unconstitutional because it violates the Alaska Constitution, depriving defendants of a right to life.

Alaska Const. Art. I, §1 declares that all persons have a natural right to life.

Courts have clearly recognized that when a person is incarcerated his life expectancy is reduced by years. *See, e.g., Taveras*, 436 F.Supp.2d at 500. The United States Sentencing Commission recognized the fact of a diminished life expectancy for prisoners by defining a life sentence for a 25 year old as 470 months, just over 39 years. [34] The median life expectancy for an inmate in a general prison population is 64 years.[35] According to a Michigan study the life

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[34]Life Sentences in the Federal System, United States Sentencing Commission, February 2015, p. 10; http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/20150226_Life_Sentences.pdf

[35] U.S. Sentencing Commission Preliminary Quarterly Data Report (through June 30, 2012) at A-8, *available at* http://www.ussc.gov/Data and Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2012_3rd_Quarter_Report.pdf., cited in http://fairsentencingofyouth.org/wp-

expectancy is even less -- 60.1 years.[36] Various factors contribute to the shortened life span, among them stress of being in jail, marginal medical care, violence, and disease. *Taveras*, 436 F.Supp.2d at 500.

Mr. Grussendorf currently has a life expectancy of approximately 75 years.[37] If Mr. Grussendorf is sentenced according to his charges, he likely will not live to be released from incarceration; his life expectancy will be reduced by at least 10 years. Mr. Grussendorf will serve a sentence that will have the practical effect of taking away a significant portion of the time he has on this earth. The deprivation of literally years of actual life, which for dangerous predators may be justifiable, is not warranted in this case.

Mr. Grussendorf and M.M. had consensual sex three times. The Alaska Constitution prohibits the interference with the natural right to life. Is it not a violation of the Alaska Constitution to take away years of a person's life in circumstances that do not justify such a result? And even beyond constitutional concerns, is it fair, moral, and principled?

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content/uploads/2010/02/Michigan-Life-Expectancy-Data-Youth-Serving-Life.pdf

[36] Id. p. 2.

[37] Health, United States, 2011, U.S. Department of Health and Human Services, figure 32, Chartbook; Special Features p. 37 (p. 57 of document), http://www.cdc.gov/nchs/data/hus/hus11.pdf#fig32. And

Elizabeth Arias, Ctr. for Disease Control, U.S. Life Tables, 2003, NAT'L VITAL STATISTICS REP., April19, 2006, at 3, available at http://www.cdc.gov/nchs/data/nvsr/nvsr54/nvsr54_14.pdf.

G. The Legislature has usurped the judicial function by limiting judicial discretion in formulating individual sentences, violating Article II of the United States Constitution and the Alaska separation of powers doctrine.

The legislature has usurped the judicial function by mandating certain sentences with respect to sex offenses, preventing the courts from performing an individualized analysis of sentencing goals. See AS 12.55.005. In addition to limiting the scope of sentence the statutes prohibit good time and parole. AS 33.20.010. These provisions violate article 1, §12 of the Alaska Constitution which provides:

> The judicial power of the State is vested in a supreme court, a superior court, and the courts established by the legislature. The jurisdiction of courts shall be prescribed by law. The courts shall constitute a unified judicial system for operation and administration. Judicial districts shall be established by law.

These arguments were rejected in an early case, *Nell v. State,* 642 P.2d 1361, 1367-70 (Alaska App. 1982). The *Nell* court acknowledged that the presumptive sentencing scheme limits a judge's discretion in formulating a sentence but noted that there is the safety valve of a three judge panel. The three judge panel at the time had broad sentencing discretion and could individualize a sentence. *Nell,* 642 P.2d at1370. However despite its rejection of Nell's arguments the *Nell* court said that the court may rein in the legislature where it has gone beyond constitutional constraints. *Nell,* 642 P.2d at 1361; *Dancer v. State,* 715 P.2d 1174, 1176 (Alaska App. 1986).

In *Nell* the court considered a class C felony with no limitations placed on probation/parole or good time. The sentence, it held, was not unduly

harsh: for a three-time felon the maximum sentence was 5 years. The *Nell* court also noted that the *Chaney* criteria had been incorporated into the statues as AS 12.55.005, which gives the trial court discretion to lower the sentence. It held that the legislature limited but did not eliminate sentencing discretion. In *Dancer*, the court also considered constitutional challenges to the presumptive sentence scheme in a sexual assault case. The court denied the constitutional challenges in the face of an 8-year presumptive sentence, modifiable by aggravators and mitigators. *Dancer*, 715 P .2d at1181. These early cases are distinguishable from the present case; they examined sentences that were mere fractions of what current laws mandate in terms of length of sentence and did not need to consider the current statutory restrictions on good time and discretionary parole.

The 2006 legislature increased the sentences by multitudes of years and reduced the court's power to tailor a sentence, even in a case for a defendant that "begs for mercy." Mr. Grussendorf's case is an example of one that the court should be free to tailor a sentence to meet the crime and the defendant.

This case goes to the heart of the judiciary as an independent and coequal partner in government, a doctrine inherent in the Alaska Constitution. The separation of powers issue with respect to sentencing is ripe for re-examination.

H. The prosecutor crossed constitutional and ethical boundaries when charging Mr. Grussendorf.

The prosecutor failed to seek justice when charging Mr. Grussendorf. She charged him with as many offenses as possible, with no thought for the consequences to the community, to the State of Alaska, and to Mr. Grussendorf himself.

> "the breadth of discretion that our country's legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse. And broad though that discretion may be, there are undoubtedly constitutional limits upon its exercise." *Bordenkircher v. Hayes*, 434 U.S. 357, 365, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978)

Prosecutorial discretion is not unlimited.

In states where prosecutors are elected, in theory at least the public can monitor how the prosecutors serve the public good and allows voters to monitor the cost to the public coffer. (As a practical matter, as one commentator said, prosecutors are elected on the basis of "boasts about conviction rates, a few high-profile cases, and maybe a scandal."[38]) In Alaska there isn't even the fiction that the public has input. Alaska state prosecutors have basically unbridled discretion on charging. No checks and balances are available to society and to the defendant when a prosecutor charges at the maximum level possible. The public is not aware, at least until a friend or relative is enmeshed the criminal justice system, that very often the length of sentence is determined not by the Court but by the individual prosecutor.

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[38] Promoting Democracy in Prosecution. 86 Wash. L. Rev. 69, citing Stephanos Bibas, Essay, Transparency and Participation in Criminal Procedure, 81 N.Y.U. L. Rev. 911, 923-31 (2006).

However, even in Alaska, while the state has great latitude in deciding how to charge, prosecutorial discretion is not completely unlimited. Where there are constitutional issues which have been violated, or where the ethical guidelines have not been followed, this Court may intervene in the charging decision. *See State v. District.Court,* 53 P.3d 629, 631 (Alaska Ct. App. 2002).

In this case, as stated above in this motion, both the Alaska Constitution and the United States Constitution have been violated in this charging decision. No common sense application of constitutional principles was used in this case, and no attention paid to ethical principles.

The prosecutor violated ethical guidelines.

The ABA standards regarding prosecutorial discretion are worth quoting at length.

> Standard 3-3.9. Discretion in the charging decision
>
> (b) The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction. Illustrative or the factors which the prosecutor may properly consider in exercising his or her discretion are:
>
> (i) the prosecutor's reasonable doubt that the accused is in fact guilty;
>
> (ii) the extent of the harm caused by the offense;
>
> (iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
>
> (iv) possible improper motives of a complainant;
>
> (v) reluctance of the victim to testify;
>
> (vi) cooperation of the accused in the apprehension or conviction of others; and
>
> (vii) availability and likelihood of prosecution by another jurisdiction.
>
> (c) A prosecutor should not be compelled by his or her supervisor

to prosecute a case in which he or she has a reasonable doubt about the guilt of the accused.

Factors That May Properly Be Considered

The breadth of criminal legislation necessarily means that much conduct that falls within its literal terms should not always lead to criminal prosecution. It is axiomatic that all crimes cannot be prosecuted even if this were desirable. Realistically, there are not enough enforcement agencies to investigate and prosecute every criminal act that occurs.

Some violations occur in circumstances in which there is no significant impact on the community or on any of its members. A prosecutor must adopt a "first things first" policy, giving greatest concern to those areas of criminal activity that pose a threat to the security and order of the community.

Nor is it desirable that the prosecutor prosecute all crimes at the highest degree available. Crimes are necessarily defined in broad terms that encompass situations of greatly differing gravity. Differences in the circumstances under which a crime took place, the motives or pressures activating the defendant, mitigating factors of the situation, the defendant's age, prior record, general background, and role in the offense, and a host of other particular factors require that the prosecutor view the whole range of possible charges as a set of tools from which to carefully select the proper instrument to bring the charges warranted by the evidence. In exercising discretion in this way, the prosecutor is not neglecting public duty or discriminating among offenders. The public interest is best served and evenhanded justice best dispensed not by the mechanical application of the "letter of the law," but by a flexible and individualized application of its norms through the exercise of a prosecutor's thoughtful discretion.

Subparagraphs (b)(i)-(vii) provide a series of guidelines for the exercise of the prosecutor's discretion. In addition to the obvious reasonable doubt test, the extent of the harm caused by the offense is an important factor to be considered in deciding whether to charge and what charges to bring.

3-3.9 Discretion in Selecting the Number and Degree of Charges

The structure of the substantive law of crimes is such that a single criminal event will often give rise to potential criminal liability for a

> number of different crimes. Defense counsel often complain that prosecutors charge a number of different crimes, that is, "overcharge," in order to obtain leverage for plea negotiations. Although it is difficult to give a definition of "overcharging," the heart of the criticism is the belief that prosecutors bring charges not in the good faith belief that they are appropriate under the circumstances and with an intention of prosecuting them to a conclusion, but merely as a harassing and coercive device in the expectation that they will induce the defendant to plead guilty.

The broad range of prosecutorial discretion, so jealously guarded, means that prosecutors should use common sense when deciding what charges to bring to the grand jury. Any prosecutor, in seeking justice, should be aware of the potential danger to the public of a person they are contemplating charging before determining the level and number of charges. And the ABA standards also emphasizes that the prosecutor should look to the degree of harm caused by the acts alleged.

Every charging decision and conviction has a ripple effect on the community. Certainly the factor of public safety, predicting the harm a defendant might cause in the future, is perhaps the first consideration of the prosecutor, but, as the ethical guidelines state, the particular characteristics of the defendant should also be analyzed. Public interest is also served if the prosecutor looks at the greater public good before charging. In balance, is incarcerating a defendant useful to society? To the community? To his family? To the State of Alaska?

The cost of incarceration in this time of shrinking budget should be considered as part of a consideration of the public good. If a defendant is not a

threat to the public, needing isolation, the prosecutor should consider the cost of a sentence to the state.

The unbridled prosecutorial discretion allows prosecutors a blank check. Some prosecutors, when charging a defendant, give no thought of the cost to the community and to the collateral damage. And while the state may say something like "he should have thought of that before he offended" it begs the question. Community interest dictates that the social fabric not be rent because prosecutor-charged offenses are not proportionate to the damage done.

Any charging decision dictates the future sentence under the current sentencing laws. Therefore the sentence implied by the charges must be in accord with the amount of jail time that would be just for that defendant. Not all defendants take plea bargains or are even offered them—plea bargains are at a prosecutor's discretion. A prosecutor should not indict on as many charges as possible in order to force a defendant to plead. Justice should be the prosecutor's aim, not a game of scare-the-defendant-into-pleading because of the fear of even greater jail time.

The prosecutor's decision to charge Mr. Grussendorf at the highest possible level will not serve the goal of public safety. Mr. Grussendorf is in a low risk category of offending, so public safety is not a consideration when determining a sentence. Sex offender treatment for a man like Mr. Grussendorf--if it is needed at all--should not occur in jail. Counseling low-risk offenders together with higher risk offenders increases the chances of the

low-risk offender reoffending. The prosecutor's decision to send Mr. Grussendorf to jail for years may actually increase his potential to reoffend.

As noted above, in Washington State Mr. Gruessendorf would likely be sentenced to do community sex offender treatment, be placed on probation, perhaps to do some limited amount of jail time. By contrast, the prosecutor, by charging the maximum in this case, would apparently prefer he serve 55 years in jail with the state paying out millions of dollars for his incarceration – to no constructive end.

The prosecutor in this case merely indicted for every offense possible, with no thought of consequences to society, to the community, to the State of Alaska, or to Mr. Grussendorf. Other prosecutors might well have indicted reasonably and offered a plea bargain consistent with the minimal harm that Mr. Grussendorf allegedly caused. Instead this prosecutor is seeking the maximum number of charges and sentence that can be wrung out of the facts. This thoughtless approach to charging violates ethical standards; the charging and lack of a reasonable plea offer is without justice and without consideration of the public good. Ethical standards were violated.

III. CONCLUSION

As the Letter of Intent stated, some cases will out for mercy. Mr. Grussendorf's situation is one of them. To deprive him of his productive adulthood, and perhaps the rest of his life, for no reason, shocks the conscience.

The constitutional arguments in this case – due process, cruel and unusual punishment, equal protection and the goals of criminal administration – are all interconnected. This motion challenges the rigidity of a system designed to punish sexual predators. It is patently unfair to apply these charges and the resultant mandatory sentences and restrictions to high school students on an unfortunate but consensual sexual adventure. There is no humane reason to sentence Mr. Grussendorf to a slow death in the Alaska prison system. And there is no rational reason why the community would want to spend millions of dollars needlessly incarcerating him.

The system is broken. Only by declaring the charging and sentencing structure for sex offenders unconstitutional may the system be brought to rationality.