

NOTICE

*Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law, although it may be cited for whatever persuasive value it may have. See McCoy v. State, 80 P.3d 757, 764 (Alaska App. 2002).*

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

LAPAIRS ARNELL SHAW,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-13365  
Trial Court No. 1KE-18-00098 CR

MEMORANDUM OPINION

No. 6942 — May 5, 2021

Appeal from the Superior Court, First Judicial District,  
Ketchikan, William B. Carey, Judge.

Appearances: Jay A. Hochberg, Assistant Public Defender, and  
Samantha Cherot, Public Defender, Anchorage, for the  
Appellant. Mackenzie C. Olson, Assistant District Attorney,  
Anchorage, and Clyde “Ed” Sniffen Jr. Acting Attorney  
General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Wollenberg and Terrell,  
Judges.

Judge ALLARD.

Lapairs Arnell Shaw was convicted, pursuant to a plea agreement, of second-degree assault and violating conditions of release after he seriously injured his domestic partner, Rebecca Heisler, while he was subject to an order of release barring

him from having any contact with her.<sup>1</sup> The sentencing court imposed a sentence of 10 years' imprisonment with 2 years suspended (8 years to serve) for the second-degree assault conviction and 5 days' imprisonment for the violating conditions of release conviction. The sentencing court also restricted Shaw's eligibility for discretionary parole based on the violent callousness of the offense and Shaw's past and continued assaultive conduct. In addition, the sentencing court imposed a probation condition that prohibited any contact between Shaw and his four-year-old son who had witnessed the assault.

Shaw now appeals his sentence, raising two claims. First, Shaw argues that the court failed to adequately justify the restriction on his discretionary parole. For the reasons explained here, we reject this claim.

Second, Shaw argues that the court failed to apply special scrutiny to the probation condition that prohibited contact with his son. We agree that the record fails to show that the court applied the correct level of scrutiny to this probation condition, and we therefore remand the probation condition to the court for consideration of the less restrictive alternatives that Shaw proposed.

### *Background facts*

On March 6, 2018, Shaw had pending criminal charges for an alleged assault against Heisler. Despite the fact that his bail conditions prohibited contact with Heisler, Shaw showed up at the home that Heisler shared with their four-year-old son and requested a ride. When Heisler refused to immediately drive Shaw somewhere, Shaw took her car keys and attempted to take her car without her permission.

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<sup>1</sup> AS 11.41.210(a)(2) and AS 11.56.757(a), respectively.

When Heisler tried to stop him from leaving, Shaw slammed the car door on Heisler's head multiple times. Heisler lost consciousness and fell backward onto the driveway. Shaw then backed over Heisler's foot as he left in the car. Their four-year-old son witnessed the assault and was able to call 911 after Heisler regained consciousness.

Because of the severity of her injuries, Heisler was medevaced to a medical center in Seattle. She sustained skull fractures, head lacerations, and injuries to her left leg and arm. She also suffered permanent hearing loss in her left ear.

A grand jury indicted Shaw on charges of first-degree assault, first-degree vehicle theft, and first-degree robbery. Shaw was also charged with violating conditions of release.

Shaw eventually pleaded guilty, pursuant to a plea agreement, to second-degree assault and violating conditions of release. As part of the plea agreement, Shaw agreed to two statutory aggravators — AS 12.55.155(c)(12) (crime was committed while on release for a misdemeanor assault) and AS 12.55.155(c)(18)(D) (crime was committed against a person with whom the defendant had a dating relationship). There was no agreement as to the sentence.

Shaw was twenty-six years old at the time of sentencing. In addition to the charges in this case, Shaw also had pending charges of unlawful contact, fourth-degree misconduct involving a controlled substance, and fourth-degree assault. Shaw's criminal history consisted of two prior felony drug convictions and a misdemeanor assault conviction. Shaw had not done well on probation, and he had three prior probation violations. The presentence report also listed three jailhouse infractions for fighting since he had been arrested in this case.

As a third felony offender, Shaw faced a presumptive range of 4 to 10 years' imprisonment.<sup>2</sup> The State argued for the maximum sentence of 10 years, relying on the statutory aggravators and arguing that the severity of the assault made Shaw a "worst offender."<sup>3</sup>

The sentencing court agreed with the State that this was "a particularly egregious assault," and that, but for the plea agreement, the conduct would have been tried as first-degree assault, robbery, and vehicle theft. The court also noted Shaw's "significant criminal history" and "apparently violent nature," pointing out that Shaw continued to violate the law while on release and continued to be assaultive even in custody. The court found that Shaw's rehabilitation was "guarded," despite his young age, and the court therefore focused primarily on isolation and community condemnation in its evaluation of the *Chaney* criteria.<sup>4</sup>

Ultimately, the court sentenced Shaw to 10 years' imprisonment with 2 years suspended (8 years to serve) with 5 years' probation on the second-degree assault conviction and 5 days to serve on the violation of conditions of release conviction. The court also restricted Shaw's discretionary parole, explaining its reasons for doing so:

I'm restricting his right to discretionary parole under AS 33.16.090(a)(1)(B) and AS 12.55.115. He's not to be eligible for discretionary parole until he has served at least

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<sup>2</sup> Former AS 12.55.125(d)(4) (2018).

<sup>3</sup> See *State v. Wortham*, 537 P.2d 1117, 1120 (Alaska 1975) ("[M]aximum sentences generally should not be imposed without some foundation for characterizing a defendant as the worst type of offender." (internal quotations omitted)); *Fee v. State*, 656 P.2d 1202, 1204 (Alaska App. 1982) ("Where the defendant pleads guilty to a lesser offense and a review of the facts establishes that he, in fact, committed a greater offense, the court may legitimately find that he is a worst offender for purposes of sentencing him for the lesser offense.").

<sup>4</sup> See *State v. Chaney*, 477 P.2d 441, 444 (Alaska 1970).

the sentence minus good time. I specifically find that otherwise the goal — the sentencing goals of considering isolation and the community condemnation for this type of conduct is important in that regard. I know it's a restriction on the discretion of the parole board to shorten the sentence, but the fact of Mr. Shaw's record, the three assaults, including this almost deadly assault on Ms. Heisler, [h]is failure on probation in the past. I think it mandates that he serve at least the term of eight years minus any good time.

Among the probation conditions imposed by the court was Special Probation Condition 8, which prohibited any contact with Heisler “or her family.” Shaw objected to the probation condition to the extent that it prohibited all contact with his four-year-old son, and he asserted that there were less restrictive alternatives that should be considered, including written contact or contact through an appropriate third party. The sentencing court did not modify the condition in response to Shaw's objection, nor did it address the less restrictive alternatives that Shaw had proposed.

Shaw now appeals, arguing that the sentencing court erred when it restricted his eligibility for discretionary parole and when it imposed a probation condition that prohibited all contact with his son.

*Why we uphold the restriction on discretionary parole*

Alaska Statute 12.55.115 authorizes sentencing courts to restrict a defendant's eligibility for discretionary parole beyond the term required under AS 33.16.090. A court's decision to restrict discretionary parole eligibility in a particular case must be supported by “‘expressly articulated reasons’ — reasons that are case-specific, and that are backed by substantial evidence in the record.”<sup>5</sup> The court's

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<sup>5</sup> *Thomas v. State*, 413 P.3d 1207, 1213 (Alaska App. 2018) (quoting *State v. Korkow*, 314 P.3d 560, 565 (Alaska 2013)).

decision must also be based on the *Chaney* criteria, with the most relevant factors often involving public safety and potential for rehabilitation.<sup>6</sup>

The sentencing court fulfilled these requirements in this case. The court specifically explained that it had chosen to restrict Shaw’s discretionary parole because of the need for isolation and community condemnation. Moreover, its reasons for doing so — namely, the violent and callous circumstances of the current offense, Shaw’s past and continued assaultive behavior, and his past failures on supervision — were supported by substantial evidence in the record.

As a general matter, we review a trial court’s sentencing decisions — including the decision to restrict a defendant’s discretionary parole — under the clearly mistaken standard of review.<sup>7</sup> The clearly mistaken standard requires this Court to make its own independent review of the record.<sup>8</sup> But it also rests on the assumption that there is “a permissible range of reasonable sentences which a reviewing court, after an independent review of the record, will not modify.”<sup>9</sup> Having independently reviewed the record in this case, we uphold the sentencing court’s restriction on Shaw’s eligibility for discretionary parole as not clearly mistaken.

#### *Why we remand with respect to Special Probation Condition 8*

When a probation condition infringes on a defendant’s constitutional rights, such as the right to familial relationships, the sentencing court must apply special

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<sup>6</sup> *Id.*; see also *Chaney*, 477 P.2d at 444; AS 12.55.005 (codifying *Chaney* criteria).

<sup>7</sup> *Korkow*, 314 P.3d at 562.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* (quoting *State v. Hodari*, 996 P.2d 1230, 1232 (Alaska 2000)).

scrutiny to the condition.<sup>10</sup> Special scrutiny involves a two-part review: First, a probation condition that restricts a constitutional right must be “reasonably related” to sentencing criterion such as rehabilitation of the offender and protection of the public.<sup>11</sup> Second, the condition must be “narrowly tailored to avoid unnecessary interference” with the constitutional right at issue.<sup>12</sup> The sentencing court must “affirmatively consider and have good reason for rejecting less restrictive alternatives.”<sup>13</sup>

Here, the sentencing court explained its reasoning for restricting Shaw’s contact with his son. The sentencing court noted that the four-year-old son had witnessed the assault and was severely traumatized by the events of that day. The sentencing court therefore concluded that contact should be restricted to protect the child, who was an indirect victim of his father’s actions.

However, the sentencing court did not adequately explain why all contact should be prohibited until the end of Shaw’s probation, and the court did not consider the less restrictive alternatives proposed by Shaw, which included limiting the contact to written contact or contact through a third party. Accordingly, we conclude that a remand for consideration of these less restrictive alternatives is required.

### *Conclusion*

We REMAND this case for consideration of less restrictive alternatives to the portion of Special Probation Condition 8 that precludes Shaw’s contact with his son. In all other respects, we AFFIRM the judgment of the superior court.

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<sup>10</sup> *Simants v. State*, 329 P.3d 1033, 1038 (Alaska App. 2014).

<sup>11</sup> *Id.* at 1039.

<sup>12</sup> *Id.* (quoting *Diorec v. State*, 295 P.3d 409, 414 (Alaska App. 2013)).

<sup>13</sup> *Peratrovich v. State*, 903 P.2d 1071, 1079 (Alaska App. 1995).