



March 9, 2011

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The Honorable Carl Gatto, Chair
The Honorable Steve Thompson, Vice-Chair
House Judiciary Committee
Alaska House of Representatives
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[Representative Steve Thompson@legis.state.ak.us](mailto:Representative_Steve_Thompson@legis.state.ak.us)

Re: House Bill 175
ACLU Review of Legal Issues

Chair Gatto, Vice-Chair Thompson:

Thank you for the opportunity to submit written testimony with respect to House Bill 175.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. In that respect, we wish to advise you of constitutional issues with the Bill.

Last year, HB 324 was passed (26th Legislature, Chapter No. 19, SLA 2010, Effective Date: July 1, 2010), amending Alaska Rule of Criminal Procedure 5 to permit a new arrestee to be held for up to 48 hours before the initial appearance before a judge or magistrate, rather than the 24 hour period which had long been the law. HB 175 would create consistency between the amended rule and the statute relating to pretrial detention.

Requirement for Hearing Without Unreasonable Delay

Under *Gerstein v. Pugh*, a probable cause hearing must be held without unreasonable delay. 420 U.S. 103 (1975). After *Gerstein*, a standard of 24 hours was adopted by most states and most circuits. Years later, a narrowly divided US Supreme Court stated that the initial appearance must be made only within 48 hours. *Riverside v. McLaughlin*, 500 U.S. 44 (1991). However, *Riverside* does not bind the states in their interpretation of their own constitutions.

In one accounting of state responses to *Gerstein*, most states had concluded that 24 hours was the appropriate term of detention before appearing before a magistrate or judge, and only seven states explicitly permitted more than 24 hours prior to an initial hearing. *Jenkins v. Chief Justice of Dist. Court Dept.*, 619 N.E.2d 324, 333-34 (Mass. 1993).

Since Alaska had guaranteed a 24-hour window for initial appearances for 18 years since the *Riverside* decision, the state courts may be hard pressed to see why a 48-hour window would not likely permit “unreasonable delay.” The Alaska courts have not yet had a chance to rule on the dimensions of the “speedy trial” provision of Article I, section 11 as it relates to initial appearances, since Rule 5 has long guaranteed a 24-hour window of appearance. The Alaska Supreme Court could very well decide that the state constitutional provisions relating to speedy trial and due process require no more than a 24-hour window prior to initial appearance, just as the Massachusetts Supreme Court did in *Jenkins*.

Given that the currently existing rules of criminal procedure already provide an exception for defendants arrested far from urban centers and allow the prosecution to request a delay to gather more information where necessary for a bail hearing, the state’s success over the last 18 years in providing an initial appearance within 24 hours strongly suggests that a delay of more than 24 hours would represent unnecessary delay, making the statute unconstitutional.

Contribution to Prison Over-Crowding, Increased Costs

The Legislature should also take note of the fact that **almost half of all Alaska prisoners are being held pretrial**, typically constituting 46 to 48% of all prisoners in Alaskan institutions. The high rate of pre-trial detention contributes substantially to the state of overcrowding in Alaska prisons and the need to build more of the prisons that cost our state dearly. Consider that the Department of Law reports that almost 27,000 new criminal cases were filed last year – roughly 6,000 felony cases and roughly 21,000 misdemeanor cases. If every one of those 27,000 arrests results in a single extra day in custody, that increase of 27,000 prisoner-days would impose a similar burden in on the correctional system as 74 prisoners spending a year in prison.

Every prisoner-year in custody costs roughly \$45,000. **The cost of additional incarceration from such the policy change contemplated in HB 175 could cost up to \$3.3 million in increased costs every year**, just by adding a single day of initial incarceration for each arrest.

Extension of the post-arrest time that a prisoner can be kept in custody without any bail will merely serve to increase our prison population unnecessarily, mostly by increased incarceration of prisoners accused only of misdemeanors.

The Legislature should reverse course and return to the 24-hour window Alaska observed for decades. We are not aware of any evidence of a single incident in which a prisoner was released wrongfully because of any limitation imposed by the 24-hour window before the initial appearance. Locking up thousands of people accused of misdemeanors for longer periods of time and spending millions of dollars to keep our prisons crowded is not good public policy.

Please feel free to contact the undersigned should you require any additional information. We are happy to reply to any questions that may arise, or to answer informally any questions which Members of the Committee may have.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Mittman", with a long horizontal flourish extending to the right.

Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Representative Wes Keller, Representative_Wes_Keller@legis.state.ak.us
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