
APPENDICES

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APPENDIX A

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

August 8, 2022

SUBJECT: Department of Law expenditures related to the *Janus* decision
(Work Order No. 33-LS0058)

TO: Kris Curtis
Legislative Auditor

FROM: Marie Marx 
Legislative Counsel

You have asked for an opinion regarding the Department of Law's expenditure of funds related to *Janus v. AFSCME*.¹ Specifically, you asked:

1. Did [the Department of Law], by funding contracts related to Janus from the FY 21 and FY 22 "Civil Division Except Contracts Relating to the Interpretation of Janus v. AFSCME" appropriations, violate AS 37.07.080(a), Article IX, Section 13 of the Alaska Constitution, or any other state law.

2. What laws, court cases, or other legal evidence exists to support or challenge [the Department of Law]'s arguments regarding the legality of the civil division's appropriation language for FY 21 and FY 22, as documented in [the Department of Law]'s letters to Representative Josephson and Senator Stevens, and in [the Department of Law]'s legal review of the FY 21 operating budget.

1. Background.

As part of the FY 21 operating budget, the legislature included the following appropriations for the Department of Law:

Civil Division Except Contracts	48,036,200	21,113,900	26,922,300
Relating to Interpretation of Janus v AFSCME			

* * *

¹ 138 S.Ct. 2448 (2018).

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Legal Contracts Relating to Interpretation of Janus v AFSCME Decision	20,000	20,000
Legal Contracts Relating to Interpretation of Janus v AFSCME Decision ²	20,000	

As part of the FY 22 operating budget, the legislature included the following appropriations for the Department of Law:

Civil Division Except Contracts Relating to Interpretation of Janus v AFSCME	49,930,400	22,854,200	27,076,200
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* * *

Legal Contracts Relating to Interpretation of Janus v AFSCME Decision	20,000	20,000
Legal Contracts Janus v AFSCME Decision ³	20,000	

In both operating budgets, the governor vetoed the appropriation for "Legal Contracts Relating to Interpretation of Janus v AFSCME Decision,"⁴ and the legislature did not override that veto. Under the remaining appropriation in both the FY 21 and FY 22 operating budgets to the Department of Law, Civil Division, the civil division may not therefore expend funds for "Contracts Relating to Interpretation of Janus v AFSCME."

In a letter dated October 29, 2020, from acting Attorney General, Ed Sniffen, Jr., the Department of Law addressed the above restriction in the FY 21 operating budget.⁵ The Department of Law contended that

² Sec. 1, ch. 8, SLA 2020, page 23, line 29, through page 25, line 9.

³ Sec. 1, ch. 1, SSSLA 2021, page 24, line 29, through page 26, line 4.

⁴ See House Journal 2182 - 2184 (May 18, 2020); House Journal 1375 - 1377 (April 16, 2021).

⁵ Letter from Clyde "Ed" Sniffen, Jr. to Representative Andrew Josephson Re: *Letter Dated October 13, 2020* (Oct. 29, 2020) (identifying that the Department of Law, Civil Division, has outsourced work to Consovoy McCarthy in the matter of *Belgau v. Inslee*, 975 F.3d 940, 944 (9th Cir. 2020), cert. denied, 141 S. Ct. 2795, 210 L. Ed. 2d 928 (2021)).

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[r]estricting the Department's spending authority in this manner raises issues under the confinement clause of the Alaska Constitution which has been interpreted to prohibit an appropriations bill from administering a program of expenditures Accordingly, appropriation language that attempts to restrict the Attorney General from entering into contracts related to a particular legal matter--which would include not only contracts with outside counsel, but also with necessary legal experts--raises significant legal issues and impedes the Attorney General's ability to fulfill statutory duties as head legal advisor and litigator for the state. Further, an appropriation structure of this nature attempts to restrict the governor's ability to initiate court action to enforce "any constitutional or legislative mandate" under art. III, sec. 16, of the Alaska Constitution.⁶

In a subsequent letter dated December 31, 2020, from acting Attorney General, Ed Sniffen, Jr., the Department of Law reiterated its position set forth above and also contended that:

[The] expenditures that have occurred in FY'21 for outside counsel contracts are not expenditures "relating to interpretation of *Janus v. AFSCME*." Outside counsel has not been providing advice on the interpretation of *Janus*; rather, outside counsel has been assisting the State in defense of a few different lawsuits. I hope you will see that the context here differs from the appropriation language and alleged restriction on the Department of Law's ability to spend money on outside counsel.⁷

For the reasons discussed below, the governor's expenditure of funds from the Department of Law, Civil Division, on outside counsel in the matter *Belgau v. Inslee* violates art. IX, sec. 13, of the Alaska Constitution and AS 37.07.080(a), and should be remedied.⁸

⁶ *Id.* (citing *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001)).

⁷ Letter from Clyde "Ed" Sniffen, Jr. to Senator Gary Stevens Re: *Legal Contracts Relating to Interpretation of Janus v. AFSCME* (Dec. 31, 2020). The attorney general expressed similar opinions in a memorandum reviewing the FY 21 operating budget. See 2020 Op. Alaska Att'y Gen. (April 2).

⁸ Per your request in our telephone call on July 26, 2022, the analysis in this memorandum is limited to the governor's expenditure of funds from the Department of Law, Civil Division, on outside counsel in the matter *Belgau v. Inslee*. Evaluation of the governor's expenditure of funds from the Department of Law, Civil Division, on outside counsel in other cases relating to the interpretation of *Janus v. AFSCME* would follow a similar analysis. Whether a contract relates to interpretation of *Janus v. AFSCME* would be a fact-specific inquiry.

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2. Discussion

The legislature's power over appropriations is plenary. Under the Alaska Constitution, no expenditure may be made from the public treasury without a valid appropriation by the legislature.⁹ In order to validly exercise this power, the legislature must comply with the procedural requirements of the state constitution, including the confinement requirement and title requirement (art. II, sec. 13) and, if necessary, the veto override requirement (art. II, sec. 16).

However, the legislature's appropriation power is not unlimited. The governor has some control over state expenditures, most significantly the item veto power over appropriations.¹⁰ The separation of powers doctrine that is implied in the state constitution also limits the extent of the legislature's power.¹¹ The separation of powers doctrine prohibits one branch of government from encroaching upon and exercising powers of another branch. The governor is the state's chief executive and is responsible for the operation of the executive branch of government.¹² The legislature cannot impinge on the power of the governor to control the operation of the executive branch. There is no precise means to determine where the legislature's power ends and the governor's power begins in this area.

In *Legislature v. Hammond*, a superior court was faced with the question of whether a series of appropriations were validly enacted or unconstitutionally invaded the authority of the governor.¹³ After thoughtfully reviewing the development of the legislature's appropriation power in Alaska and decisions in other states, the court began its examination of the challenged appropriations with the presumption that validly enacted legislation (appropriation) is constitutional unless its unconstitutionality can be clearly established. The court then concluded, *inter alia*, the legislature could prohibit the use of specified funds for a particular purpose (ban the use of the court system operating appropriation to move the Supreme Court clerk's office from Juneau),¹⁴ but the legislature could not involve itself in the routine execution of the law (appropriate funds to the legislative council for engineering studies on a public works project; specify a particular brand and model of tractor to be purchased with an appropriation; provide a detailed

⁹ Art. IX, sec. 13, Constitution of the State of Alaska.

¹⁰ Art. II, sec. 15, Constitution of the State of Alaska.

¹¹ *Bradner v. Hammond*, 553 P.2d 1, 5 - 6 (Alaska 1976).

¹² Art. III, secs. 1 and 16, Constitution of the State of Alaska.

¹³ *Legislature v. Hammond*, Case No. 1JU-80-1163 Civil, Memorandum of Decision (May 25, 1983).

¹⁴ *Id.* at 57 - 58.

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scheme for administration of an appropriation),¹⁵ or impose a duty on an agency as a condition attached to an appropriation.¹⁶

Later, the Alaska Supreme Court, in *Knowles*, (the case cited by the Department of Law in this matter) held:

[The Alaska Constitution] gives the legislature the power to legislate and appropriate. It gives the governor the power to influence the state's budget by requiring him or her to submit a proposed budget and general appropriation bill to the legislature and by striking or reducing items appropriated by the legislature. The governor's item veto power is thus one of limitation. The governor can delete and take away, *but the constitution does not give the governor power to add to or divert for other purposes the appropriations enacted by the legislature.*¹⁷

Thus, in defining the governor's veto powers, the *Knowles* court held:

Altering the purpose of the appropriation by striking descriptive words interferes with that unity because the result is no longer the item the legislature enacted. In comparison, striking the amount is the equivalent of a complete veto of a particular appropriation. And reducing the amount is a result the constitution expressly permits.¹⁸

Therefore, the Alaska Supreme Court recognized the power of the legislature to use descriptive words to describe the purpose of an appropriation, and the governor's lack of power to strike such descriptive words.

Next, the *Knowles* Court adopted the *Hammond* factors used in the superior case cited above to be used in determining compliance with the confinement clause, holding

that to satisfy the confinement clause, the qualifying language must be the minimum necessary to explain the Legislature's intent regarding how the money appropriated is to be spent. It must not administer the program of expenditures. It must not enact law or amend existing law. It must not

¹⁵ *Id.* at 20 - 21, 52 - 53, and 54 - 56.

¹⁶ *Id.* at 56 - 57.

¹⁷ *Knowles*, 21 P.3d at 371 (Alaska 2001) (emphasis added).

¹⁸ *Id.* at 371 - 72.

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extend beyond the life of the appropriation. Finally, the language must be germane, that is appropriate, to an appropriations bill.¹⁹

The extent of the Department of Law's authority to expend funds depends on the corresponding appropriations. AS 37.07.080(a) provides:

Except as limited by executive decisions of the governor, the mission statements and desired results issued by the legislature, appropriations by the legislature, and other provisions of law, the several state agencies have full authority for administering their program service assignments and are responsible for their proper management.

Under this statute and the plain language of the FY 21 and FY 22 operating budgets, the Department of Law's authority to contract for legal services is clearly limited by the scope of the appropriations to the Department of Law. AS 37.07.120(3) defines an appropriation as "a maximum amount available for expenditure by a state agency for a stated purpose set out in an appropriation act[.]" The "appropriation item" is the fundamental unit of an appropriation. An appropriation item is "a sum of money dedicated to a particular purpose" and consists of the amount being appropriated, a source of funds, and a purpose for which the funds are to be expended.²⁰ The executive branch cannot exceed the amount appropriated or vary from the purpose for which the funds are appropriated.²¹ The governor may transfer funds between allocations and objects of expenditure, but the governor may not transfer funds between appropriations.²² Only the legislature may transfer funds between appropriations and it may do so only by passing an act of the legislature.²³

Here, the purpose of the appropriations at issue for the Department of Law were expressly for the "Civil Division *Except* Contracts Relating to Interpretation of Janus v AFSCME."²⁴ To use those funds to outsource litigation on matters relating to the interpretation of *Janus* violates the purpose identified by the legislature in making those appropriations.

¹⁹ *Id.* at 377.

²⁰ *Id.* at 374.

²¹ *Knowles*, 21 P.3d at 371; art. II, sec. 15, Constitution of the State of Alaska; AS 37.07.080(a).

²² AS 37.07.080(e).

²³ *Id.*

²⁴ Sec. 1, ch. 8, SLA 2020, page 23, line 29 through page 25, line 9 (emphasis added).

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The governor has discretion to fashion the manner in which the purposes of each appropriation will be achieved, within the constraints of statutory mandates relating to program execution and to the operation of specific programs. The governor may generally shift positions, functions, and funds and reorganize governmental units as he determines is best to achieve the purposes of an appropriation. In cases where an appropriation funds several different programs or subprograms within an agency, the governor may be able to reduce or eliminate funding to certain programs or subprograms in order to increase funding for other programs so as to best achieve the overall purposes of the appropriation. It is difficult for the legislature to prevent these kinds of internal changes in the executive branch. The approval of the detailed agency and program budgets by the legislative finance committees is evidence of legislative intent and is useful in construing how an appropriation is to be implemented, but because the detailed agency budgets are not part of the budget bill and not voted upon by the entire legislature, those detailed budgets are not binding on the governor.

Here, however, there is an explicit restriction on using funds from the Department of Law, Civil Division, for contracts related to the *Janus* decision. While the legislature cannot manage the operations of the executive branch, or prevent the governor from shifting funds within a particular appropriation, it does have the power to make policy decisions on which programs to fund with public funds. Moreover, despite the Department of Law's assertions, nothing in the appropriation at issue prevents the Department of Law or Attorney General from fulfilling its duties as head legal advisor and litigator. In fact, the Department of Law could use in-house resources to pursue matters related to the *Janus* decision without running afoul of the appropriation language at issue. Thus, the restriction on contracts in no way restricts the governor's power or ability to initiate court action - on the *Janus* matter or any other issue.

The Department of Law further contends that the appropriation language has the effect of administering a program of expenditures. While there is always a risk that if litigated a court might agree, in my opinion, it is more likely that a court would conclude that because the restrictive language is limited to a single appropriation within the comprehensive operating budget, the legislature is not administering a program of expenditures and that the restriction attached to the appropriation must be enforced. Significantly, the legislature appropriated \$20,000 for the explicit purpose of contracting with outside firms to litigate matters relating to the *Janus* decision, *and the governor vetoed those funds*. It is unlikely that a court would find that the legislature was impermissibly administering a program of expenditures, when the legislature specifically appropriated funds for the expenditure at issue, but the governor vetoed that (nominal) appropriation. Because the governor vetoed funds appropriated for that purpose, the governor may not now expend other funds for that same purpose. To do so would be a violation of an explicit restriction against expenditure, as enacted into law by the legislature.

The Department of Law also contends that its expenditures for outside counsel in the matter *Belgau v. Inslee* are not expenditures relating to interpretation of *Janus*. This is

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incorrect. AS 01.10.040(a) directs that words and phrases be construed according to their common and approved usage.²⁵ The FY 21 and FY 22 operating budgets' use of "Contracts Relating to Interpretation of Janus v AFSCME Decision" means exactly what it says — any contract related to interpretation of *Janus*. The Department of Law acknowledges it contracted with outside counsel for the preparation of an amicus brief in the matter *Belgau v. Inslee*.²⁶ The state's amicus brief filed with the Ninth Circuit explicitly argues, "Because the [Ninth Circuit's] decision conflicts with the Supreme Court's decision in *Janus* and presents several questions of 'exceptional importance,' Fed. R. App. P. 35(b)(1)(B), the Court should grant the petition for rehearing en banc."²⁷ The state's amicus brief filed with the United States Supreme Court in the matter contended the Court should grant certiorari "because the decision below squarely conflicts with *Janus v. AF-SCME, Council 31*."²⁸ The filings made by outside counsel on behalf of the State of Alaska in *Belgau v. Inslee* explicitly relate to interpretation of *Janus*.

In sum, the governor's expenditure of funds from the Department of Law, Civil Division, on outside counsel in the matter *Belgau v. Inslee* violates art. IX, sec. 13, of the Alaska Constitution and AS 37.07.080(a), and should be remedied.

Please let me know if I may be of further assistance.

MYM:mjt
22-277.mjt

²⁵ See also, *Wells v. State*, 102 P.3d 972, 975 (Alaska App. 2004) ("When the legislature uses a word or phrase but does not define it, a court should normally assume that the legislature intended the word or phrase to have its common, ordinary meaning.").

²⁶ Letter from Clyde "Ed" Sniffen, Jr. to Representative Andrew Josephson Re: *Letter Dated October 13, 2020* (Oct. 29, 2020) (identifying that the Department of Law, Civil Division, had outsourced work to Consovoy McCarthy in the matter of *Belgau v. Inslee*, 975 F.3d 940, 944 (9th Cir. 2020), cert. denied, 141 S. Ct. 2795, 210 L. Ed. 2d 928 (2021)).

²⁷ Brief for the State of Alaska as Amicus Curiae at p. 2, *Belgau v. Inslee*, 975 F.3d 940, 944 (9th Cir. 2020), cert. denied, 141 S. Ct. 2795, 210 L. Ed. 2d 928 (2021)).

²⁸ Brief for the States of Alaska, Alabama, Arizona, Arkansas, Idaho, Indiana, Louisiana, Montana, South Carolina, South Dakota, Texas, Utah, and West Virginia as Amici Curiae in Support of Petitioners at * 2, *Belgau v. Inslee*, 2021 WL 1089791 (Mar. 18, 2021).

APPENDIX B



THE STATE
of ALASKA
GOVERNOR MIKE DUNLEAVY

Department of Law

OFFICE OF THE ATTORNEY GENERAL

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Anchorage, AK 99501
Main: 907-269-5100
Fax: 907-276-3697

October 29, 2020

Via Email

The Honorable Andrew Josephson
Alaska House of Representatives
Email: Rep.Andy.Josephson@akleg.gov

Re: *Your Letter Dated October 13, 2020*

Dear Representative Josephson:

In your letter dated October 13, 2020, you inquired about the amicus brief prepared by Consovoy McCarthy, PLLC, for *Belgau v. Inslee*, 19-35137 (9th Cir. Oct 12, 2020). As you are aware, attorneys general regularly submit amicus briefs in federal court cases of importance to their states. Alaska has a strong interest in this case because the panel's decision impacts the constitutional rights of Alaska state employees. Alaska's Attorney General issued a legal opinion on August 27, 2019 concluding that the State's payroll deduction process was constitutionally untenable under *Janus v. AFSCME* and recommended actions to bring the state into compliance. The validity of these actions is currently being litigated in state court (*State of Alaska v. ASEA*) and the Attorney General had a duty to consider submitting an amicus brief. Ultimately the work was outsourced to Consovoy McCarthy, a firm with relevant expertise that the Department of Law already had under contract. The Department expects Consovoy McCarthy's total costs for preparing the brief to be under \$6,000, less than what it would have cost to prepare using in-house attorneys.

You raised concern over the Department's use of appropriated funds for outside counsel related to *Janus*. As noted in our review of HB 205 for the Governor (available [here](#), pages 7-8), the appropriation structure adopted for the Department of Law this year was unusual. The Department is comprised of a civil division and a criminal division and not organizationally separated by particular legal matters. Restricting the Department's spending authority in this manner raises issues under the confinement clause of the Alaska Constitution which has been interpreted to prohibit an appropriations bill from administering a program of expenditures. See *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001). In carrying out the state's legal business, the Alaska Supreme Court has held that the Attorney General has the powers and duties ascribed to that position under the common law which includes the authority to bring actions that the Attorney General considers to be in the public interest. See *Public Defender Agency v.*

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Representative Andrew Josephson
Re: *Letter Dated October 13, 2020*

October 29, 2020
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Superior Court, 534 P.2d 947 (Alaska 1975). Accordingly, appropriation language that attempts to restrict the Attorney General from entering into contracts related to a particular legal matter—which could include not only contracts with outside counsel, but also with necessary legal experts—raises significant legal issues and impedes the Attorney General’s ability to fulfill statutory duties as head legal advisor and litigator for the state. Further, an appropriation structure of this nature attempts to restrict the governor’s ability to initiate court action to enforce “any constitutional or legislative mandate” under Article III, sec. 16, of the Alaska Constitution. The *Janus v. AFSCME* decision concerned core First Amendment issues and related litigation involves the application of the First Amendment.

Please contact me with any additional questions.

Sincerely,



Clyde “Ed” Sniffen, Jr.
Acting Attorney General

cc: Rep. Matt Claman, House Judiciary Chair (via email)
Miles Bakes, Legislative Director, Governor’s Legislative Office (via email)
Sharla Mylar, Legislative Liaison, Department of Law (via email)

APPENDIX C



THE STATE
of ALASKA
GOVERNOR MICHAEL J. DUNLEAVY

Department of Law

OFFICE OF THE ATTORNEY GENERAL

1031 West Fourth Avenue, Suite 200
Anchorage, AK 99501
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February 14, 2020

The Honorable Neal Foster
Co-Chair, House Finance Committee
State Capitol Room 505
Juneau, AK 99801

The Honorable Jennifer Johnston
Co-Chair, House Finance Committee
State Capitol Room 511
Juneau, AK 99801

Re: *Department of Law FY 2021 Budget*

Dear Representative Foster and Representative Johnston:

This week, the House Finance Subcommittee for the Department of Law's Budget approved several amendments that will drastically and significantly reduce our budget, affecting the services we provide to our clients and the public. The net total unrestricted general fund (UGF) reduction recommended by the subcommittee is \$755,000. Coupled with a reduction of \$750,000 to the Civil Division for FY 2020, this is a loss of \$1.5 million in UGF for the Civil Division over two years—on top of an 18.6% reduction to the entire department's UGF since FY 2014.

While I understand the state's fiscal crisis and the need to be very judicious with our budget, my department is already operating on a tight budget and cannot sustain such reductions. Although recently enacted legislation has improved the resources of the Criminal Division, the department still has 55 fewer positions today than it did in FY 2014. Further reductions to the budget will continue to hamper the department's ability to recruit and retain high-quality attorneys and staff for the positions we still have. Recruitment and retention of quality attorneys are already significant problems that we are endeavoring to address with our already reduced budget.

Further, cutting the Department of Law's Civil Division budget is counterproductive to the State's fiscal well-being. The Department of Law represents only slightly over 1% of the state's total budget for all agencies, yet our Civil Division

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House Finance Committee Chairs
Re: *Department of Law Budget*

February 14, 2020
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generates the most revenue for the state of any department. Our efforts to recover taxes and royalties resulted in \$300 million in revenue to the state in calendar year 2019 alone, and billions over the last three decades. Our tort and workers' compensation defense saves the state tens of millions of dollars every year, and our consumer protection function has netted the state over \$11 million in the last fifteen years. These examples of revenue-generating work are all functions of the Civil Division, which is the target of the committee's reductions.

The revenue-generating function of the department is an important service to Alaskans, but is not its only, or even most important, function. A core mission of the department, and a responsibility I take very seriously, is the protection of the constitutional and civil rights of Alaskans. The department often must step forward to engage in legal battles in order to protect the rights of Alaskans. This is particularly and most often true in the areas of consumer protection and criminal prosecution.

The proposed reductions from the subcommittee come from two amendments. The first cuts \$375,000 and three positions from the Special Litigation section. The stated reason for this reduction is confusing, and it appears that the subcommittee has a misunderstanding of a recent realignment. Three positions and associated funding were moved to Special Litigation from our Commercial and Fair Business section in order to accommodate the movement of consumer protection work from one section to another. Removing this funding will compromise our ability to protect consumers.

The second reduction is more straightforward. The subcommittee deleted \$400,000 in UGF from the Labor and State Affairs section, and the stated purpose of this reduction is to constrain my use of outside counsel for the *Janus v. AFSCME* case. The subcommittee has commented often on that case and the amount of that contract, which is \$600,000. But the Labor and State Affairs section performs important work on a wide array of issues, including statewide governance issues and aid-to-agency advice for a broad swath of state government agencies. This is the reason that we assigned this particular contract to the Labor and State Affairs component, just as outside counsel on oil and gas matters would be assigned to the Natural Resources component.

I will always respect those who may disagree with me on various legal issues, but the Committee should understand that significantly reducing the department's budget to try to force me to forego hiring outside counsel for any particular case, including this important case regarding the First Amendment rights of state employees, will not have that effect. The Department of Law will continue to retain outside counsel as I deem necessary based upon the circumstances presented by each case. I urge you to reject these amendments, which will only result in further difficulty for the department in its effort to address critical issues important to the people of Alaska.

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House Finance Committee Chairs
Re: *Department of Law Budget*

February 14, 2020
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Thank you for your consideration. I am available at your convenience to meet with you and other members of the Finance Committee to discuss this in more detail.

Sincerely,

A handwritten signature in blue ink, appearing to read "Kevin G. Clarkson", with a stylized flourish extending to the right.

Kevin G. Clarkson
Attorney General

cc: Suzanne Cunningham, Governor's Legislative Office

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APPENDIX D



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

Department of Law

OFFICE OF THE ATTORNEY GENERAL

1031 W. 4th Avenue, Suite 200
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December 31, 2020

Via Email

The Honorable Gary Stevens
Chair of Legislative Council
Alaska State Senate
Email: senator.gary.stevens@akleg.gov

Re: *Legal Contracts Relating to Interpretation of Janus v. AFSCME*

Dear Chair Stevens:

We have further reviewed concerns by the Legislative Council regarding expenditures related to the *Janus v. AFSCME* decision. As noted in our correspondence dated October 29, 2020 to Representative Josephson regarding the preparation of an amicus brief in *Belgau v. Inslee*, 19-351347 (9th Cir. Oct. 12, 2020), the Department of Law determined that this expenditure on outside counsel was appropriate under the circumstances, and we continue to believe that these types of expenditures are appropriate and lawful.

As previously explained, the Attorney General is responsible for the state's legal business including the defense of lawsuits brought against the State. This responsibility inevitably involves assessing whether the use of outside contractors to perform legal work, participate as expert witnesses in litigation, or to provide other assistance in relation to litigation or legal advice would be helpful. These are strategic decisions that clearly fall within the constitutional and common law authority of the state Attorney General. *See Public Defender Agency v. Superior Court*, 534 P.2d 947 (Alaska 1975). These strategic decisions are also integral to carrying out the state program assigned to the Department of Law—the state's legal business—and as noted previously the Alaska Constitution prohibits use of an appropriations bill to administer a state program. *See Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001). If the attempt to restrict the Attorney General's ability to utilize outside contractors violates the confinement clause (which is our position), then article IX, section 13 powers are not implicated because the purported appropriation is not actually an appropriation at all, but instead an improper effort to utilize an appropriations bill to administer a state program.

However, this is not the only reason the expenditures are appropriate. We believe the expenditures that have occurred in FY'21 for outside counsel contracts are not expenditures "relating to interpretation of *Janus v. AFSCME*." Outside counsel has not been providing advice on the interpretation of *Janus*; rather, outside counsel has been assisting the State in defense of a few different lawsuits. I hope you will see that the context here differs from the appropriation language and alleged restriction on the Department of Law's ability to spend money on outside counsel.

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(Continued)

The Honorable Gary Stevens
Re: *Legal Contracts Relating to Interpretation of Janus v. AFSCME*

December 31, 2020
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The State has been sued in two federal cases regarding the lawfulness of employee payroll deductions made by the State, collective bargaining agreement terms, Alaska statutes and an Administrative Order. *See Creed and Riberio v. ASEA, Comm. Tshibaka 20-35743* (Ninth Circuit); *Woods v. ASEA, Comm. Tshibaka, 20-35954* (Ninth Circuit). The State is also a party to similar litigation in state court. *State of Alaska v. ASEA*, No. 3AN-19-9971 CI. The Ninth Circuit's decision in *Belgau* involved issues very similar to the ones raised in those cases. Therefore, the Ninth Circuit's conclusions were of significant interest to the Department of Law because that case could become a precedent that would apply to the pending Alaska cases. Although the Supreme Court's decision in *Janus* is certainly a part of the legal analysis in the lawsuits filed against the State, it would be an oversimplification to say that the expenditure on outside counsel was merely related to an "interpretation of *Janus v. AFSCME*." In fact, the expenditures in FY'21 have mainly involved litigation strategy and defending the State's position—not on providing an interpretation or assisting the Attorney General in interpreting *Janus*.

Even assuming that the purported restriction in HB 205 (and vetoed) could restrict the Department from utilizing outside counsel to assist the Attorney General in forming a legal opinion on *Janus*, such a restriction could not reasonably be interpreted to hamstring the Department's ability to make the complex and strategic decisions involved in carrying out the Department's mission to conduct the legal affairs of the State. At the heart of this statutory mission is responding to court actions brought against the State.

For these reasons, we maintain our position that the expenditures on outside counsel have been appropriate. We are in the middle of at least two federal court cases for which outside counsel is most up to speed and well-suited for the task. This allows in-house resources, which are also stretched thin, to focus on other pressing matters of the State. It would be difficult to transition the cases midstream, even though we are focused in the long-term on limiting the use of outside counsel for these types of matters.

Nonetheless, we do appreciate the Council's perspective and wish to work cooperatively with the Legislature. Accordingly, our Department will take a careful look at our contracts with outside counsel that relate in some way to the *Janus* decision and will seek to maximize the use of in-house resources and decrease the use of outside counsel when possible and when appropriate.

Sincerely,



Clyde "Ed" Sniffen, Jr.
Acting Attorney General

cc: Miles Baker, Governor's Office Legislative Director
Megan A. Wallace, Legislative Office Legal Services Director

APPENDIX E



THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

Department of Law

OFFICE OF THE ATTORNEY GENERAL

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September 7, 2022

Kris Curtis, Director
Division of Legislative Audit
P.O. Box 113300
Juneau, Alaska 99811
Email: legaudit@akleg.gov

RECEIVED

SEP 07 2022

LEGISLATIVE AUDIT

Re: Response to August 11, 2022 Letter

Dear Ms. Curtis:

I am writing in response to your August 11, 2022 letter wherein you requested the Department of Law's review and response to Legislative Legal's memorandum on the expenditure of funds for outside counsel contracts related to the interpretation of *Janus v. AFSCME*.¹ This response supplements the letters that have already been provided to your office sent to the legislature when similar questions were raised. As previously stated by this office, any attempt to constrain the discretion of the Attorney General through an appropriation bill violates the confinement clause of the Alaska Constitution² and represents an improper encroachment on the powers of a separate branch of government.³ We disagree with Legislative Legal's conclusion that the legislature can use the appropriations process to limit the way in which the Attorney General can provide legal services to the State and its agencies.

¹ The Department of Law notes that despite the necessity of stating a remedy, Legislative Legal's memorandum does not identify how this could be remedied. The Alaska Supreme Court has warned against the issuance of advisory opinions when no actual relief is available. *Ahtna Tene Nene v. State, Dep't of Fish & Game*, 288 P.3d 452, 457 (Alaska 2012) ("A controversy is a claim that affects the legal rights of a party; it is definite and concrete ... *admitting of specific relief* through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts")(emphasis in original)(internal quotations omitted).

² Art. II, sec. 13, Alaska Const.

³ "The doctrine prohibits one branch from encroaching upon and exercising the powers of another branch." *Bradner v. Hammond*, 553 P.2d 1, 5 n.8 (Alaska 1976).

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I believe the background of this matter has been well vetted and is known by all interested parties.⁴ And, while we are in general agreement that the legislature has broad appropriation authority, it is not an unfettered power.⁵ The legislature's appropriation authority is still constrained by the Alaska Constitution, both directly⁶ and indirectly.⁷ Moreover, Alaska's constitution recognizes strong executive control over state expenditures⁸ and the Alaska Supreme Court has instructed the legislature to avoid the administration of executive branch activities through the use of appropriation power.⁹ In contrasting the legislature's authority over appropriations and its authority to detail the duties of executive branch agencies, the Court stated:

The process for enacting substantive bills gives meaningful opportunity for public notice and comment. Article II, section 14 of the Alaska Constitution requires three readings of a substantive bill, on three separate days, “ ‘to ensure that the legislature knows what it is passing’ and to ensure an opportunity for the expression of public

⁴ See LTR from AG Clarkson to Chairs of House Finance Committee dated Feb. 14, 2020; LTR from Acting AG Sniffen to Rep. Andy Josephson dated Oct. 29, 2020; LTR from Acting AG Sniffen to Chair Gary Stevens dated Dec. 31, 2020; LTR from AG Taylor to Rep. Andy Josephson dated Jan. 21, 2022; MT Ms. Kris Curtis, Legislative Auditor FRM Marie Marx, Legislative Counsel, dated Aug. 8, 2022.

⁵ See *State v. Alaska Legislative Council*, No. S7612 at p. 16 (Alaska August 12, 2022) (“[The Constitution] create[s] a strong executive branch with a strong control on the purse strings of the State and limit[s] the legislature’s power to impose current spending priorities on future governors and legislatures”)(*internal quotations omitted*); *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001) (“The confinement clause prevents the legislature from enacting substantive policy outside the public eye. The process for enacting substantive bills gives meaningful opportunity for public notice and comment”).

⁶ Art. II, Sec. 13, Alaska Const.

⁷ *State v. Alaska Legislative Council*, No. S7612 at p. 15 (Alaska August 12, 2022) (“We acknowledge that none of the Constitution’s budgetary clauses expressly prohibit forward funding. We reiterate, however, that ‘often what is implied is as much a part of the constitution as what is expressed.’ Implicit in the budgetary clauses is a requirement that the budget be determined annually; when examined together, the budgetary clauses, the sources from which they were drawn, the underlying policies they were designed to promote, and our case law all support this conclusion”).

⁸ *Thomas v. Rosen*, 569 P.2d 793, 795 (Alaska 1977). See also *State v. Alaska Legislative Council*, No. S7612 at p. 15-16 (Alaska August 12, 2022).

⁹ *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 377 (Alaska 2001).

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opinion and due deliberation.” This opportunity may be stifled if substantive provisions are attached to appropriation bills in the form of conditions. Unlike other legislation, appropriations are not subject to the single-subject requirement of article II, section 13—a requirement meant to avoid logrolling. Allowing substantive enactments in an appropriation bill may also be problematic because appropriation bills are frequently a product of a free conference committee and, as such, must be voted on in their entirety and cannot be amended on the floor. Consequently, as the superior court noted, the confinement clause prevents a legislator seeking to advance unpopular legislation from burying it in a popular appropriation measure. Strict enforcement of constitutional limits helps ensure that the public will be fully informed of proposed legislation.¹⁰

The Alaska Supreme Court has made clear that the legislature is without authority to alter or negate the actions of the executive branch through the use of an appropriation bill.¹¹

CONFINEMENT CLAUSE

While the memorandum enclosed with your letter purports to find a constitutional error, the Alaska Supreme Court has already stated that legislative attempts to limit executive discretion in staffing and managing state programs violate art. II, sec. 13 of the Alaska Constitution.¹² In *Knowles*, the legislature attempted to limit the activities of the Alaska Seafood Marketing Institute (ASMI) by refusing to fund positions outside Alaska paid at a range 21 or higher on the state salary scale.¹³ The Court applied the *Hammond* factors and determined that the attempt to administer the actual operation of a state program in an appropriation bill violated the confinement clause.¹⁴ *Knowles* recognized that the executive branch has wide discretion in the expenditure of appropriated funds. The legislature’s attempt to control which legal matters are pursued by the Department of Law through the use of an appropriation bill ignores the role of the Attorney General in

¹⁰ *Id.* (internal citations omitted).

¹¹ See *State ex rel. McGraw v. Burton*, 569 S.E.2d 99, 117 (W. Va. 2002) (“no statute, policy, rule, or practice may constitutionally operate, alone or cumulatively, to limit, reduce, transfer, or reassign the duties and powers of the Office of the Attorney General in such a fashion as to prevent that office from performing its inherent constitutional functions”).

¹² *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 380 (Alaska 2001).

¹³ *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 370 (Alaska 2001).

¹⁴ *Alaska Legislative Council v. Knowles*, 21 P.3d 367, 381 (Alaska 2001).

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determining the nature and course of litigation and the practical operation of the Department of Law.

The appropriations in question identified the “Civil Division Except Contracts Relating to Interpretation of *Janus v. AFSCME*” and “Legal Contracts Relating to Interpretation of *Janus v. AFSCME* Decision.” An effort to restrict the spending authority of the Department of Law based on the subject matter of legal matters raises issues under the confinement clause similar to the legislature’s attempt to control the operation of ASMI in *Knowles*.

The Department of Law carries out the state’s legal business, and the Alaska Supreme Court has held that in carrying out those functions the Attorney General has the powers and duties ascribed to that position under the common law, including the authority to bring actions that the Attorney General considers to be in the public interest.¹⁵ Neither the Alaska Constitution nor the legislation establishing the Department of Law limits or deprives the Attorney General of the power to appoint outside counsel when, in the wide discretion granted, the Attorney General believes such an arrangement to be in the public interest.¹⁶ Accordingly, the language in the fiscal year 2021 and fiscal year 2022 appropriation bills that attempted to restrict the Attorney General from entering into contracts regarding particular legal matters violated the confinement clause because it was an attempt to restrict the Attorney General’s ability to fulfill his statutory duties as head legal advisor and litigator for the state.¹⁷

The legislature is without authority to use an appropriation bill to pick and choose which cases the state will prosecute or defend, just as it is without power to direct where and how state employees are to be employed.

¹⁵ *Public Defender Agency v. Superior Court*, 534 P.2d 947 (Alaska 1975).

¹⁶ *State v. Breeze*, 873 P.2d 627, 634–35 (Alaska App. 1994)(holding appointment of special prosecutor valid in absence of a law limiting the power).

¹⁷ *Pub. Def. Agency v. Superior Ct., Third Jud. Dist.*, 534 P.2d 947, 950–51 (Alaska 1975)(“In that field[control of litigation], the discretion of the Attorney General is plenary. He is a constitutional officer . . . and, as such, the head of the state’s legal department. His discretion as to what litigation shall or shall not be instituted by him is beyond the control of any other officer or department of the state”)(*internal citations omitted*). Moreover, the courts have frowned on the state wielding its appropriation power for purely political purposes. *See* Order Granting Summary Judgment, *American Civil Liberties Union of Alaska v. Dunleavy*, Superior Court No. 3AN-19-08349CJ (Oct. 16, 2020).

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SEPARATION OF POWERS

The Office of the Attorney General is established by statute¹⁸ in furtherance of art. III, sec. 16 of the Alaska Constitution. Under law, “[t]he attorney general is the legal advisor of the governor and other state officers.”¹⁹ The Attorney General is required to defend the Constitution of the State of Alaska, bring, prosecute, and defend all necessary and proper actions in the name of the state, and administer state legal services.²⁰

The legislature, through the exercise of its appropriation power, sought to exact a monetary punishment on the Office of the Attorney General for the very performance of its duties under the law. This level of political coercion is exactly the issue that the separation of powers doctrine seeks to prevent. “The doctrine prohibits one branch from encroaching upon and exercising the powers of another branch.”²¹ More specifically, the doctrine is breached when “[o]ne department of government usurps the powers of another department [by] exercise[ing] coercive influence on the other.”²² The Attorney General’s duty to defend and prosecute in the name of the state is so entrenched in law that other executive branch agencies must seek the Attorney General’s approval before seeking legal services outside the Department of Law.²³

The idea that the Department of Law’s budget is dependent on the popularity of its decisions, rather than on the Attorney General’s actual assessment of the legal needs of the state, strikes to the core of the separation of powers doctrine. The particular expenditure at issue, the preparation of an amicus brief for *Belgau v. Inslee*, 19-35137 (9th Ct. Oct. 12, 2020), goes directly to the core functions of the Attorney General.²⁴ The Attorney General has broad powers and discretion in the initiation and maintenance of a lawsuit,²⁵ including the designation of outside counsel as deemed necessary by the

¹⁸ AS 44.23.010.

¹⁹ AS 44.23.020.

²⁰ AS 44.23.020(b)(1) - (5).

²¹ *Bradner v. Hammond*, 553 P.2d 1, 5 n.8 (Alaska 1976).

²² *Solomon v. State*, 364 P.3d 536, 546 (Kan. 2015).

²³ AS 36.30.015(d); *State v. Breeze*, 873 P.2d 627, 633–34 (Alaska App. 1994).

²⁴ *Botelho v. Griffin*, 25 P.3d 689, 692 (Alaska 2001) (“Generally, an attorney general has those powers which existed at common law except where they are limited by statute or conferred upon some other state official. Under the common law, the attorney general has the power to bring any action which he thinks necessary to protect the public interest, a broad grant of authority which includes the power to act to enforce Alaska’s statutes”)(*internal quotations omitted*).

²⁵ See *Botelho v. Griffin*, 25 P.3d 689, 694 (Alaska 2001).

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Attorney General.^{26 27} “As a general rule the attorney general has control of litigation involving the state and the procedure by which it is conducted.”²⁸ Moreover, “[t]he attorney general’s discretion to bring suit is plenary and is beyond the control of any other state department or officer.”²⁹ Importantly, the Alaska Supreme Court has stated:

Under the common law, an attorney general is empowered to bring any action which he thinks necessary to protect the public interest, and he possesses the corollary power to make any disposition of the state’s litigation which he thinks best . . . This discretionary control over the legal business of the state, both civil and criminal, includes the initiation, prosecution and disposition of cases.³⁰

When an act is committed to the discretion of a particular branch of state government, interference with that discretion is a violation of the doctrine of separation of powers.³¹ Accordingly, “no statute, policy, rule, or practice may constitutionally operate, alone or cumulatively, to limit, reduce, transfer, or reassign the duties and powers of the Office of the Attorney General in such a fashion as to prevent that office from performing” its inherent functions.³² The legislature’s attempt to control the discretion of the Attorney General in the prosecution and defense of state litigation by rearranging the Department of Law’s budget for one specific case violates the separation of powers doctrine.

²⁶ *State v. Breeze*, 873 P.2d 627, 633–34 (Alaska App. 1994).

²⁷ The amicus brief highlighted here is a prime example. With the expertise and previous drafting outside counsel had already done, outside counsel was able to draft the brief in less time and for less costs than would likely have occurred internally. Additionally, if the U.S. Supreme Court had taken up *Belgau*, it would have negated the need for further legal services on the cases in which the State is a party. This would have saved the State significant financial resources. These are the types of litigation decisions properly delegated to the Attorney General.

²⁸ *State v. Hagerty*, 580 N.W.2d 139, 147 (N.D. 1998).

²⁹ *State ex rel. Hatch v. Am. Fam. Mut. Ins. Co.*, 609 N.W.2d 1, 4 (Minn. Ct. App. 2000).

³⁰ *Pub. Def. Agency v. Superior Ct., Third Jud. Dist.*, 534 P.2d 947, 950 (Alaska 1975).

³¹ *Pub. Def. Agency v. Superior Ct., Third Jud. Dist.*, 534 P.2d 947, 950 (Alaska 1975).

³² *State ex rel. McGraw v. Burton*, 569 S.E.2d 99, 117 (W. Va. 2002).

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ETHICAL, PROFESSIONAL, AND OTHER CONSTITUTIONAL CONCERNS

While the Legislative Legal memorandum is constrained to consideration of the confinement clause, separation of powers, and AS 37.07.080(a)³³, other considerations exist that question whether a legal error exists in the Department of Law's expenditure of funds. Initially, we note that the legislature's attempts to de-fund an existing contract may have implications under art. I, sec. 15, of the Alaska Constitution. While we recognize all state contracts and expenditures are subject to legislative appropriation, circumstances can arise that obligate a state agency to meet its obligations despite a lack of supporting appropriations.³⁴

Finally, certain doctrines of ethical and professional responsibility exist in the context of the practice of law and are applicable to this inquiry. The Attorney General is free to appoint outside counsel to ensure the protection of state laws.³⁵ Under the Rules of Professional Conduct applicable to the Alaska Bar, attorneys must possess the time and competence to represent their respective clients.³⁶ The Attorney General's authority to deploy the Department of Law's resources to uphold these standards is unquestioned.³⁷

The termination of an outside counsel arrangement, or other withdrawal from litigation, must be accomplished in a manner that does not have an adverse material effect on the state's interest.³⁸ Under the professional rules, the supervising attorney has the ultimate say in determining the tactics used to prosecute a matter within the bounds of

³³ The purported violation of AS 37.07.080(a) is vaguely defined in the memorandum. The memorandum explicitly recognizes the executive branch's authority to organize and administer appropriations made by the legislature. Consequently, it seems the reference to AS 37.07.080(a) is an attempt to support the memorandum's conclusory statement that there was a constitutional error. In response, the Department of Law would note that AS 24.08.030 explicitly limits appropriation bills to the subject of appropriations as evidence that the legislature's attempt to control discretionary acts related to a *single* specific legal issue violates the purposes of an appropriation bill.

³⁴ See generally *DeLisio v. Alaska Superior Ct.*, 740 P.2d 437, 443 (Alaska 1987)(finding attorney services are property rights under art. I, sec. 18, Alaska Const.).

³⁵ *State v. Breeze*, 873 P.2d 627, 632 (Alaska App. 1994).

³⁶ Alaska Rules of Professional Conduct (ARPC) 1.1.

³⁷ *State v. Breeze*, 873 P.2d 627, 633 (Alaska App. 1994); *State v. Hagerty*, 580 N.W.2d 139, 148 (N.D. 1998)("In general, the Rules of Professional Conduct apply to a lawyer representing a governmental entity in the same manner as they apply to a lawyer for a private client").

³⁸ Cmt. to ARPC 1.16.

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his ethical duties.³⁹ For example, under Rule 3.2, the Attorney General is required to avoid undue delay in the pursuit of litigation. To immediately revoke outside counsel agreements and attempt to transfer complex and fact-intensive projects to Assistant Attorneys General, who are already operating at capacity, based on the political whims of the legislative branch may violate the Attorney General's duty under the professional rules.

CONCLUSION

The Attorney General is vested with broad discretion in the administration of the Department of Law and the prosecution of legal matters on behalf of the state. The legislature's attempt to curtail the Attorney General's discretion in litigation matters through the use of an appropriation bill violates the confinement clause contained in art. II, sec. 13 of the Alaska Constitution, and is a violation of the doctrine of separation of powers. The Alaska Supreme Court has long recognized the Attorney General's plenary authority over the state's legal matters. The actions taken by the Attorney General in relation to the amicus brief for *Belgau v. Inslee* do not result in a constitutional error.

Sincerely,



Treg R. Taylor
Attorney General

³⁹ See *Simeon v. State*, 90 P.3d 181, 184 (Alaska App. 2004). In addition, the simple fact that one can conceive of an alternative approach to the representation does not negate the actions of the supervising attorney. See *Risher v. State*, 523 P.2d 421, 425 (Alaska 1974) ("We are not condoning the second-guessing of trial counsel in making the myriad decisions encountered in a criminal trial, for it is a truism that hindsight furnishes 20-20 vision. All that is required of counsel is that his decisions, when viewed in the framework of trial pressures, be within the range of reasonable actions which might have been taken by an attorney skilled in the criminal law, regardless of the outcome of such decisions").