

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

FILED in the TRIAL COURTS  
State of Alaska Third District

State of Alaska,

vs.

Daniel M Carey,

Plaintiff, APR 27 2017

CASE NO: 3AN-14-00853CR

Clerk of the Trial Courts

JUDGMENT OF ACQUITTAL

By Sf  
Defendant.

Deputy

on CTN(s) 001

DOB: 08/14/1981

APSIN: 6900591

ATN: 114388488

DL/ST: 6900591 AK

Defendant was charged with:

CTN:	Offense Date:	Statute Violated / Offense:
001	08/01/2013	AS11.41.436(a)(6): Sex Abuse Minor 2-Auth Fig 18 yrs+

Defendant came before the court for a court trial on 4/27/2017, with counsel, Craig Howard, Assistant Public Advocate and Saritha Anjilvel, Assistant District Attorney present.

- After the State presented its evidence, the defendant moved for a judgment of acquittal and the motion was granted.
- The jury has returned a verdict of NOT GUILTY.
- The court has entered a finding of NOT GUILTY.

IT IS THEREFORE ORDERED that the defendant is acquitted and discharged and that any appearance or performance bond executed on behalf of the defendant is exonerated, and any cash or other security posted as bail be refunded or released to depositors.

4/27/2017  
Effective Date

Michael L. Wolverton  
Judge Michael L. Wolverton

I certify that on 4/23/17 a copy of this judgment was sent to:

<input checked="" type="checkbox"/> DA	<input checked="" type="checkbox"/> Def Atty <u>Howard</u>
<input type="checkbox"/> Jail	<input type="checkbox"/> R & I, DPS - Anchorage
<input checked="" type="checkbox"/> DOC	<input type="checkbox"/> Off. Loc.
<input type="checkbox"/> Data	

Clerk: cau

I certify that on 5/24/17  
a copy of the above was mailed/DPS  
hand delivered to each of the  
attorneys and / or individuals at  
their address of record.  
Sf

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA, )  
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Plaintiff, )  
 )  
vs. )  
 )  
DANIEL MAURICE CAREY, )  
 )  
Defendant. )

FILED IN OPEN COURT  
Date 4/26/17 TH

Case No. 3AN-14-00853CR

**WRITTEN SUMMARY OF  
DEFENDANT'S ORAL SUMMATION IN SUPPORT OF ACQUITTAL:  
THE DEFENDANT WAS NOT IN A POSITION OF AUTHORITY VIS-À-VIS T.A.**

**VRA CERTIFICATION**

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

**A. Preface**

AS 11.41.425(5) provides that an offender commits the crime of sexual assault in the third degree, a class C felony, if:

“While employed as a juvenile probation officer or as a juvenile facility staff, engages in sexual penetration with a person of 18 or 19 years of age with reckless disregard that the person is committed to the custody or probationary supervision of the Department of Health and Social Services.”

Juvenile facility staff is defined as: “a person employed in a juvenile detention center or treatment facility”. AS 11.41.425(b)(1). A juvenile probation officer “...means a person assigned to supervise another person 18 or 19 years of age who is committed to the probationary supervision of the Department of Health and Social Services.” AS 11.41.425(b)(2).

1  
2 At the time of this alleged offense, Daniel Maurice Carey clearly fit into the definition  
3 of "juvenile facility staff." Position of authority is not an element of this crime. The State,  
4 however, is barred from prosecuting Mr. Carey under this provision because T.A. was  
5 approximately six months shy of her 18<sup>th</sup> birthday at the time of this offense.  
6

7 Common sense would lead one to believe that the same conduct, sexual penetration of a  
8 16 or 17 year-old committed to the care and supervision of the Department of Health and Social  
9 Services by a juvenile facility staff member would be criminal. However, that is not the case.  
10 There is no corollary statute in the sexual abuse of a minor provisions. Hence, a juvenile staff  
11 facility member can have sexual relations with a 16 or 17 year-old without criminal exposure,  
12 but once the complaining witness turns 18, it is felonious conduct. This really does not make  
13 sense since one would expect that the younger age group would be less mature and more in  
14 need of protection from undue influence. Obviously, this is a flaw in the current statutory  
15 scheme since persons who are juvenile facility staff (but not in a position of authority) are free  
16 to have sexual relations with 16 and 17 years-olds.  
17

18 Since Mr. Carey could not be prosecuted under AS 11.41.425(5), the government  
19 elected to prosecute him under the only other conceivable statute available to it. This appears  
20 to be a prosecution of first impression. The legal reasoning justifying this prosecution is novel  
21 at best.  
22

23 Mr. Carey was indicted for sexual abuse of a minor in the second degree under AS  
24 11.41.436(6). In order to be convicted of this offense, the defendant must have been in a  
25 **position of authority** over T.A at the time of their sexual relations. Here, the gravamen of the  
26 offense turns on not whether Mr. Carey is a juvenile facility staff member, but whether he  
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1  
2 occupied a position of authority over T.A. If Mr. Carey is not in a position of authority, no  
3 crime has been committed. Both factually and legally, it is manifestly apparent that this  
4 element of the offense does not exist in the case at bar.

5  
6 The legislature has defined "position of authority" in AS. 11.41.470(5) as meaning:

7 "An employer, youth leader, scout leader, coach, teacher,  
8 counselor, school administrator, religious leader, doctor, nurse,  
9 psychologist, guardian ad litem, babysitter, or a substantially  
10 similar position, and a police officer or probation officer other  
11 than when the officer is exercising custodial control over a  
12 minor."

13 AS 11.41.470(5) was enacted into law in 1990. It apparently has not been amended since that  
14 time.

15 **B. Juvenile Justice Officer Does Not Fall Within the Ambit of the Definition of  
16 "Position of Authority"**

17 Mr. Carey was hired, trained and worked as a juvenile justice officer. The Division of  
18 Juvenile Justice (hereinafter, "DJJ") has extensive job descriptions and requirements for a  
19 juvenile justice officer. See defense Exhibits L and M. The term juvenile justice officer is not  
20 defined in either the Alaska Statutes or the Administrative Code.

21 There is a separate job known as a juvenile probation officer. See defense Exhibit A. A  
22 juvenile probation officer is defined in AS 11.41.425(b)(2). Mr. Carey was not a juvenile  
23 probation officer as classified by the Division of Personnel and Labor Relations.

24 Mr. Carey could be considered part of "juvenile facility staff" as defined in AS  
25 11.41.425(b)(1). However, the term "juvenile facility staff" is not included in the definition of  
26 "position of authority." When the legislature adopted the term "juvenile facility staff" in 2013,  
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1  
2 it elected to not include that term in the "position of authority" statute. More importantly, the  
3 legislature never amended AS 11.41.470(5) to include the term juvenile justice officer.

4  
5 At the time of his hire, the position of youth counselor had been eliminated by the  
6 Division of Personnel. Mr. Carey was never given notice that a juvenile justice officer was the  
7 same as a youth counselor. That is because they are not the same, nor are they even similar  
8 positions. Furthermore, Mr. Carey could not be included as a probation officer since he was  
9 not one.

10  
11 **C. A 2004 Revamping of the Division of Juvenile Justice Abrogated the**  
12 **Position of Youth Counselor and Created a New Position of Juvenile Justice**  
13 **Officer.**

14 DJJ was created in 1999 to administer the juvenile justice system. Prior to that date,  
15 child protection and youth corrections were combined in the Division of Family and Youth  
16 Services (now the Office of Children's Services). The position of youth counselor was  
17 originally established in 1970. The advent and creation of DJJ involved a massive  
18 reorganization. This revamping was required because it was deemed the old structure had  
19 become out-dated. DJJ positions were expanded in their scope and duties, and minimum and  
20 educational requirements were instituted.

21  
22 DJJ petitioned the Department of Administration and the Division of Personnel and  
23 Labor Relations for a reclassification of numerous positions that would be reflective of the new  
24 and expanded goals and tasks confronting DJJ. The reclassification of youth counselors to  
25 juvenile justice officers was delegated to the Division of Personnel and Labor Relations under  
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1  
2 Title 39 of the Alaska statutes. Hence, the State originated the plan to create juvenile justice  
3 officers. This request was made and accomplished prior to Mr. Carey's hire in 2007.

4 A reclassification under the Division's rules is:

5  
6 "A formal change in a position's classification, based on changes  
7 to the assigned duties and responsibilities, to either a different  
8 level within the current class series or to a *completely different job*  
9 *class series.*" (Emphasis added.) See Addendum A (p. 12).

10 The reclassification sought by the State in 2004 created a completely different job class series  
11 known as a juvenile justice officer. The job classification of youth counselor ceased to exist.

12 The problem is that AS 47.12.270 which utilizes the term youth counselor was never  
13 amended to track the creation of the new job of juvenile justice officer. That is, if DJJ wanted  
14 the new position of juvenile justice officer to replace the term youth counselor in this statute, it  
15 was incumbent upon it to have the statute modified. The State never sought this amendment. It  
16 is Mr. Carey's position that the reclassification abrogated AS 47.12.270 insofar as the  
17 applicability of the term youth counselor to Mr. Carey. The position was eradicated and  
18 replaced with a completely different job class series. To apply the old job classification to Mr.  
19 Carey is obviously violative of his due process rights. Similarly, the term "counselor" as it  
20 appears in AS 11.41.470(5) does not encompass the term juvenile justice officer for the reasons  
21 set forth hereinabove.

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SOA v. Daniel Maurice Carey Case No. 3AN-14-00853CR

Written Summary of Defendant's Oral Summation in Support of Acquittal

1  
2 **D. The Now Defunct Term “Youth Counselor” Has Been Judicially**  
3 **Determined to Actually Mean a Correctional Officer Not a Counselor.**  
4 **Correctional Officers Are Not a Class Recognized by the Legislature for**  
5 **Purposes of the “Position of Authority” Found in AS 11.41.470(5).**

6 Mr. Carey’s position that he is not a counselor for purposes of AS 11.41.470(b)(5) is  
7 heavily bolstered by the case of *Wilson v. State*, 967 P.2d 98 (Alaska App. 1998). Wilson was  
8 a juvenile under detention at McLaughlin Youth Center (hereinafter, “MYC”). He assaulted a  
9 youth counselor in 1995.<sup>1</sup> The State insisted on prosecuting him as an adult. Upon conviction  
10 for a felony assault, the State further sought to enhance his sentence into a presumptive one by  
11 arguing that a “youth counselor” is actually a “correctional officer”. The government  
12 contended that under former AS 12.55.125(d)(3), Wilson’s actions were directed at a  
13 correctional officer and not a counselor.<sup>2</sup>

14 Wilson defended that a “youth counselor” was a counselor and not a correctional  
15 officer. Accordingly, he could not be aggravated for directing his actions at a correctional  
16 officer. The State argued strenuously that a so-called youth counselor was actually a  
17 correctional officer and not a counselor as the term is utilized in common usage. The Alaska  
18 Court of Appeals agreed with the State that the legislature, although using the name “youth  
19 counselor”, intended the term to actually mean correctional officer. The court found MYC to  
20 be a correctional facility pursuant to AS 11.81.900(b)(36). Since MYC is a “correctional  
21 facility”, the people who supervise the detainees are also “correctional officers”. Citing AS  
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24  
25 <sup>1</sup> Wilson was decided several years before the massive revamping of DJJ discussed in Section C. Assuming  
26 arguendo, the State’s argument is that a juvenile justice officer is identical to a youth counselor, Wilson’s holding  
27 and logic are still applicable.

28 <sup>2</sup> This statute was repealed and reenacted as AS.12.55.125(c)(2). It is noteworthy to observe that correctional  
officer was broadened to “correctional employee”. The term counselor or youth counselor was not included by the  
legislature. Similarly, AS 12.55.155(a)(13) provides for an independent statutory aggravating factor if action is  
directed toward a correctional officer. Again, counselor or youth counselor is not utilized.

1  
2 47.12.270 and 7AAC 52.170<sup>3</sup>, the court agreed with the State that the legislature's intent was to  
3 have "youth counselors" actually be correctional officers.

4         The prosecution cannot have its cake and eat it too. In order to convict Mr. Carey, the  
5 government must now make the same argument that Wilson made unsuccessfully. That is, Mr.  
6 Carey is not a correctional officer but is a "youth counselor". *Wilson, supra* bars such an  
7 argument.  
8

9         For all Title 11 purposes, "youth counselor" means correctional officer. The position of  
10 authority statute, AS 11.41.470, is in Title 11. It utilizes the term "counselor", not "youth  
11 counselor". The legislature has had ample opportunity in light of the issuance of *Wilson* in  
12 1998 to overturn the holding in *Wilson* by amending the statute to state that "counselor" and  
13 "youth counselor" are one and the same. However, that has never occurred. The legislature's  
14 intent was not to include "youth counselor" in AS 11.41.470. Correctional officers (both adult  
15 and juvenile) are specifically omitted from that statute. That is because correctional officers  
16 having sexual activity with inmates, detainees or probationers is prohibited in other statutes.  
17

18         Mr. Carey, for Title 11 purposes, is a correctional officer according to the Court of  
19 Appeals and the Legislature. That term is not included in AS 11.41.470. The State is barred  
20 from prosecuting him under the theory that he is in a position of authority. Its logic is  
21 incredibly tortured. He is a juvenile justice officer which used to be a "youth counselor", and  
22 "youth counselor" has the term "counselor" in it. So *ergo* the term "counselor" that is in AS  
23 11.41.470 applies to him. Mr. Carey is a correctional officer under Alaska law. The  
24 superintendent conceded as much under cross-examination that juvenile justice officers are the  
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<sup>3</sup> This regulation was repealed and now appears as 7AAC.52.135



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2 same as prison guards/correctional officers. Accordingly, Mr. Carey does not fall within the  
3 purview of AS 11.41.470.  
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6 **E. Mr. Carey's Position as a Juvenile Justice Officer Does Not Fit into the  
7 Category of "Substantially Similar" in AS 11.41.470.**

8 At the grand jury, the government took the position that Mr. Carey's position of a  
9 juvenile justice officer may not have fit into one of the many delineated positions within the  
10 ambit of the "position of authority" statute as set forth in AS. 11.41.470(5). Instead, the  
11 government appears to have taken the position that Mr. Carey's position of a juvenile justice  
12 officer was so "substantially similar" to the enumerated categories so as to cause liability to  
13 attach to his actions. See "Addendum B" (GJ at 45). As has been discussed in the foregoing  
14 sections, Mr. Carey does not fall into any of these categories. Furthermore, his position as a  
15 juvenile justice officer is not even close to the categories that have been enumerated by the  
16 legislature. Testimony at trial as well as the arguments in this pleading clearly establishes that  
17 the category he is most "substantially similar" to is a correctional officer.  
18

19 The legislature specifically chose not to include the term "correctional officer" in the  
20 "position of authority" statute. This is because the issue of correctional officers having sexual  
21 relations with persons they supervise are covered in other statutes. Mr. Carey's position as a  
22 juvenile justice officer has been on the books since 2004. The legislature has had numerous  
23 opportunities to include this position in AS 11.41.470(5) but has chosen not to do so.  
24 Accordingly, the government's theory that Mr. Carey's job was substantially similar to any of  
25 those in the governing statute must fail.  
26  
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1  
2 **F. The State's Theory that AS 47.12.470 Extends Liability to Mr. Carey is**  
3 **Misplaced. The Abrogation of the Term "Youth Counselor" Rendered the**  
4 **Statute a Nullity. The Legislature Recognized the Problem and is in the**  
5 **Process of Correcting the Deficiencies that Currently Exist in the Statute.**

6 Near the end of the grand jury proceeding, the government apparently came up with an  
7 alternative theory of criminal liability. It read AS 47.12.270 (Youth Counselors) to the grand  
8 jury. See "Addendum C" (GJ at 50-51). That statute states:

9 "The department may employ youth counselors. Youth counselors  
10 shall exercise the duties of probation officers and shall prepare  
11 preliminary investigations for the court. They shall also carry out  
12 other duties in the care and treatment of minors that are consistent  
13 with the intent of this chapter. Youth counselors have the powers  
14 of a peace officer with respect to the service of process, the  
15 making of arrests of minors who violate state or municipal law,  
16 and the execution of orders of the court relating to juveniles, and  
17 shall assist and advise the courts in the furtherance of the welfare  
18 and control of minor's under the court's jurisdiction."

19 The grand jury was instructed that this statute defines the duties of a youth counselor which it  
20 does not. This statute was enacted in 1996. Accordingly, it was never amended to reflect the  
21 decision in *Wilson, supra* and the State's abrogation of the position of "youth counselor".

22 The State's theory is that AS 47.12.470 makes a youth counselor a *de facto* probation  
23 officer and peace officer. Since these latter two terms are in the position of authority statute, a  
24 youth counselor also is within the purview of AS 11.41.270(5). There are several problems  
25 with this supposition. First, under *Wilson, supra*, a youth counselor is a correctional officer,  
26 not a probation officer or a peace officer. Additionally, youth counselors were taken off the  
27 books at the request of the State. This action rendered the statute null as to Mr. Carey. There is  
28 no notice to anyone hired as a juvenile justice officer that s/he may be governed by this statute.

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2 The government has recognized these serious deficiencies. Legislation introduced in  
3 the State Senate on March 3, 2017 (SB 74) corrects the problem that exists. See Addendum D  
4 (pp. 2, 13-14). At the outset, this legislation adds the term "adult and juvenile probation  
5 officers" to the position of authority statute, AS 11.41.470(5). The Legislature specifically  
6 omitted the terms juvenile justice officers and juvenile facility staff. This is indicative that Mr.  
7 Carey's position was never intended to be in this classification. The State could easily have  
8 requested that addition to the position of authority statute.  
9

10 More importantly, AS 47.12.270 is completely repealed. The Legislature is doing this  
11 so that it can enact a new provision that comports with the changes to laws and regulations  
12 governing "youth counselors". As is readily apparent, the newly proposed AS 47.12.270 only  
13 applies to juvenile probation officers. Juvenile justice officers or any type of juvenile facility  
14 staff are purposely omitted from the statute. Any successor to the previous youth counselor  
15 classification is deleted. Furthermore, the powers delineated to the juvenile probation officers  
16 vis-à-vis peace officer duties are more circumscribed than the language in the current version.  
17

18 Although this legislation is not legally binding on this Court in the case at bar, there is  
19 no bar from the Court utilizing the logic in its analysis of whether the current AS 47.12.270 can  
20 be applied to his case legally. As a matter of law, Mr. Carey is not a youth counselor.  
21 Accordingly, any attempt by the State to extend this statute to his case is legally not  
22 permissible. Otherwise, his due process rights will be severely contravened.  
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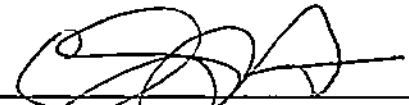
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**G. Conclusion**

For the foregoing reasons, this Court must find that Mr. Carey is not guilty inasmuch as he does not fall within the definition of a position of authority as set forth in AS 11.41.470(5).

Respectfully submitted this 26<sup>th</sup> day of April, 2017 at Anchorage, Alaska.

ANCHORAGE CONFLICT COUNSEL  
Attorneys for Daniel Maurice Carey

  
\_\_\_\_\_  
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