

LAW AND
ORDER
PACKET

Mr. Malone

STATEMENT BEFORE THE HOUSE JUDICIARY COMMITTEE

ON MARCH 27, 1973, ROOM 104, ASSEMBLY BUILDING

JUNEAU, ALASKA

I am Carolyn Burg, a law student. I have been a citizen of the United States all of my life, having been born here, and I have been a resident of the State of Alaska for approximately twenty years.

Sometimes situations arise in the life of men which confront and startle them. Such is the situation I present before you today, as it was envisioned by Alexander Hamilton when he was supporting the Constitution of the United States before it was put into effect. Writing as "Publius" he got out a set of papers now printed in The Federalist from which we are quoting from page 169 of the Wesleyan University Press: .

"...Schemes to subvert the liberties of a great community require time to mature them for execution. An army so large as seriously to menace those liberties could only be formed by progressive augmentations; which would suppose, not merely a temporary combination between the legislature and executive but a continued conspiracy for a series of time. Is it probable that it would be persevered in and transmitted through all the successive variations in the representative body, which biennial elections would naturally produce in both houses? Is it presumable, that every man, the instant he took his seat in the national senate, or house of representatives, would commence a traitor to his constituents and to his country?...It is impossible that the people could be long deceived; and the destruction of the project and of the projectors would quickly follow the discovery."

We have today such a case, and we are alleging that the Criminal Justice Information System, better known as the Omnibus Crime Control and Safe Streets Act, as amended (PL 90-351) is unconstitutional nationally

because our tax dollar is being used for expensive computers and a large staff on a nationwide basis to monitor lawful citizens, which is in complete contravention of the Constitution of the United States and the true intent of the original Safe Streets Act as set up and used by President Johnson.

We are not conceding that even under President Johnson's wire-tapping law, the law is constitutional, but it was at least kept in check.¹ It may be that all wiretapping is unconstitutional.²

The original Safe Streets Act was set up to monitor subversives, Mafia and organized crime, and even this type of wiretapping required a court order by a judge before it was instituted. President Johnson, in fact, warned his Attorney General Ramsey Clark at the time to be very cautious of the wiretapping power even under these conditions and under his administration wiretapping was drastically reduced.³

Here in Alaska and all over the nation the Criminal Justice Information Agency is set up to monitor lawful citizens, without probable cause, who have committed no crimes whatever, when just last year by mandate of the people of Alaska, for instance, they voted in by approximately 85% of our populace, an amendment to our own Alaska State Constitution to be left alone. Although this might not be constitutional as set up, in spirit this is what the people wanted, and we are alleging an implied mandate of the citizenry of Alaska that they wish to be brought under the United States Fourth Amendment in their own constitution of the state.

Of course we have run onto some authorities which state that Alaskan inhabitants may have no rights at all in comparison with the other states of the Union. Article III of the Treaty of Cession states the

"people" crowned with such rights are not the inhabitants of Alaska.⁴ Perhaps under this authority and others such as U.S. v. Lanza, Essree Co. v. U.S., Boyd, Weeks and Gouled cases Alaskan citizens may be completely discriminated against from the other inhabitants in our Union regarding their rights. In Abbate v. United States it does not go so far as holding that in this state a person may be held for punishment under two acts for the same offense, but this may very well be. In Ashworth 7 Alaska, 70, it suggests that Alaska may be a "government by men and not by law." So Alaska may be wide open for any type of wiretapping.

So far, it appears that "citizens of Alaska" in order to be "citizens of the United States" have to resort to be "citizens of Oregon" before they can claim a Fourth Amendment right under the Constitution of the United States. This is a circuitous route, indeed. It might have one advantage to the present "citizen of Alaska" by putting into play the Sherman Act and the Clayton Act, allowing three times the amount in damages, as putting our commercial law into effect, but this would surely not be to the advantage of the State and we are concerned not only for the "citizen of Alaska" but the State.

However, we are implying before this Committee today, as we did before the Governor's Committee for the Criminal Justice Information System on March 7, 1973 that we are under the protection of the United States Constitution as having been brought under the laws of Oregon and into the

nation as a State. Therefore, our contract with Congress under the Constitution of the United States as a State of the Union is implied in spirit if not in the law.⁵ Even though we are just inhabitants of Alaska, we claim diverse citizenship under the laws of Oregon and implied citizenship under the Union by being called "A State of the United States."

As stated in U.S. v. Gordon, Fed Case No. 15,231 (1861) the term "United States" is defined in the Immigration and Nationality Act as follows:

"The term "United States" except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States." 66 Stat 165, Sec. 101 (38) Whether the expression is used in the same sense in Amendment XIV may be questionable."

However, we have hopes. We are taking an implied protection of the United States Constitution, under the Fourteenth Amendment, in spirit if not in the law.

Completely Discriminating

PL 90-351 is completely discriminating. Congress does not come under this law, nor the President's Commission or the State Commissions. ^{(under} PL 90 351) Incompetent interrogations and incompetent courts are excluded from the computer. The machine lists fishermen but not non-fishermen, hunters but not non hunters, car drivers, but not non car drivers. The bill was drafted to bring power to the President, to strengthen the Executive Branch, weaken the Legislative Branch and completely exclude the Judiciary. 6

We are arguing this before the Judiciary Committees when it should be the Judiciary Committees who should be deeply concerned about their own branch.

Congress cannot delegate its legislative power to the President.⁷
 An Act making it unlawful for a person to charge unjust or unreasonable rates,
 etc. was held unconstitutional under the Sixth Amendment to the U.S. Constitution
the accused...shall be informed of the nature and cause of the accusation.⁸
 In tax on grain involved in sales for future delivery was held invalid as
 an interference with the authority of the State⁹. It is a violation of the
 Fifth Amendment to the U.S. Constitution under the due process clause to
 take property without just compensation.¹⁰ The Criminal Justice Information
 Agency is at best a scheme for purchasing with federal funds submission to
 Federal Regulations of a subject reserved to the States.¹¹ though the
 legislature has no power by a subsequent curative statute, to remedy a
 jurisdictional defect, or one which obviously goes to the substance of a
 vested right, it is stated in 12 C.J. 973, Sec. 553 "A vested ground of
 defense is as fully protected from being cut off or destroyed by an act
 of the legislature as is a vested cause of action."¹² Although a legislature
 may, however, deprive a party of technical defenses involving no substantial
 equities, Mr. Chief Justice Holmes of the Supreme Judicial Court of Massa-
 chusetts declared that "a party has no vested right in a defense based
 upon an informality not affecting his substantial equities...there is no
 such thing as a vested right to do wrong."¹³ (emphasis supplied)

How Much does it Cost?

How much, we ask, is this costing the taxpayer? Billions of
 dollars have been set aside for the carrying out of this atrocious scheme,
 when we hear that money is being held back from education, social programs
 and other beneficial projects. "We have no money," they say, (meaning yours
 and mine.)

We are coming into our 200th Anniversary of the framing of our government in 1776. Under the title "The Twelve Great Justice of all Time" in the October 1971 issue of "Life" among other greats and near great Chief Justices, the Hon. Chief Justice John Marshall was chosen as No. 1 by a poll of scholars on the quality of individual contributions by all Chief Justices of the United States.

Here are some of the principles he set out regarding our Constitution:

1. The Constitution of the United States is an ordinance of the people of the United States and not a compact of the States, and Congress derives its only powers from the Constitution.

2. Therefore the Constitution is to be interpreted with a view to securing a beneficial use of the powers which it creates, not with the purpose of safeguarding the prerogatives of State sovereignty.

3. The National Government is present within the States, not by the tolerance of the States, but by the supreme authority of the people of the United States.

I am alleging implied protection of the United States Constitution under a completely unconstitutional public law using my tax dollar against me, the citizen. U.S. Const. Amend 4, 5 and 9 and 14. My tax dollar is my property.

My name is also my property, and no one has a right to trespass over it or physically invade it. I may use my name in any way I wish. I have complete control over it as my personal, individual property. If I despoil it by committing a crime, then forces will be started to withhold certain rights I can expect will be taken away. But as a lawful citizen in the State of Alaska and the United States of America I have complete control over my personal property, my name.

* "Human relationships depend largely on the sense that the participants are free from the observation of others, and that sense is essential to the development of individual points of view and modes of life. Continuing contacts with those looking for damaging information are both highly unpleasant and deeply disturbing to any sense of security. Moreover, the more wide sweeping the power to gather evidence, the greater the danger that the power will be arbitrarily used to harass those "out of favor" or those against whom particular officials have personal grievances; the greater also the danger that information obtained will fall into inappropriate hands or be misused...."

The right of privacy is a precious right. It is the

* "right to be free from undesired uses of one's name or picture and from the unjustified publication of private information about oneself.

Wouldn't it be wonderful if before 1976 the "citizens of Alaska" would be made "citizens of the United States" so that they could all be joyous in the celebration of our Declaration of Independence!

Thank you.

Respectfully submitted,

Carolyn Burg
Carolyn Burg

- * Taken from "The Right of Privacy" by Kent Greenawalt in "Rights of Americans" p.299
1. Please see Note 10 in U.S. v. U.S. Dist. Ct. for the Eastern Dist. of Michigan, 32 L ed 2d 752, 92 S. Ct.
 2. Gelbard v. U.S. 92 S. Ct. (Dissenting opinion of Justice Douglas)
 3. Please see (1) above
 4. Kochler v. Hill, 60 Iowa, 543, 14 NW 738, 15 NW 609, 615
 5. Sinking Fund Cases, 90 U.S. 700, 718-719 (1878) 14th Am. Art. III, V, All Amendments to the U.S. Constitution.
 6. Please see (1) above
 7. Panama Refining Co. v. Ryan (1935) "Hot Oil Case"
 8. U.S. v. V.L. Cohen Grocery Co (1921)
 9. Hill v. Wallace (1922)
 10. Louisville Joint Stock Land Bank v. Radford (1935)
 11. Hoozac Mills, Inc. (1935)
 12. Fritchard v. Norton, 106 U.S. 124, 1 S Ct. 102, 27 L ed 104

In a grant this Omnibus Crime Control & Safe
Streets Act of 1968, Title III. Wire tapping is
the negation of our laws of freedom under
the 4th & 5th Amendment. I have friends
who lived under the Iron Curtain in
Europe and wire tapping and snooping
into ones private life are the negation
of the law of our personal freedom as
guaranteed by our Constitution.

My personal knowledge of this came
from a close friend and a researcher
who finally after 10 years was able to
locate Bucharest Romania. He is a
Surgeon and she was a Librarian
in the Univ. of Bucharest. Even her picture
was spotted.

Katherine Larkin

3230 La Touche Ct #6-4

Anchorage, Ak. 99504

B. EAVESDROPPING DEVICES

§ 47.4. In general [new]

(Electronic eavesdropping, where unauthorized, is illegal), Police are known to use illegal bugging and wiretapping, and defense attorneys should thus be able to detect illegal eavesdropping. We will attempt to describe the various types of electronic eavesdropping devices, their uses, and their usual placement.

Contrary to popular belief, most eavesdropping devices are not intricate and custom-built but are often home-made and constructed very simply with equipment of standard manufacture. This simplicity in structure is inexpensive and it makes it almost impossible to trace the device back to the original installer.

§ 47.5. Wiretapping [new]

Eavesdropping devices usually fall into two categories: wiretapping or bugging. Wiretapping, or the intercepting of telephone conversations, despite advances in the sophistication of bugging devices, is still the principal method of electronic snooping. There are three basic methods of wiretapping: the direct tap, the indirect or induction-coil tap, and the microphone tap.

Direct taps, if skillfully placed, can be detected only by a careful search of the telephone line. The indirect or induction-coil tap has to be placed within the magnetic field caused by the current on the wire; it does not have to be actually connected to the telephone wire. The induction coil can be placed as far away as fifty feet from the telephone line. Access to the telephone is necessary to install the microphone tap. A small microphone with a transmitter is hidden inside the telephone. Commonly, this replaces the device inside the mouthpiece and is difficult to detect.

Several recent advances in electronics have aided the wiretapper. Until the development of the tape recorder, the wiretapper had to transcribe by hand conversations he heard from earphones at the listening post. Now, voice-activated tape recorders are available which record only when a voice is on the line. Also, the development of radio transmitters eliminated wires, increased the speed of installation, and decreased the possibility of finding the tapper.

§ 47.6. Bugging [new]

In addition to the telephone wiretap, other devices available to the snooper are the "bug," the transmitter, and the recorder. A bug is a tiny concealed microphone wired into a room. An improvement on this device is a combination microphone and transmitter. This device eliminates the necessity of wiring and can be easily hidden in a room or carried on the person. The miniature tape recorder with a microphone is another useful device for the snooper. This can be easily concealed in a briefcase or even carried on the body.

If a person has access to the room he wishes to bug, he often can convert the present power systems into eavesdropping devices. The telephone, besides being tapped, can also be adjusted to provide a microphone for listening to room conversations. Always check the telephone thoroughly when snooping is suspected. There are other systems which can be tampered with to

create eavesdropping devices. The Muzak system in a hotel can be adjusted so that the room speaker serves as a microphone. In an apartment building the door signal system can monitor a specific apartment if a microphone has been hidden in the apartment. Schools, offices and other institutions are also vulnerable to eavesdropping, if access to the control board of the intercom system is available.

If no alternative power systems are available, there are several devices which can be planted in a room to "listen." Microphones exist which are smaller than a postage stamp. These can be hidden anywhere in a room where wires can be covered up. Also available, but without wires, is the combination microphone and transmitter which may operate, by battery or by being plugged into the house current. Another wireless bugging device is the tiny microcircuit which is 1/1000th of an inch thick. The transmitter in this device draws power from the radio waves in the vicinity. The microcircuit can be hidden inside wallpaper or in any tiny crack.

Because direct access to the room to be "bugged" is rare, many techniques have been developed which require only proximity to the desired location. The "black box" when attached to the telephone line at any terminal box will turn the telephone into a microphone, monitoring all room and phone conversations. This device is very difficult to detect and is not available to the ordinary eavesdropper. To place this or another wiretap, the snooper must find the correct telephone wires. He may pose as a repairman or, if the police are involved, the telephone company may cooperate.

If the room next door is available, several types of microphones can be utilized. A contact mike can be placed on the connecting door. A small mike can be placed under the connecting door. A spike mike can be hammered into one side of the wall until it touches the other side of the wall. This mike causes the other side of the wall to act as a sounding board, and all conversations can be picked up.

If the room above is available, a microphone can be lowered down an air duct or out the window. False ceilings, attics, and basements are also excellent locations for eavesdropping devices.

If the snooper cannot gain entrance to the room, or a nearby room there are several long-range eavesdropping devices which he can utilize. The telescopic, or parabolic, microphone, which is used to cover news events, can pick up conversations up to 500

feet away. This device, aimed at the desired location, blocks out all side conversation. A microphone can be hidden outside the window which is powerful enough to pick up all room conversation.

Even on a busy street, snooping can be effective. A small recorder in a shoulder holster, a transmitter the size of a cigarette pack, and a mike in a tie-clip all would go unnoticed. A telescopic mike also be used in a crowd of people.

PHOTO COPY OF
NEWS ITEM IN
COURIER
Jan. 24, 1974

People are Mad Movement

When asking about the status of certain LAW & ORDER legislation, Earl Westphal, of Soldotna was told by one of the legislators that "We will not get such legislation through until the people get mad and take action." Thus began a movement to secure the support of honest citizens, through the power of the pen, to combat the deplorable condition of our criminal justice system. Westphal said, "It is time the overwhelming majority of honest citizens were protected from the offending minority."

A meeting of the Law enforcement agencies to the Kenai Peninsula was called by Westphal, to study legislation already in the hopper and to gain knowledge of possible additional needs. Attending were Judge James Hanson, of the Superior Court; Sgt. George Polite, who is in charge of State Troopers on the Kenai; Police Chief Doherty, of Homer and Chief Kilmer, of the Soldotna Police dept.

Numerous criminal cases were reviewed and weak spots in the system were pointed out along the way. The first issue, and one receiving considerable attention, was the release on bail of criminals who are a danger to society, pending trial and/or sentencing. Judge Hanson said that different Judges interpret the bail law differently and some feel the law prohibits their retention. This question needs to be clarified by the legislature.

Another avenue for improvement was said to be the method of appointing members of the Parole Board. At present there seems to be no qualifications which have to met except "favor of the governor." The legislature needs to establish some qualifications for membership on this board. It is believed that much better decisions would be rendered by a Parole Board made up of those with expertise in Law Enforcement and Criminology.

Probation should, very definitely, be placed under the Court System for better control. The District Attorney's office is seriously under staffed. The case load is such that an adequate job of preparing the state's case is almost impossible. Plea bargaining seems to be used all too frequently possible because of the over load on D. A. s. Much stiffer sentences should be handed down for murder, rape, use of gun in commission of a crime and other serious offences against society, with the court's recommendations on Parole more closely adhered to.

Rehabilitation efforts are fine in some cases, but where do we draw the line? How many times must a criminal offend society before he is considered a habitual? How many times should we allow one to commit rape, murder, or armed robbery, before he is considered a menace to society? We MUST get some results from the current session of the Legislature, before the pipeline impact really hits," said Westphal, "or we just as well list CRIME as another major industry for Alaska."

PEOPLE ARE MAD - and that is what Westphal is calling the move for public support of crime legislation. "Watch for more information," he says, "on bills to write to your legislators about." "Let's make Alaska a state where CRIME DOES NOT PAY."

Feb. 10, 1974

TO: Clem Tillion, Chairman, House Judiciary Committee

FROM: Earl W. Westphal, Co-ordinator, People are Mad, A citizen's
Movement for Law & Order.

Subject: Written testimony for public hearings on Law & Order

Legislation Wednesday and Thursday, Feb. 13 and 14, 1974.

(TO BE READ INTO THE RECORD)

Members of the HOUSE JUDICIARY COMMITTEE:

The United States of America, especially since the era of the "Warren Court", has become increasingly Liberal and Permissive toward the Criminal Element. Alaska, the 49th State, seems one of the more Liberal of the 50.

I am unable to identify the element which has led our Criminal Justice system into the deplorable condition it is in today, but whoever they are, they have been most successful.

The job of the Police Officer and the prosecutor has been made much more difficult because of our undue concern for the rights of the accused; yes, even the convicted.

This committee is respectfully asked to approach their task with sound common sense; with more consideration for the victims of the offenders of society. Those who seek pleasure or material gain through utter disregard for the life, safety or general welfare of their fellow man must suffer their just reward. They must be separated from society unless and until it has been proved, beyond doubt, they are fit to mingle with Honest Citizens.

One who contemplates a crime against society knows what he plans is wrong; he oftentimes even seeks legal advice to weigh the gain against the possible punishment. A responsible society seeks to provide a penalty suitable to the crime.

Some will argue that stiffer penalties are not necessarily a deterrent to crime. A simple study in human nature will show otherwise. We are all inclined to weigh the risk against the possible gain. Place a Ten Dollar bill in the middle of a lake frozen over with quite thin ice, watch how few people even think of going after it. On the other hand, increase that amount to a million dollars and you will have mass drownings as the force of greed takes over. Conversely, as the risk becomes greater, the prize becomes less desirable.

I, nor those who follow my recommendations, are not in favor of the "HANGING JUDGE" concept nor do we approve of the "WRIST SLAPPER". We do not believe the average citizen should be subjected to harassment by Law Enforcement officials, yet, I feel sure, the Honest citizen, with nothing to hide, will gladly submit to reasonable investigation by authorities in their attempts to apprehend offenders of society.

We must act now to correct the dangerous trends in criminal justice. We must not allow the pendulum to swing too far in the permissive direction lest the people force it back beyond the point of reason and we find ourselves in a POLICE STATE.

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One's rights should cease at the point where they interfere with the rights of others. When it becomes unsafe for a person to walk down a public street, his rights are being infringed upon. He is being denied EQUAL PROTECTION under the law, if the law is not doing all in its power to correct the situation.

Let us concentrate, for a spell, on the rights of the overwhelming majority; the good, honest, law-abiding citizens.

In this age of extremeism, there seems to be two main factions pulling in opposite directions. It behooves you, our law-makers, to seek the reasonable, straight forward approach and make Alaska a state where Good, old fashioned Americanism is engendered.

TO TOUCH LIGHTLY ON BILLS CURRENTLY BEFORE YOU:

- H.B. 391. Seems quite reasonable. Meets EQUAL PROTECTION standards.
- H.B. 451. Should discourage the "Crackpot" as well as the bearer of false witness.
- H.B. 452. A common sense approach to criminal use of fire arms.
(I am definitely opposed to GUN CONTROL)
- H.B. 460. Very good and MUCH NEEDED. These people have suffered much abuse while serving and defending society.
- H.B. 511. A step in the right direction. If the offender is such a nice guy and good citizen, he wouldn't have committed the crime in the first place. (One case, known locally, the prisoner was released after a few months and against his own wishes. He felt he was a danger to society) His crime, MURDER.
- H.B. 512. Good Judges need this to support their actions and less desirable Judges need to be pushed toward better protection of society.
- H.B. 513. Good legislation. Should discourage additional crime with knowledge that sentence will be served consecutively instead of concurrently.
- H.B. 515. A jury of six, especially with current selection techniques, seems more than adequate to assure a fair decision. The money saved can very well be used for additional personnel.
- H.B. 562. The mandatory wording seems more appropriate and less discriminatory.
- H.B. 563. Recommend amendment: Sec.33.30.185.(a) When a person is sentenced to imprisonment by a court for a criminal offense, COPIES OF all reports etc. Court and corrections should have these records.
- H.B. 564. As I understand this bill, it prohibits only those agreements as stated, between defence and prosecutor but not those which also involves the judge. I dislike the practice of plea bargaining as a time saver in some cases. It should be used only when all facts are known. Again, a local case. SALE OF CANNABIS. This was reduced to POSSESSION. The

Written testimony for public hearings by House Judiciary
Committee Feb. 13 and 14, 1974. Clem Tillion, Chairman.

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Judge was not aware of previous conviction on charge of
ARMED ROBBERY of drugs. I hate to see criminals granted
the privilege of reduced charges when evidence exists
which could establish guilt on the charge for which he
was arrested.

I have been unable to secure copies of House Bills: 565, 566, 568,
570 and H.J.R. 67. Please apply principles as outlined in narrative.

H.J.R. 66. I heartily support this resolution. Society has not had
EQUAL PROTECTION under the law when certain criminals
have been released on bail to repeat crimes.

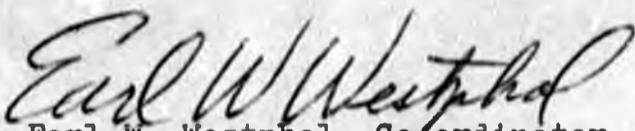
H.J.R. 68. Agree with this along with H.J.R. 66.

H.J.R. 71. I am in full support of this as a more "common sense"
approach to criminal justice.

I trust the time and effort spent in the preparation of this
testimony will not be without it's reward, better criminal justice
in the state of Alaska.

I deeply appreciate your indulgence.

Respectfully submitted,



Earl W. Westphal, Co-ordinator

PEOPLE ARE MAD, A citizen's movement for Law and Order

Dear Clem: Thought this letter would be of interest —
Sincerely, Walt & Elva

STATE OF ALASKA

WILLIAM A. FOGAN GOVERNOR

Emery W. Chapple, Jr.
Commissioner

DEPARTMENT OF PUBLIC SAFETY

DIVISION OF STATE TROOPERS

Box 6188 Annex, Anchorage, Alaska 99502

January 30, 1974

Mr. Walt Rogovin
P. O. Box 28
Sterling, Alaska 99571

TIMES (WP)

Dear Walt and Elva:

I received your letter of January 17 concerning the advertisements for massage parlors in our daily paper, and I would like to assure you that I am wholeheartedly in agreement with what you said in your letter, and appreciate the fact that some citizens are enough to say "no" to it.

Many citizens wonder how organized crime is allowed to flourish and prosper in Anchorage in a community, yet often these who are in the know think they are very good who are contributing to its success. A few thousand dollars' takeoff of organized crime for advertising is, to me, immaterial, an example of how legitimate business practices are compromised at those bent on illegal activities.

I strongly agree with you that when the courts are concerned and deterred by money, it is equally heinous that when our judicial system is affected by the presence of organized and persistent, and established, organized crime, consideration for the rights of the citizen who must abide by the law-abiding citizen, they damaged themselves by the loss of public confidence and respect.

This loss of confidence in our judicial system concerning an organized crime is an open door to the people, then it is putting the control of our system back with the people instead of the Alaska Bar Association. This could be accomplished by electing Attorney General, State Attorneys, and Judges, and so in charge of our state. In the event today, I can assure you that I, and my staff, of law enforcement are working towards this end, and a community citizen's presence and participation are most concerned in the matter.

Sincerely yours,
[Signature]
Colonel M. L. Dankworth
Director
Alaska State Troopers

MWD:led



Supreme Court

State of Alaska

CHIEF JUSTICE
JAY A. RABINOWITZ

JUSTICES
ROGER G. CONNOR
ROBERT C. ERWIN
ROBERT BOOCHEVER
JAMES M. FITZGERALD

941 Fourth Avenue
Anchorage, Alaska 99501

January 30, 1973

Honorable Lowell Thomas
Senator, Alaska State Senate
Pouch V
Juneau, Alaska 99801

Dear Senator Thomas:

I appreciate your invitation to comment on Senate Bill No. 15. While I will be unable personally to appear before your committee, I have nonetheless been authorized to express the views of the Alaska Supreme Court on this proposed legislation.

As you are aware, Senate Bill No. 15 would amend AS 17.10.200 to require mandatory prison terms of five years for possession or control of narcotic drugs for the purpose of sale to another person, and amend AS 17.12.110(b) and (c) to require mandatory five year prison terms for possession or control of depressants, hallucinogens, or stimulant drugs for the purpose of sale or disposal to another person. Summarily stated, it is the opinion of the Supreme Court of Alaska that mandatory minimum sentences are inappropriate and may result in substantial injustice to individuals convicted of these crimes in particular circumstances.

Significantly different crimes and offenders may fall within the scope of the proposed statutes. The casual exchange of a small quantity of contraband will subject the offender to the same five year minimum sentence as a large sale by seasoned, professional criminals. Under the proposed amendments no inquiry is required to be made as to whether the individual convicted of sale or disposal of contraband will pose any continuing threat to society; whether lengthy confinement will serve to correct the offender's behavior; or whether a minimum period of five years incarceration generally will further the goals of Alaska's Criminal Justice System. In this regard we believe that parole

officials generally have sufficient data to determine when an offender can be released from incarceration without unreasonable risk to society. At best, the confinement of the offender past the time when parole may be prudently granted will inflict unnecessary harm upon the convict; at worst, it will deprive him of the incentive to reform his behavior and might possibly increase the likelihood of repeated antisocial behavior upon release from confinement.

It is also our view that lengthy mandatory minimum sentences are likely to encourage defendants to bargain for pleas of guilty to reduced charges. Another facet of this question is that where enforcement personnel are of the view that imposition of the mandatory minimum sentence will work a hardship in a particular case, imposition of the mandatory sentence can be avoided by reduction of charges. Further, where the imposition of mandatory minimum sentences will cause manifest hardship to defendants, judges and prosecutors are likely to be inclined to consent to the bargained pleas. The danger is that innocent defendants may decide that on balance it is better to accept a short period of confinement for an offense never committed than to risk conviction and a mandatory sentence.

Mandatory minimum sentences are at times appropriate. In our view the sentencing court, when properly informed, can better determine when such sentences are well-advised. We endorse the position on the question of minimum sentences taken by the American Bar Association's Committee on Minimum Standards for Criminal Justice - Sentencing Alternatives and Procedures. The Committee's view is that in the rare situation where a minimum sentence is called for, the sentence should issue only after the court has been adequately informed of the offender's amenability to treatment and after the court has considered making a non-binding recommendation to parole authorities suggesting the earliest time at which the offender can be considered for release.

We concur with the Advisory Committee on the Standards, in stating:

The Advisory Committee holds no sympathy for the offender who poses a significant public danger and is just as anxious as anyone else to get him off the streets for a period of time sufficient to neutralize the danger. But this position does not and should not lead to the conclusion that offenders who do not pose such a danger should be committed for a substantial period of time because the offense they committed happens to be one that is often committed by dangerous people. The evil of the mandatory term is that it robs the system of the capacity to discriminate between offenders who do and offenders who do not deserve the harsh treatment which the minimum signifies. A far better way to

attack the problem would be to arm the system with the funds and the facilities to enable it to identify the particular offenders from whom society legitimately needs protection.

I note in closing that the views expressed here are only those of the members of the Supreme Court and not of the trial judges within the Alaska Court System. Again, I wish to thank you for the opportunity to express our views concerning Senate Bill No. 15.

Very truly yours,

Jay A. Rabinowitz
Chief Justice

GREATER ANCHORAGE AREA BOROUGH

3500 EAST TUDOR ROAD
ANCHORAGE, ALASKA 99507



DEPARTMENT OF LAW
279-8686

February 20, 1974

Representative Helen Fischer, Chairman
State Affairs Committee
House of Representatives
State Capitol Building
Juneau, Alaska 99801

Dear Helen:

I received your letter addressed to Ms. Sheila Gallagher, Borough Attorney. I know you will want Sheila's personal views on the crime bills but you probably also would like the views of the Borough Attorney.

Before commenting on the bills, I should point out that the Borough Attorney, like other municipal attorneys, does not prosecute felonies and accordingly, does not, by virtue of his office, have any direct familiarity with prosecution of felonies, commission of crimes while on bail, etc. The Borough provides police protection in the Spenard Service Area, an urban area of 30,000 people, and we do prosecute a great volume of traffic offenses, but the bulk of these are relatively minor in nature, the more serious crimes such as drunk driving, reckless driving, and eluding an officer being in the minority. So I will have to speak for myself as a private citizen and not for the Borough on the felony proposals.

I agree with House Joint Resolution 66 providing that the court may deny bail if there is substantial evidence that, if released, the accused would pose a danger to other persons and to the community. The need for this change would be much less if there were speedier trials and certainly, defendants denied bail should receive a speedy trial.

I disagree with House Bill 511, House Bill 512, and House Bill 513 because I believe that if these bills were enacted, the Legislature would be invading an area in which the court system is best prepared to act. It may be that the court system should be nudged into acting in these areas, and I think that the State Affairs Committee, in the course of holding its hearings, may accomplish such a result.

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I am sure that the reasons for House Bill 511 is the feeling among that some criminals are paroled too soon, that the reason for House Bill 512 is the feeling that some sentences for serious crimes are too short, and that the reason for House Bill 513 is the belief that the punishment for committing a felony while on bail is too lenient. In other words, there is a feeling that judges are abusing their discretion in administering the laws. I do not know if there is also a belief that sentencing and punishment are unequal for similarly situated criminal defendants, but I suspect that that is a major concern too.

These are all legitimate concerns.

Certainly you are entitled to know, and the justices and judges should know:

What sentences are pronounced for a given category of crime? For a first offender? For a frequent offender? Are similarly situated criminal defendants charged with similar crimes sentenced the same? Does it make a difference if a criminal defendant is prosecuted by one prosecutor rather than another, if sentence is pronounced by one judge instead of another, if the criminal defendant pleads to a lesser crime and so on.

What bail is required for different categories of crime? Again are similarly situated criminal defendants treated the same?

When is bail set so high as to be, in effect, a denial of bail? Is policy on high bail uniform for similarly situated criminal defendants?

What sanctions are employed when a person on bail for a felony commits a felony? Are the sanctions uniformly applied and are they effective? I understand that about 4% of criminal defendants on bail for a felony are charged with an additional felony committed while on bail.

What part of a sentence is actually served? Again are similarly situated criminal defendants convicted of similar crimes treated the same with respect to parole?

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I do not think that rational decisions on legislation affecting sentencing and parole can be made until reliable hard information on these subjects are available. And similarly, I doubt if the justices and judges can do the job they ought to be doing without this information.

I am saying this knowing that this type of information is probably not available here or in any other jurisdiction. I have heard that the Alaska Judicial Council has obtained a Law Enforcement Assistance Agency (LEAA) grant to develop some of this information but I do not know what the particulars of this effort are.

I also understand that the Chief Justice of the U. S. Supreme Court, Chief Justice Warren Burger, has made a special effort to determine whether criminal justice is being fairly and uniformly achieved in federal courts. I believe this includes the amount of bail being required of first offenders for different categories of an offense, second offenders, etc., the time not served on various sentences for various types of offenders for various types of offenses due to parole, and so on.

I would hope that development of this type of information will be one result achieved as a result of this legislative session. For my part, I would prefer to see the Alaska Court System develop this information between now and the next legislative session. This would probably require an appropriation for that purpose.

I think House Bill No. 512 may backfire if enacted. First, I am convinced that the judge must have discretion in imposing sentences for any type of crime and that this discretion should not be taken away by legislative act. The Legislature simply cannot foresee and anticipate every circumstance that might come up. If a judge is out of line in sentencing, this should be made apparent by the process of systematically comparing sentences and procedures for appellate review of sentences that the prosecution believes are too lenient.

House Bill 512 requires imposition of the statutory minimum penalty for not only murder or rape, but also the minimum statutory penalty for possession of narcotic drugs. For example, if a high school or college kid should experiment on a one time basis with a hard drug, the judge would be required to sentence the student to imprisonment for not less than two years. I think it is a mistake to handle an offense of that type as if it were of the same gravity as,

say, murder or rape, offenses for which courts must, under existing law, pronounce at least the minimum sentence. I also think that a result of removing the power to exercise discretion in a case of this kind means that certain persons will wind up serving sentences of two years while others convicted of far more serious crimes involving possibly injury to a life or the physical person receive a much lesser sentence. This is not equal justice and it is a step backwards.

This raises an issue relating to law and order attitudes generally. I have seen polls showing a relatively high level of coolness towards law enforcement personnel among persons under the age of 25 and among members of minority groups. It is important that the great majority of every segment of our society have confidence in and support law enforcement, that they cooperate whenever they can in preventing crimes and that the police have the wholehearted cooperation and support of every population group. I think that one reason for disenchantment with law enforcement among some young people and some members of minority groups is the feeling that they are being singled out for punishment for activities which are either not, in their opinion, criminal at all, as in the case of marijuana smoking, or are of relative low priority among criminal offenses, while those who do much more substantial damage to the lives and properties of others do not bear the full brunt of the law. There is probably general agreement among all groups that acts which are dangerous to life and the physical well-being of others, such as assault with dangerous weapons, robbery, murder, burglary and other crimes which pose an immediate threat to life of others should be severely dealt with. The whole matter becomes confused when other categories of crime are brought in.

The Alaska judiciary, judges and justices alike, are exceptionally qualified to handle criminal matters. Each member of the Alaska Supreme Court has long experience with criminal prosecutions and, in some cases, criminal defense. All except one have lived in Alaska since, at least, 1951 and the one exception has lived here since 1956 or 1957. All have prosecuted as Assistant U. S. or Assistant State District Attorneys or as a State District Attorney in a variety of places including Ketchikan, Juneau, Anchorage, Fairbanks and Nome. They are experienced men with both a sense of justice and a down to earth sense of practicality. The State judges I know best are all ex-legislators and you probably know them as well as I do. None of them are soft on criminals. I am sure that they will use any hard information

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on sentencing for purposes of achieving equal treatment under the law.

I recognize that under Article IV, Section 15 of the Alaska Constitution the Legislature may by a two-thirds vote change rules promulgated by the State Supreme Court governing practice and procedure in civil and criminal cases. I hope that the Legislature will refrain from any such action. The newly adopted Rules of Criminal Procedure are fair, are practical and reflect, not only the experience of the Alaska courts, but also the experience of courts throughout the United States. If problems do develop in the course of time, the Alaska Supreme Court is best equipped to handle them.

On plea bargaining, it is essential that the District Attorney have the discretion to reduce charges where the original charge is too high. However, lesser pleas should not be accepted for the convenience of the prosecutor or the court. Lesser pleas should not be accepted because the prosecutor or the court is short of manpower, is confronted with a heavy backlog or the press of time. Consider, for example, the effects of making an unusual number of felony arrests due to a drive against hard drugs. Although the evidence obtained may be solid, the prosecutor and the court may feel under some pressure to accept reduced pleas just to be able to handle the cases within the limitations of manpower and time available. This would be wrong. It would not only be demoralizing to those who developed the cases, but it would mean that criminal defendants would not be treated equally due to the exigencies of time and budget. Any pressures to engage in plea bargaining for economic reasons or because of time pressures should be resisted.

Your review of the effectiveness of Alaska law enforcement is timely because we have had a sharp increase in major crime in the Anchorage area in 1973. We will have a much higher level of criminal activity in 1974 as we begin to bear the full brunt of pipeline construction. I will be looking forward to receiving a copy of your report.

Sincerely yours,

Gary Thurlow
Borough Attorney

Gary Thurlow

GT/sj

intending letter

2 appropriate letters submitted + reviewed as do not on app.

cc: Sheila Gallagher
Anchorage Borough School District

Thank you Gary Thurlow for this letter + tell them I turned it over to Judiciary Committee where rules are.

JUNEAU BAR ASSOCIATION

JUNEAU, ALASKA 99801

OFFICE OF THE President

201 Franklin St.

Honorable Clem V. Tillion
Chairman, House Judiciary Committee
Alaska State House of Representatives
Alaska State Capitol Building
Juneau, Alaska 99801

RE: Law and Order Package

Dear Mr. Chairman:

I appreciated Mrs. Mason's call advising me of the scheduling of the hearings on various law and order proposals that were being reviewed by your committee. I regret that I was unable to sit through the entire two days of testimony in order that I might speak personally, although I think much of what I would have said would have been redundant.

The Legislative Committee of the Juneau Bar Association reviewed a number of the proposals, though not all. I do not think it necessary to detail the committee's criticism of individual bills. It is my very distinct impression that the committee's thoughts in general closely parallel the thoughts expressed by Chief Justice Jay Rabinowitz' letter to the committee and to Senator Lowell Thomas.

The feeling of the committee seems to be that of concern over the tenor of the package as a whole. The committee seems to feel strongly that piecemeal tampering with the present system would not serve the purpose intended, but would rather create significant imbalances and inequities. There have been recent attempts to revise the Criminal Code in its entirety, which might be a better approach. I am personally aware of the efforts that the State of Colorado went through several years ago in totally revising the Colorado criminal laws. That was accomplished by a substantial fund to set up the mechanism for revising the criminal laws. Retired Chief Justice O. Otto Moore headed a committee, which spent roughly two years in the process.

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Lengthy dialogues between the committee, representatives of the State Attorney General's Office and various District Attorney offices, Public Defender agencies and the Bar Association were held. It is my understanding that the results were gratifying.

If recidivism is the major problem, then it would strike me that a deeper probe into the reasons for the recidivism would be indicated rather than simply trying to keep more people in jail where they are doubtless an enormous cost to the taxpayer. Furthermore, if the proposals were adopted in toto, the result would be the greatest economic blessing to the criminal defense bar that ever came down the pike. If the rate of recidivism among people on probation or parole is significantly less than the national average, which it apparently is, something must be working right. Furthermore, I am informed that reasonably reliable statistics indicate a rate of criminal activity among people out on bail that is again lower than the national average. Certainly no system will ever be perfect.

I was personally troubled by some of the statistics presented at the hearing. The statistics which presumably show a significant increase in criminal activity in Anchorage cannot be taken at face value. What they show is that there has been a greater reporting of criminal activity, and presumably it can be assumed that this is indicative of some increase in criminal activity. However, the figures simply are not absolutes. Chief Hibpshman stated that over a period of approximately four and one-half months, 84 persons were arrested for burglaries or burglary-related offenses. He further stated that of those, 36 were repeat offenders. What I do not recall his ever having said is how many of those 36, of even of the 84, were formally charged after their arrest and were subsequently either convicted or entered guilty pleas. That is something that one would want to know.

If you believe it would serve a useful purpose for me to either personally confer with you or appear before the committee at some time when the committee is not totally occupied with other matters, I will be more than happy to do so. Furthermore, the Juneau Bar Association

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would be pleased to give you thoughts on any other matters
you deem necessary.

Thank you for your attention.

Respectfully,


Allen T. Compton

ATC/wlp

The Citizen's Legislative Committee have recently drawn up a list of recommendations for legislative and judicial action against crime problems facing the people of Alaska.

The list includes:

1. More trained state troopers.
2. Stricter enforcement of existing laws.
3. Enforcement of the state's habitual criminal law and removal of discretionary powers of judges.
4. Stricter enforcement of drug laws.
5. A parole violator, if found guilty, should complete his original sentence.
6. Improvement of parole system.
7. Make the attorney general's office elective rather than an appointive one.
8. Election of judges.
9. Election of the district attorney.
10. Restrict the use of plea-bargaining.

In recommending that judges, district attorney's and the attorney general be elected, the committee feels that such action would make these positions more receptive to the wants and needs of the people.

Also the Committee is urging that the legislature NOT pass laws legalizing or decriminalizing marijuana. This matter should be placed before the voters, and the choice be made by the majority after more study and information is available. A group of Columbia University researchers reported that marijuana may weaken the body's defenses against disease by inhibiting division of the white blood cells that fight viruses. As a result of the study, Dr. Gabriel Nahas of the team of researchers called for a re-examination of the findings of the National Commission on Marijuana, which recommended decriminalization of marijuana use. A full account of the research team's studies will appear in the Feb. 1. issue of "Science" magazine.

The Citizen's Legislative Committee has been formed as a study group to study all bills originating from Juneau, and will take action on such ones as they deem necessary. Anyone interested in more information may contact State Chairman, Mrs. R. H. Frank, St. Rt. B, Box 516, Palmer, Alaska, 99645 or by phone 745-4128.

State Chairman Mrs Kay Frank

Kay Frank

DIVISION OF CORRECTIONS

1971 - 1972

RECIDIVISM DATA

Prepared by the
Systems and Research Unit
Division of Corrections
Charles G. Adams, Jr., Director
Department of Health & Social Services
State of Alaska

1 March 1974

1971 - 1972 RECIDIVISM

Introduction

This report is a brief preliminary version of a more extensive report which is currently in preparation. It includes data from a review of Division of Corrections releases from custody during 1971 and 1972.

National standards for recidivism, published in 1973 by the National Advisory Commission on Criminal Justice Standards and Goals, are as follows:

Recidivism is measured by (1) criminal acts that resulted in conviction by a court, when committed by individuals who are under correctional supervision or who have been released from correctional supervision within the previous three years, and by (2) technical violations of probation or parole in which a sentencing or paroling authority took action that resulted in an adverse change in the offender's legal status.

Our data departs from these standards in several respects, and suffers from the following limitations:

(1) Release data is available only for 1971 and 1972. Radical changes in record storage took place during 1969 and 1970, and release data prior to 1971 is not reliable. The present information must therefore be regarded as establishing a baseline, upon which the recommended three-year follow-up can be constructed.

(2) No data is available for adult offenders who received sentences of ten days or less. Again, the record-storage system precludes retrieval of this information.

(3) Having access only to Division of Corrections data, we can provide only Corrections-to-Corrections information. Thus recidivism

is measured from time of release (from institution, parole or probation) to time of re-sentencing to Corrections. Suspended sentences, fines and court probation are therefore not included.

Methodology

Two research assistants, under the supervision of the Division's programmer, were hired to review all active and closed files. This task was accomplished during the period from October, 1973, through January, 1974. Active file review was terminated in November, 1973; at a minimum, 95% of 1973 files were included.

Records consisted of three types of material: files which had been closed and microfiched, closed paper files, and active files. The data collectors visited major field locations to review active files; supervisors of small district offices either mailed or hand-carried their active files to the regional offices for review. Closed files were reviewed in Juneau, in the Central Office of the Division.

Of files containing 1971 and 1972 releases, distribution by type of file was as follows:

Microfiche:	80%
Closed paper files:	7%
Active files:	13%

The general procedure in approaching a file was first to determine whether there had been any correctional activity after the date of 1/1/71. Approximately half of the files reviewed contained relevant data. If an admission or release had taken place in 1971 or thereafter, it was recorded. (Admission data will be reported in a separate study). For each release, the most recent preceding release

during the past three years and all subsequent admissions were recorded.

The data collection form is shown on page 4. Although only very basic information was sought, availability of data varied widely among files, and some ingenuity was required to reconstruct histories of correctional experience. In general, the following procedure was utilized: The first sources of information were the booking sheet and judgement, which the raters found to be the most reliable documents in the records. Where information was not available from these sources, the probation/parole worksheet (which is often completed by the client) was used, with supplementary or confirming information sought from the presentence report. Individual items were obtained as follows:

1. Name: booking sheet, judgement, worksheet, pre-sentence report.
2. D.O.B.: same
3. Sex: same
4. Race: same
5. AID Number: not used
6. Crime: Booking sheet, judgement
7. Date of crime: same
8. Still serving: not used
9. Institution: booking sheet for admission and release dates
10. Parole: Parole Board Action Sheet. This includes date supervision began, date of parole, and end of parole and probation.
11. Probation: from the judgement, or from chronological

RECIDIVISM DATA

Identification

Name

Date of Birth

____/____/____

Sex

Race

AID Number

Crime <input type="checkbox"/>	Date of Crime <input type="checkbox"/>
Sentence Served: <input type="checkbox"/> Still Serving <input type="checkbox"/>	
INSTITUTION <input type="checkbox"/>	PAROLE <input type="checkbox"/>
PROBATION <input type="checkbox"/>	Date of RELEASE <input type="checkbox"/>
Category at time of this crime. Inst <input type="checkbox"/> Par <input type="checkbox"/> Prob <input type="checkbox"/> Rel <input type="checkbox"/>	

Crime <input type="checkbox"/>	Date of Crime <input type="checkbox"/>
Sentence Served: <input type="checkbox"/> Still Serving <input type="checkbox"/>	
INSTITUTION <input type="checkbox"/>	PAROLE <input type="checkbox"/>
PROBATION <input type="checkbox"/>	Date of RELEASE <input type="checkbox"/>
Category at time of this crime. Inst <input type="checkbox"/> Par <input type="checkbox"/> Prob <input type="checkbox"/> Rel <input type="checkbox"/>	

Crime <input type="checkbox"/>	Date of Crime <input type="checkbox"/>
Sentence Served: <input type="checkbox"/> Still Serving <input type="checkbox"/>	
INSTITUTION <input type="checkbox"/>	PAROLE <input type="checkbox"/>
PROBATION <input type="checkbox"/>	Date of RELEASE <input type="checkbox"/>
Category at time of this crime. Inst <input type="checkbox"/> Par <input type="checkbox"/> Prob <input type="checkbox"/> Rel <input type="checkbox"/>	

Crime <input type="checkbox"/>	Date of Crime <input type="checkbox"/>
Sentence Served: <input type="checkbox"/> Still Serving <input type="checkbox"/>	
INSTITUTION <input type="checkbox"/>	PAROLE <input type="checkbox"/>
PROBATION <input type="checkbox"/>	Date of RELEASE <input type="checkbox"/>
Category at time of this crime. Inst <input type="checkbox"/> Par <input type="checkbox"/> Prob <input type="checkbox"/> Rel <input type="checkbox"/>	

notes made by the probation officer, when no judgement was available.

A sample of 100 adult cases (50 microfiche and 50 paper files) was drawn and reviewed by both raters, in order to ensure reliability of information. ("Reliability" is the extent to which two raters agree in recording information from the same file). Agreement on major items was as follows:

Number of crimes reported:	92% agreement
D.O.B.:	95%
Race:	94%
Sex:	99%
Institution sentence served:	96%
Time on parole:	97%
Time on probation:	95%
Date of crime:	94%
Date of release:	92%
Crime category:	93%

The average of 95% agreement attained over the ten categories was considered an acceptable level of reliability.

Results:

Data is reported as cases, not individuals. Thus each release is a "case", which may become a case of recidivism. A single individual may account for a number of cases, and no inferences about numbers of people can be made from this data.

Data is reported separately for adult and juvenile offenders. In order to maintain relative simplicity of presentation, and because there are few women offenders, distribution by sex is not shown.

For 1971 releases, recidivism rates are given both for the first year following release from custody, the second year, and a cumulative total for the two-year period. For 1972 releases, rates include recidivism only within a one-year period.

Table 1 shows cumulative recidivism rates for 1971 and 1972.

Table 1
Cumulative Recidivism Rates

	<u>Adult</u>		<u>Juvenile</u>	
	<u>Total Number Releases</u>	<u>% Reci- divism</u>	<u>Total Number Releases</u>	<u>% Reci- divism</u>
1971 (2 yr. exposure)	1155	31	376	14
1972 (1 yr. exposure)	931	21	318	8

"Percent recidivism" indicates the recidivism rate, and the percent not recidivating is the reciprocal of this figure. Although mere failure to recidivate cannot be considered "success", we can at least say that of adult releases in 1971, 69% had not recidivated within two years following release; this is true of 86% of juvenile releases during that year.

Table 2 shows the number and percentages of adults and juveniles who were released from each of three possible supervision modes: institution only, field services only, and combined institution and field service supervision. Table 3 shows recidivism rates for each of the types of supervision. It is important to remember, in looking at these tables, that they do not include a large and unknown number of cases where individuals served jail sentences of less than ten days.

Table 2

Distribution by
Type of Supervision

	<u>Adult Releases</u>					
	1971		1972		Total	
	<u>N</u>	<u>%</u>	<u>N</u>	<u>%</u>	<u>N</u>	<u>%</u>
Institutions only	906	78	692	74	1598	77
Field Service only	126	11	114	12	240	11
Institutions and Field Service	112	10	119	13	231	11
Unknown	<u>11</u>	<u>1</u>	<u>6</u>	<u>1</u>	<u>17</u>	<u>1</u>
Total	1155	100	931	100	2086	100

	<u>Juvenile Releases</u>					
	1971		1972		Total	
	<u>N</u>	<u>%</u>	<u>N</u>	<u>%</u>	<u>N</u>	<u>%</u>
Institutions only	85	23	39	12	124	18
Field Service only	216	57	208	65	424	61
Institutions and Field Services	69	18	65	21	134	19
Unknown	<u>6</u>	<u>2</u>	<u>6</u>	<u>2</u>	<u>12</u>	<u>2</u>
Total	376	100	318	100	694	100

Table 3
 Recidivism Rates by
 Types of Supervision

	<u>1971 Releases</u>			<u>1972 Releases</u>
	<u>% Recid. 1st year</u>	<u>% Recid. 2nd year</u>	<u>Cumulative Two Year Rate</u>	<u>% Recid. 1st year</u>
<u>ADULT</u>				
Institution only	29	6	35	26
Field Service only	9	3	12	7
Institution & Field Service	14	2	16	7
<u>Total Rate</u>	26	5	31	21
<u>JUVENILE</u>				
Institution only	18	2	20	13
Field Service only	9	4	13	6
Institution & Field Service	3	6	9	11
<u>Total Rate</u>	10	4	14	8

Offenses were coded according to the Uniform Crime Reporting Handbook, and combined according to F. B. I. Part I and Part II categories. The original list of crimes is included at the end of this report.

For reporting purposes, Part I crimes were divided into those involving Personal Harm (murder, negligent, and non-negligent manslaughter, forcible rape, robbery, aggravated assault, and other assaults), and those involving Property theft (burglary, breaking and entering, and auto theft).

Part II crimes were divided into those involving, or probably involving, alcohol use (drunkenness, disorderly conduct, and vagrancy), and All Other.

Table 4 shows the number and percentages of cases falling into each of the four crime categories, and Table 5 shows recidivism rate by crime category.

The term "original crime type" refers to the fact that these tables show the crime upon which the releases was based, and not the crime at time of recidivism.

Table 4
Original Crime Type

	1971 Releases		1972 Releases	
	<u>N</u>	<u>%</u>	<u>N</u>	<u>%</u>
ADULT				
<u>Part I Crimes</u>				
Personal Harm	140	12	134	14
Property Theft	141	12	390	34
<u>Part II Crimes</u>				
Drunk, Disorderly	390	34	232	25
All other	484	42	394	42
Total	1155	100	931	100
JUVENILES				
<u>Part I Crimes</u>				
Personal Harm	10	3	6	2
Property Theft	114	30	106	33
<u>Part II Crimes</u>				
Drunk, Disorderly	32	9	18	6
All other	220	58	191	59
Total	376	100	321	100

Table 5
 Recidivism by
 Original Crime Type

	<u>1971 Releases</u>			<u>1972 Releases</u>
	<u>% Recid. 1st year</u>	<u>% Recid. 2nd year</u>	<u>Cumulative Two Year Rate</u>	<u>% Recid. 1st year</u>
<u>ADULT</u>				
<u>Part I Crimes</u>				
Personal Harm	21	6	27	14
Property Theft	23	8	31	19
<u>Part II Crimes</u>				
Drunk, Disorderly	37	6	43	46
All Other	18	4	22	16
<u>JUVENILE</u>				
<u>Part I Crimes</u>				
Personal Harm	20	(*)	(**)	0
Property Theft	10	(*)	10	9
<u>Part II Crimes</u>				
Drunk, Disorderly	6	0	6	22
All Other	10	5	15	6

(*) = one case

(**) = 3 cases

Detailed discussion of the data will await the more detailed presentation which is underway.

Summarizing the present material briefly, we find an over-all two-year recidivism rate of 31% for adults, and 14% for juveniles. Both adults and juveniles who were in "institutions only" had higher rates of recidivism than those who were supervised by field services. Adults who had been sentenced for offenses involving alcohol had much higher recidivism rates than any other category of offenses; this fact is reflected in the relatively high rates for those with "institution only" supervision.

The relatively small juvenile sample and small number of cases of recidivism precludes any conclusions concerning recidivism by category of offense.

SECTION 11

OFFENSES

11.1 LOCAL & STATE

See the UNIFORM CRIME REPORTING HANDBOOK for further definition of local offenses.

- 1A Murder and nonnegligent manslaughter
- 1B Manslaughter by negligence
- 02 Forcible rape
- 03 Robbery
- 04 Aggravated assault
- 05 Burglary - breaking or entering
- 06 Larceny - theft (except auto theft)
- 07 Auto theft
- 08 Other assaults
- 09 Arson
- *10 Forgery
- 11 Fraud
- 12 Embezzlement
- 13 Stolen property; buying, receiving, and possessing
- 14 Vandalism
- 15 Weapons; carrying, possessing, etc.
- 16 Prostitution and commercialized vice
- 17 Sex offenses (except forcible rape and prostitution)
- 18 Narcotic drug laws SALE (NB: USE & POSSESSION)
- 19 Gambling
- 20 Offenses against family and children
- 21 Driving under the influence
- 22 Liquor laws
- 23 Drunkenness
- 24 Disorderly conduct
- 25 Vagrancy
- 26 All other offenses
- 27 Suspicion
- 28 Curfew and loitering law violations
- 29 Runaways and missing persons
- 30 Traffic and Motor vehicle laws (except driving under the influence and manslaughter)
- 31 Obscene material
- 32 Election laws

- 35 Probation violator
- 36 Parole violator
- 37 Mandatory and conditional release violator
- 38 Bail violations
- 39 Escape
- 40 Blackmail - extortion
- 41 Juvenile delinquency
- 42 Abortion
- 43 Bribery
- 44 Harboring and obstructing justice
- 45 Kidnaping
- 46 Contributing to delinquency of minors
- 47 Counterfeiting
- 48 POSSESSION & USE OF NARCOTIC DRUGS

* NOTE: Code #10 as used in the Uniform Crime Reporting Program combines Forgery and Counterfeiting. For NCIC use, Counterfeiting has been assigned a separate code, #47.

11.2 FEDERAL

- 51 Interstate Transportation of Stolen Motor Vehicles or Aircraft
- 52 Theft from Interstate Shipment
- 53 Interstate Transportation of Stolen Property
- 54 Postal Laws (except Extortion and Counterfeiting)
- 55 Bank Offenses
- 56 National Bank and Federal Reserve Act
- 57 Bankruptcy Laws
- 58 Tax Laws
- 59 Liquor Laws
- 60 Veteran Matters
- 61 Narcotic Laws
- 62 National and Federal Firearms Act
- 63 Immigration Laws
- 64 Interstate Commerce, (Except thefts from)
- 65 Theft, Embezzlement, etc., of Government Property
- 66 Offenses on Government Reservations, Indian Reservations, High Seas, and Territories
- 67 Smuggling
- 68 Counterfeiting

THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA,)
)
 Appellant,)
) File No. 1249
 v.)
) O P I N I O N
 DONALD SCOTT CHANEY,)
) [No. 653 - December 7, 1970]
 Appellee.)
)
 _____)

Appeal from the Superior Court of the State of
Alaska, Third Judicial District, Anchorage,
Edward V. Davis, Judge.

Appearances: G. Kent Edwards, Attorney General,
Harold W. Tobey, District Attorney, Anchorage,
and Robert L. Eastaugh, Assistant District
Attorney, for Appellant. Herbert D. Soll,
Assistant Public Defender, Anchorage, for
Appellee.

Before: Boney, Chief Justice, Dimond, Rabinowitz,
Connor, and Erwin, Justices.

RABINOWITZ, Justice.

Appellee Donald Scott Chaney was indicted on two counts
of forcible rape and one count of robbery. After trial by jury,
appellee was found guilty on all three counts. The superior
court imposed concurrent one-year terms of imprisonment and
provided for parole in the discretion of the parole board. The
State of Alaska has appealed from the judgment and commitment
which was entered by the trial court.

First impression issues concerning Alaska's recently enacted legislation establishing appellate review of criminal sentences are presented in this appeal. In Bear v. State,¹ this court concluded that it lacked "jurisdiction to review and remand or to review and revise a criminal sentence for abuse of discretion."² Bear was subsequently followed in Faulkner v.

¹
439 P.2d 432 (Alaska 1968).

²
that: Id. at 435. In Bear, a majority of the court concluded

It is the view of this court that review of legal criminal sentences should be provided for by statute only after a careful study of the efficacy of reviewing techniques now in force in other jurisdictions has been made, and the need for the procedure determined. Reviewing authority should perhaps include the power to modify a sentence upward as well as downward in order to achieve the full advantage of the procedure and decrease or eliminate disparity in sentences.

Id. at 437 (footnote omitted).

³ State and ⁴ Thessen v. State. In 1969, the Alaska legislature enacted legislation providing for appellate review of criminal sentences. ⁵ The 1969 act, codified as AS 12.55.120, states in part that:

(a) A sentence of imprisonment lawfully imposed by the superior court for a term or for aggregate terms exceeding one year may be appealed to the supreme court by the defendant on the ground that the sentence is excessive. By appealing a sentence under this section, the defendant waives the right to plead that by a revision of the sentence resulting from the appeal he has been twice placed in jeopardy for the same offense.

(b) A sentence of imprisonment lawfully imposed by the superior court may be appealed to the supreme court by the state on the ground that the sentence is too

³ 445 P.2d 815 (Alaska 1968). In Faulkner, Justice Dimond thought the sentence violated both the federal and Alaskan constitutional protections against cruel and unusual punishment. Justice Rabinowitz took the view that the court had jurisdiction to review the sentence and that the sentence was excessive. Chief Justice Nesbett was of the opinion that the court lacked jurisdiction to review the sentence for excessiveness, and further that the sentence did not contravene constitutional protections against cruel and unusual punishment.

⁴ 454 P.2d 341, 354 (Alaska 1969). In Berfield v. State, 458 P.2d 1008, 1011 (Alaska 1969), we said:

A majority of the court as now constituted has not had occasion to express itself on the question presented in Bear of whether this court has jurisdiction to review criminal sentences for abuse of discretion.

⁵ SLA 1969, ch. 117. A comprehensive study conducted by the Judicial Council played a significant role in the shaping and enactment of this legislation.

lenient; however, when a sentence is appealed by the state and the defendant has not appealed the sentence, the court is not authorized to increase the sentence but may express its approval or disapproval of the sentence and its reasons in a written opinion.⁶

In the case at bar, the state has appealed from the sentence imposed. In such circumstances, the provisions of subsection (b) of AS 12.55.120 prohibit any increase in the sentence which was passed by the trial court although this court may express its approval or disapproval of the sentence in a written opinion.

This appeal is the first by the state under the 1969 act. Since this legislation is of great significance to

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Subsection (c) of AS 12.55.120 treats the subject of bail in regard to sentence appeals. Sections 1 and 2 of chapter 117, SLA 1969 amended the statutes which delineate the jurisdiction of both the Supreme and Superior Courts of the State of Alaska. In regard to this court's jurisdiction, it was provided that:

The supreme court has jurisdiction to hear appeals of sentences of imprisonment lawfully imposed by the superior courts on the grounds that the sentence is excessive or too lenient and, in the exercise of this jurisdiction, may modify the sentence as provided by law and by the constitution of this state. For the purpose of considering appeals of sentences on these grounds, the supreme court may sit in divisions. (SLA 1969, ch. 117, § 1, codified as AS 22.05.010(b)).

In order to conform with the changes instituted by chapter 117, SLA 1969, Supreme Ct. R. 6 was amended to read in part as follows:

. . . except that the state shall have a right to appeal in criminal cases . . . on the ground that the sentence is too lenient.

the administration of criminal justice in the State of Alaska, we deem it important to express our approval or disapproval of sentences within this category of sentence appeal.⁷ For in our view, the 1969 sentence appeal statute manifests the legislature's awareness of existing deficiencies in sentencing practices throughout Alaska's entire court system and the compelling necessity of developing appropriate sentencing criteria. The primary goal of such legislation is an attempt to implement Alaska's constitutional mandate that "Penal administration shall be based on the principle of reformation and upon the need for protecting the public."⁸

In the case at bar, appellant, the State of Alaska, claims that the one-year concurrent sentences were too lenient in view of the severity of the crimes of forcible rape and robbery, the need to deter others from such brutal behavior, and in view of the presentence recommendations, all of which called for significantly greater sentences than those which were imposed by the superior court.

⁷ The lack of sentence review precedent requires that this court's discretion be exercised in favor of expression of our views in an attempt to articulate and develop sentencing standards. The decision to express our views in appeals by the state on grounds of excessive leniency reflects our awareness of the possibility that distorted criteria could result if review were limited exclusively to claims of excessive harshness.

⁸ Alaska Const., art. 1, § 12.

At the threshold, we are confronted with the problem of determining the scope of our review of criminal sentences under the 1969 act. As we interpret this legislative enactment, it is our duty to examine the proceedings below to review for excessiveness or leniency the sentence imposed by the trial court, in light of the nature of the crime, the defendant's character, and the need for protecting the public. We are also obliged to consider the manner in which the sentence was imposed, including the sufficiency and accuracy of the information upon which it was based.⁹ Sentence review by this court must be carried out with a view to effectuate the purposes of the 1969 act, as well as the goals of sentence review in general. The objectives of sentence review have been said to be:

(i) to correct the sentence which is excessive in length, having regard to the nature of the offense, the character of the offender, and the protection of the public interest;

(ii) to facilitate the rehabilitation of the offender by affording him an opportunity to assert grievances he may have regarding his sentence;

(iii) to promote respect for law by correcting abuses of the sentencing power and by increasing the fairness of the sentencing process; and

⁹
ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Reivew of Sentences, Standard 3.2 (Approved Draft, 1968).

(iv) to promote the development and application of criteria for sentencing which are both rational and just.¹⁰

We think this a fair statement of some of the general objectives of sentencing review.

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Sentencing is a discretionary judicial function.

When a sentence is appealed, we will make our own examination of the record and will modify the sentence if we are convinced that the sentencing court was clearly mistaken in imposing the

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ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences, Standard 1.2 (Approved Draft, 1968). Under the 1969 act, codified as AS 12.55.120(b), the state was given the right of appeal on the ground that the sentence imposed was too lenient. Thus, one of the objectives of sentence review under our statute is to express our disapproval of the sentence which is too lenient, having regard to the nature of the offense, the character of the offender, and protection of the public. See also the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 25-26 (1967).

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G. Mueller, Penology on Appeal: Appellate Review of Legal but Excessive Sentences, 15 Vand. L. Rev. 671, 684 (1962), says regarding the discretionary aspects of sentencing in criminal law,

[s]entencing is a judicial problem, and as long as the judiciary is vested with a discretionary range of sentences, there must be some guard against a possible abuse of such discretion, just as there is appellate supervision over every other exercise of judicial discretion.

See State v. Pete, 420 P.2d 338 (Alaska 1966); Battese v. State, 425 P.2d 606 (Alaska 1967); Egelak v. State, 438 P.2d 712 (Alaska 1968).

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sanction it did. Under Alaska's Constitution, the principles
of reformation and necessity of protecting the public constitute
the touchstones of penal administration.¹³ Multiple goals are
encompassed within these broad constitutional standards. Within
the ambit of this constitutional phraseology are found the
objectives of rehabilitation of the offender into a noncriminal
member of society, isolation of the offender from society to prevent
criminal conduct during the period of confinement, deterrence of
the offender himself after his release from confinement or other
penological treatment, as well as deterrence of other members of
the community who might possess tendencies toward criminal conduct

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In the ABA's Project on Minimum Standards for Criminal
Justice, Standards Relating to Appellate Review of Sentences,
Standard 3.1, 49-50 (Approved Draft, 1968), while clear recognition
is accorded the difficulty of articulating precisely the proper
role of reviewing courts in sentencing appeals, it is suggested that

respect for the discretion of the trial judge should not
prevent the reviewing court from making its own inquiry
into the justice of the sentence before it. Having made
that inquiry, the reviewing court, to be sure, should
not 'tinker' with the sentence. Still, the point remains
that an independent examination of the justice of the
particular sentence is necessary in order for the review
process to properly function.

See also President's Commission on Law Enforcement and
Administration of Justice, Task Force Report: The Courts 26 (1967);
President's Commission on Law Enforcement and Administration of
Justice, The Challenge of Crime in a Free Society 357-58 (Avon
1968).

13
Alaska Const., art. I, § 12.

similar to that of the offender, and community condemnation of the individual offender, or in other words, reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves.¹⁴

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In Faulkner v. State, it was said, determination of an appropriate sentence involves the judicious balancing of many and oftentimes competing factors. . . [of which] primacy cannot be ascribed to any particular factor.¹⁶

We now turn to the facts of the case at bar. At the time appellee committed the crimes of forcible rape and robbery, he was an unmarried member of the United States Armed Forces

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Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study, 69 Yale L.J. 1454 (1960).

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445 P.2d 815, 823 (Alaska 1968).

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In Bear v. State, 439 P.2d 432, 436 (Alaska 1968) (footnote omitted), we said:

The determination of the exact period of time that a convicted defendant should serve is basically a sociological problem to be resolved by a careful weighing of the principle of reformation and the need for protecting the public.

In Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study, 69 Yale L.J. 1454 (1960), it is stated in part:

[T]o determine the appropriate type and degree of sanction to be applied, the sentencing authority must decide which aim is primarily to be implemented and the relative weight to be assigned to secondary aims.

stationed at Fort Richardson, near Anchorage, Alaska. Appellee was born in 1948, the youngest of eight children. His youth was spent on the family's dairy farm in Washington County, Maryland. He played basketball on the Boonsboro High School team, was a member of Future Farmers of America and the Boy Scouts. Appellee did not complete high school, having dropped out one month prior to graduation.¹⁸ After a series of varying types of employment, appellee was drafted into the United States Army in 1968. At sentencing, it was disclosed that appellee did not have any prior criminal record, was not a user of drugs, and was only a social drinker.

From the record that has been furnished, it appears that appellee and a companion picked up the prosecutrix at a downtown location in Anchorage. After driving the victim around in their car, appellee and his companion beat her and forcibly

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Appellee's commanding officer stated, prior to sentencing, that appellee was an excellent soldier, takes orders well, and was on the promotion list before his crimes.

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Appellee asserts he was forced to take this action because his father needed his help on the family dairy farm.

raped her four times. During this same period of time, the victim's money was removed from her purse. Upon completion of these events, the prosecutrix was permitted to leave the vehicle to the accompaniment of dire threats of reprisals if she attempted to report the incident to the police.

The presentence report which was furnished to the trial court prior to sentencing contains appellee's version of the rapes. According to appellee, he felt "that it wasn't rape as forcible and against her will on my part." As to his conviction of robbery, appellee states: "I found the money on the floor of the car afterwards and was planning on giving it back, but didn't get to see the girl." At the time of sentencing, appellee told the court that he "didn't direct any violence against the girl."

The Division of Corrections, in its presentence report, recommended appellee be incarcerated and parole be denied. The assistant district attorney who appeared for the state at the time of sentencing recommended that appellee receive concurrent seven-year sentences with two years suspended on the two rape convictions, and that the appellee be sentenced to a consecutive five-year term of imprisonment on the robbery conviction, and that this sentence be suspended and appellee be placed on

The prosecutrix was also forced to perform an act of fellatio with appellee's companion.

probation during this period of time. At the time of sentencing, a representative of the Division of Corrections recommended that appellee serve two years on each of the rape convictions and that appellee be sentenced to two years suspended with probation as to the robbery conviction. In his opinion, there was "an excellent possibility of . . . early parole." Counsel for appellee concurred in the Division of Corrections' recommendation. As was

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After the state made its recommendation, the following transpired:

THE COURT: I wish Mr. Tobey were -- were here. I would like to find out . . . why he makes that particular recommendation and I presume you don't know?

MR. FELTON: No, Your Honor, this is what I tried to explain to the Court earlier, why the -- defense counsel may specifically request Mr. Tobey's presence rather than my own.

MR. KERNAN [trial counsel for appellee]: I was not aware, Your Honor, that Mr. Tobey would be unavailable and . . . since this is -- I believe the sentence that's been recommended . . . it is a very vindictive sentence. . . . Under the circumstances of this case, I would like to have Mr. Tobey here to explain his reasoning.

. . . .

THE COURT: . . . I suppose everybody else being here, we might as well go ahead and pass the sentence. . . .

. . . .

MR. FELTON: I think, Your Honor, that primarily the State was concerned -- or appalled by the -- the apparent violence involved in this thing. I think this is probably the major reason that Mr. Tobey recommended these things that he's indicated to me, Your Honor.

indicated at the outset, the trial court imposed concurrent one-year terms of imprisonment and provided for parole at the discretion of the parole board.²¹ The trial judge further recommended that appellee be placed in a minimum security facility.

In imposing this sentence, the trial judge remarked that he was "sorry that the [military] regulations would not permit keeping [appellee] . . . in the service if he wanted to stay because it seems to me that is . . . a better setup for everybody concerned than putting him in the penitentiary."²²

At a later point in his remarks, the trial judge said:

Now as a matter of fact, I have sentenced you to a minimum on all 3 counts here but there will be no problem as far as I'm concerned for you to be paroled at the first day the Parole Board says that you're eligible for parole. . . . [If] the Parole Board should decide 10 days from now that you're eligible for parole and parole you, it's entirely satisfactory

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These were minimum sentences under the applicable statutes. Rape carries a potential range of imprisonment from 1 to 20 years while a conviction of robbery can result in imprisonment from 1 to 15 years.

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Collateral consequences flowing from an accused's conviction may be considered by the trial judge in arriving at an appropriate sentence. In addition to giving weight to the fact that military regulations prohibited appellee's retention in the service, the record further indicates that the trial judge also took into consideration the fact that appellee's conviction would result in his receiving an undesirable discharge from the military service.

with the court.

Exercising the appellate jurisdiction vested in this court by virtue of the provisions of AS 12.55.120(b), we express our disapproval of the sentence which was imposed by the trial court in the case at bar. In our opinion, the sentence was too lenient considering the circumstances surrounding the commission of these crimes. It further appears that several significant goals of our system of penal justice were accorded little or no weight by the sentencing court.

Forcible rape and robbery rank among the most serious

Supreme Ct. R. 21(f) requires that:

At the time of imposition of sentence the judge shall make a statement on the record explaining his reasons for imposition of the sentence.

The ABA recommends that when sentence is imposed the court

normally should state for the record in the presence of the defendant the reasons for selecting the particular sentence to be imposed. In the exceptional cases where the court deems it in the best interests of the defendant not to state fully in his presence the reasons for the sentence, the court should prepare such a statement for inclusion in the record

The basic reasons for this requirement are that a statement of the reasons by the sentencing judge should greatly increase the rationality of sentences, such a statement can be of therapeutic value to the defendant, and the statement can be of significance to an appellate court faced with the prospect of reviewing the sentence.

ABA Project on Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures, Standard 5.6 (ii) 269, 270-71 (Approved Draft, 1968).

crimes. In the case at bar, the record reflects that the trial judge explicitly stated, on several occasions, that he disbelieved appellee and believed the prosecutrix's version of what happened after she entered the vehicle which was occupied by appellee and his companion. Considering both the jury's and the trial judge's resolution of this issue of credibility, and the violent circumstances surrounding the commission of these dangerous crimes, we have difficulty in understanding why one-year concurrent sentences were thought appropriate.

Review of the sentencing proceedings leads to the impression that the trial judge was apologetic in regard to his decision to impose a sanction of incarceration. Much was made of appellee's fine military record and his potential eligibility for early parole. ²⁴ On the ~~other~~ ^{one} hand, the record is devoid of any trace of remorse on appellee's part. Seemingly all but forgotten in the sentencing proceedings is the victim of appellee's rapes and robbery. On the other hand, the record discloses that the trial judge properly considered the mitigating circumstance that the prosecutrix, who at the time did not know either appellee or his companion, voluntarily entered appellee's

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A military spokesman represented to the sentencing court that:

An occurrence such as the one concerned is very common and happens many times each night in Anchorage. Needless to say, Donald Chaney was the unlucky 'G.I.' that picked a young lady who told.

car. But the crux of our disapproval of the sentence stems from what we consider to be the trial judge's de-emphasis of several important goals of criminal justice.

In view of the circumstances of this record, we think the sentence imposed is not well calculated to achieve the objective of reformation of the accused. Considering the apologetic tone of the sentencing proceedings, the court's endorsement of an extremely early parole, and the concurrent minimum sentences which were imposed for these three serious felonies, we fail to discern how the objective of reformation was effectuated. At most, appellee was told that he was only technically guilty and minimally blameworthy, all of which minimized the possibility of appellee's comprehending the wrongfulness of his conduct.

We also think that the sentence imposed falls short of effectuating the goal of community condemnation, or the reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves. In short, knowledge of the calculated circumstances involved in the commission of these felonies and the sentence imposed could lead to the conclusion that forcible rape and robbery are not reflective of serious antisocial conduct. Thus, respect for society's condemnation of forcible rape and robbery is eroded and reaffirmation of

THE SUPREME COURT OF THE STATE OF ALASKA

ROY ANTHONY SCOTT,)
a/k/a ROY ANTHONY STROPKAI,)
)
Petitioner,)
)
v.) File No. 1968
)
STATE OF ALASKA,) O P I N I O N
)
Respondent.) [No. 1004 - March 1, 1974]

Petition for Review from the Superior Court of
the State of Alaska, Third Judicial District,
Anchorage.

Ralph E. Moody, Judge.

Appearances: Herbert D. Soll, Public Defender, and
Larry A. Jordan, Assistant Public Defender,
Anchorage, for Petitioner. John E. Havelock,
Attorney General, Juneau, Seaborn J. Buckalew,
Jr., District Attorney, and Louis Agi, Assistant
District Attorney, Anchorage, for Respondent.

Before: Rabinowitz, Chief Justice, Connor, Ex
Boochever, and Fitzgerald, Justices.

FITZGERALD, Justice.

This petition for review raises the question of the con-
stitutionality of a superior court pretrial order authorizing
broad prosecutorial discovery.

The petitioner Scott was arraigned in superior court
on an indictment charging him with rape. The court in conformity
to Rule 16(f) of the Alaska Rules of Criminal Procedure scheduled
a pretrial omnibus hearing. A few days before the hearing, the
respondent State of Alaska filed a motion for a sweeping discovery

1. AS 11.15.120.

order. Petitioner filed opposition to the motion, but his objections were overruled. The superior court granted respondent's motion and ordered petitioner to disclose:

- (1) the names and addresses of all prospective defense witnesses, other than defendant himself.
- (2) the production or inspection and copying of any written or recorded statements in defendant's possession or prospective defense or government witnesses, other than defendant himself.
- (3) advance notice of an alibi defense, together with information indicating the place or places defendant claims to have been and the names of witnesses upon whom he intends to rely.

Petitioner promptly sought interlocutory appellate review of the discovery order by way of a petition for review.

We granted the petition for review in this case because we concluded that postponement of appellate review until a final judgment may "result in injustice because of impairment of a legal right" and because "the order . . . sought to be reviewed is of such substance and importance as to justify deviation from the normal appellate procedure by way of appeal and to require the immediate attention of this court."²

In his petition for review, Scott claims error on the part of the trial court in several respects. He suggests that the court, in ordering the pretrial production of certain information not expressly provided for in Rule 16(c) of the Alaska Rules of Criminal Procedure, promulgated a new rule of criminal procedure. This is, he argues, constitutionally impermissible since article IV, section 15 of the Alaska constitution placed

2. Alaska App. R. 23(e), 24(a).

the rule-making authority in this court. Petitioner also claims that the discovery order infringes upon his privilege against compulsory self-incrimination under article I, section 9 of the Alaska constitution and the fifth and fourteenth amendments of the United States Constitution. Furthermore, he argues that the discovery order violates his right to effective confrontation and cross-examination secured by article I, section 11 of the Alaska constitution and the sixth and fourteenth amendments to the United States Constitution. Petitioner also advances one claim of procedural error. He argues that the superior court abused its discretion in making a discovery order which goes beyond the express provisions of Criminal Rule 16(c).

We find no merit in Scott's claim that the superior court, in ordering the production of certain information not expressly mentioned in Criminal Rule 16(c), effectively promulgated a new rule of criminal procedure and thereby usurped this court's constitutional rule-making authority. The record does not establish that the superior court intended to promulgate new rules to govern pretrial procedure in criminal

3. Alaska R. Crim. P. 16(c) provides:

(1) Non-Testimonial Identification Procedures.
A judicial officer may upon motion, for good cause shown, require the accused to do or submit to any or all of the following:

- (i) Appear in a line-up;
- (ii) Speak for identification by witnesses to an offense;
- (iii) Be fingerprinted;
- (iv) Pose for photographs not involving reenactment of a scene;
- (v) Try on articles of clothing;

(continued)

proceedings. Moreover, petitioner's reliance upon Lee v. State is misplaced. While in Lee we did observe that the "superior court has no responsibility or authority to promulgate rules of

3 (continued)

- (vi) Permit the taking of specimens of material under his fingernails;
- (vii) Permit the taking of samples of his blood, hair and other materials of his body which involve no unreasonable intrusion thereof;
- (viii) Provide specimens of his handwriting;
- (ix) Submit to a reasonable physical or medical inspection of his body.

(2) Reports or Statements of Experts. The trial court may require that the prosecuting attorney be informed of and permitted to inspect and to copy or photograph any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons which are intended by the defendant to be used at trial. Information obtained by the state under the provisions of this section shall be used only for cross-examination or rebuttal of defense testimony.

(3) Notice of Intent to Raise Insanity Defense. Following substantial compliance by the state with section (b) of this rule a defendant who intends to offer evidence of a defense of insanity shall inform the state of such intention at the time of plea or at such other time as may be designated by the trial court. The court may order the defendant to submit to psychiatric examination by a psychiatrist or psychologist selected by the court, and the report shall be made available to both parties. Notice of intent to raise a defense of insanity shall not be commented on by the prosecution at trial.

4. 374 P.2d 868 (Alaska 1962).

practice and procedure," the statement was not made in the context of a pretrial order by the superior court. In Lee the appellants contended that the trial court was in error for having failed to promulgate rules of procedure by which appeals could be taken from the magistrate's court. In the case before us now, the trial court was ruling upon a motion for discovery brought under existing rules of criminal procedure. Since the underlying facts of the Lee case are essentially different, its rationale is not applicable to the case at bar.

We also disagree with petitioner's contention that since the order in question exceeds the scope of materials discoverable under Criminal Rule 16(c), it constitutes an abuse of trial court discretion. Criminal Rule 16(c) permits the trial court, upon proper motion by the prosecution, to order the accused to submit to certain non-testimonial identification procedures, to allow discovery of experts' reports or statements and to require notice if the accused intends to raise insanity as a defense. The discovery order before us, however, goes beyond the material enumerated in the rule and orders the petitioner to produce the names and addresses of defense witnesses, written statements taken from defense and government witnesses, advance notice of an alibi defense, together with names of prospective alibi witnesses and information concerning the locations to be relied upon for alibi purposes.

5. Id. at 869.

In our opinion, broad latitude must be accorded a trial court in the conduct and management of pretrial procedures. This interpretation is in keeping with the spirit and purpose of discovery rules generally, and comports with the expressed term of Criminal Rule 16(a).

(a) Scope of Discovery. In order to provide adequate information for informed pleas, expedite trial, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protection of persons, effective law enforcement, and the adversary system. (emphasis added)

Reading sections (a) and (c) of Rule 16 together, we conclude that a ruling compelling the production of items not expressly mentioned in section (c) of the rule is within the "broad discretion of the trial court." We find no abuse of discretion merely because information not specifically included in the rule is ordered to be disclosed.

The most serious constitutional claim advanced by petitioner is that the broad prosecutorial discovery order⁶ contravenes his privilege against self-incrimination under the fifth and fourteenth amendments to the United States

6. Recently, the tension existing between prosecutorial discovery and the constitutional privilege against self-incrimination has received considerable attention from legal commentators. See, e.g., Everett, Discovery in Criminal Cases -- In Search of a Standard, 1964 Duke L.J. 477, 492-94, 503-05; Moran, Federal Criminal Rules Changes: Aid or Illusion for the Indigent Defendant?, 51 A.B.A.J. 64 (1965); Nakell, Criminal Discovery for the Defense and the Prosecution -- the Developing Constitutional Considerations, 50 N.C.L.Rev. 437, 479-516 (1972); Reznick, Justice

Constitution and article I, section 9 of the Alaska constitution.

In other words, we must determine whether petitioner has a constitutional right to refuse to disclose some or all of the evidentiary material required to be disclosed by the discovery order.

We begin our analysis by examining the historical development of criminal discovery in the context of the privilege against self-incrimination under the fifth amendment to the United States Constitution. The common law recognized no right

6. (continued)

Brennan and Discovery in Criminal Cases, 4 Rutgers-Camden L.J. 85 (1972); Symposium, Discovery in Federal Criminal Cases, 33 F.R.D. 47-128 (1965); Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U.L.Rev. 228 (1964); Wilder, Prosecution Discovery and the Privilege Against Self-Incrimination, 6 Am. Crim. L.Q. 3 (1967); Zagel and Carr, State Criminal Discovery and the New Illinois Rules, 1971, U. Ill. L. Forum 557 (1971); Annot., 45 A.L.R.3d 959 (1972); Annot., 96 A.L.R.2d 1224 (1964); Comment, Developments in the Law -- Discovery, 74 Harv. L.Rev. 940 (1961); Note, The Self-Incrimination Privilege: Barrier to Criminal Discovery?, 51 Calif. L.Rev. 135 (1963); Note, Prosecutorial Discovery Under Proposed Rule 16, 85 Harv. L.Rev. 994 (1972); 35 Colo. L.Rev. 290 (1963); 63 Colum. L.Rev. 361 (1963); 76 Harv. L.Rev. 838 (1963); 49 Ia. L.Rev. 176 (1963); 61 Mich. L.Rev. 987 (1963); 15 Stan. L.Rev. 700 (1963).

7. The fifth amendment to the United States Constitution provides in part:

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law

The fifth amendment has been made applicable to the states through the fourteenth amendment to the United States Constitution. Malloy v. Hogan, 378 U.S. 1, 12 L.Ed.2d 653 (1964).

8. Art. I, §9 of the Alaska constitution provides:

No person shall be compelled in any criminal proceeding to be a witness against himself.

of discovery in a criminal case by either the prosecution or the defendant. NOR was such a right said to exist under traditional concepts of due process.⁹ In recent years, however, several exceptions have emerged. The prosecution has an affirmative duty to disclose to an accused any information within its control which tends to negate defendant's guilt.¹⁰ It has now become well-settled in many jurisdictions that trial courts have broad discretionary power to order the prosecution to disclose to the defendant any relevant information in the possession or control of the prosecution.¹¹

Prosecutorial discovery was strongly condemned in early American jurisprudence. The United States Supreme Court in 1886 announced strong opposition to compulsory self-incrimination through discovery orders. In Boyd v. United States,¹² Mr.

9. Cicenia v. LaGay, 357 U.S. 504, 510, 2 L.Ed. 1523, 1529 (1958); State v. Thompson, 134 A.2d 266, 268 (Del. 1957); Commonwealth v. Bartolini, 13 N.E.2d 382, 386 (Mass. 1938), cert. denied, 304 U.S. 565, 83 L.Ed. 1531 (1938); State v. Goldberg, 134 S.E.2d 334, 340-41 (N.C. 1964).

10. Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215 (1963); United States ex rel. Butler v. Maroney, 319 F.2d 622, 627 (3d Cir. 1963); People v. Hoffman, 203 N.E.2d 873 (Ill. 1965).

11. State v. Coon, 2 Alaska L.J. No. 1 at 3 (Super. Ct. 1964); State ex rel. Polley v. Superior Court of Santa Cruz County, 302 P.2d 263, 265 (Ariz. 1956); People v. Riser, 305 P.2d 1, 12 (Cal. 1956), cert. denied, 358 U.S. 646, 3 L.Ed.2d 568 (1959); State v. Haas, 51 A.2d 647, 649 (Md. 1947); Commonwealth v. Bartolini, 13 N.E.2d 382, 385 (Mass. 1938), cert. denied, 304 U.S. 565, 83 L.Ed. 1531 (1938); People v. Johnson, 97 N.W.2d 739, 741-43 (Mich. 1959); People v. Calandrillo, 215 N.Y.S.2d 364, 366 (Suffolk County Ct. 1961); State v. Leland, 227 P.2d 785, 793 (Ore. 1961), aff'd, 343 U.S. 790, 793, 96 L.Ed. 1302 (1952).

12. 116 U.S. 616, 29 L.Ed. 746 (1886).

Justice Bradley, speaking for the court, stated:

Now it is elementary knowledge that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property. And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom. 13

Similar views have since been expressed by Professor Wigmore:

It follows that the production of documents or chattels by a person (whether ordinary witness or party witness) in response to a subpoena, or to a motion to order production, or to other form of process relying on his moral responsibility for truth-telling, may be refused under the protection of the privilege [against self-incrimination]. This 14 is universally conceded. (emphasis in original)

As recently as 1967, a federal district court observed that the fifth amendment privilege against self-incrimination operated to bar prosecutorial discovery of evidence to be used in the government's case-in-chief. 15

13. Id. at 631-32, 29 L.Ed. at 751 (footnote omitted).

14. 8 J. Wigmore, Evidence §2264 (McNaughton rev. 1961) (footnote omitted).

15. In *United States v. Fratello*, 44 F.R.D. 444 (S.D.N.Y. 1967), the trial court declined to condition defense discovery upon the defendant's provision to the prosecution of documentary evidence under the former's control. The court concluded that "the right of a defendant in a criminal case to remain silent in face of accusations against him, even at the discovery stage, seems clear."

The constitutional questions arising out of prosecutorial discovery are reflected in Rule 16(c) of the Federal Rules of Criminal Procedure. That rule by its terms does not directly compel the defendant to provide prosecutorial discovery. Rather, it permits the court to condition discovery when sought by the defense by requiring the defense to make a reciprocal exchange with the government.¹⁶ Any possible conflict with fifth amendment rights is thought to be avoided on theories of implied consent or waiver by the defendant. Thus the Federal Rules of Criminal Procedure have preserved without resolving the constitutional questions raised by

16. Fed. R. Crim. P. 16(c) provides:

(c) Discovery by the Government. If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

prosecutorial discovery.

Possibly one of the greatest influences in the development of new concepts of criminal discovery generally and prosecutorial discovery in particular has been Justice Roger J. Traynor, formerly Chief Justice of the Supreme Court of California. Writing for that court in 1962, Justice Traynor upheld broad prosecutorial discovery in Jones v. Superior Court of Nevada County.¹⁸ The defendant in the case had been charged with rape. He asserted an affirmative defense of impotency. The Supreme Court of California upheld the prosecution's right to discover the names of witnesses upon whom the defendant intended to rely in advancing his affirmative defense as well as any relevant medical reports and x-rays.¹⁹ Justice Traynor reasoned that prosecutorial discovery of information relating to issues raised by the affirmative defense

17. The Advisory Committee on Rules suggested:

"Mutual disclosure so far as consistent with the privilege against self-incrimination would seem as appropriate as in civil cases." Fed. R. Crim. P. 16, 18 U.S.C.A. Rule 16, at 19 (1969).

18. 372 P.2d 919 (Cal. 1962).

19. For critical constitutional commentary upon the holding reached in Jones, supra n. 19, see Smith and McCollom, Counterdiscovery in Criminal Cases: Fifth Amendment Privileges Abridged, 54 A.B.A.J. 256 (1968); Wilder, Prosecution Discovery and the Privilege Against Self-Incrimination, 6 Am. Crim. L.Q. 3 (1967); Note, 63 Colum. L. Rev. 361 (1963); Note, 25 Stan. L. Rev. 700 (1963).

does not violate the privilege against self-incrimination. Nor to this extent does it violate the attorney-client privilege. It simply requires petitioner to disclose information that he will shortly reveal anyway. Such information is discoverable. 20

Justice Traynor has discussed the holding in Jones in a law review article and has further explained his reasoning that prosecutorial discovery merely accelerated the timing of the defendant's strategic mid-trial decisions.

[Notice-of-alibi] statutes have been sustained over the objection that they violate constitutional privileges against self-incrimination, for they do not compel the defendant to reveal or produce anything, but merely regulate the procedure by which he presents his case. We found this reasoning persuasive. The trial court's order that the defendant reveal the names of witnesses he intended to call and produce reports and x-rays he intended to introduce in evidence simply required him to disclose information that he would shortly reveal in any event. He was thus required only to decide at a point earlier in time than he would ordinarily have to whether to remain silent or to disclose the information. He lost only the possible tactical advantage of taking the prosecution by surprise at the trial, an advantage that in any event would easily have gone for naught given the probability that the trial court would have granted the prosecution a continuance to prepare a rebuttal. 21

In the same discussion, Justice Traynor went on to analogize criminal discovery to civil discovery in which pretrial discovery is a "two-way street" for both litigants.

20. 372 P.2d at 922.

21. Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U. L.Rev. 228, 247 (1964) (footnote omitted).

Likewise, nothing is lost of the privilege, and much is gained in orderly procedure, if the defendant is required to give advance notice of the evidence he intends to offer in defense after he has himself received pretrial discovery of the prosecution's case. He can hardly demand pretrial discovery and still insist on reserving his own surprises for the trial. The good coin of discovery gains in value when it is fairly exchanged at the appropriate procedural hours.

. . . .

The Jones case, indicating the two-sidedness of the discovery process, suggests that we may be on the way to abandoning our preoccupation with surprise tactics just as we have substantially abandoned the technicalities of pleading that in their time were also overvalued. 22

Seven years after Jones the California Supreme Court²³ decided People v. Pike. In that case, a prosecution for first degree murder, the court held that the state was entitled to pretrial discovery of the names, addresses and expected testimony of defense witnesses. But within a year, the California Supreme Court retrenched somewhat from its leading position on prosecutorial discovery. In Prudhomme v. Superior Court of Los Angeles County,²⁴ another prosecution for murder, a trial court was restrained from enforcing a discovery order which would have compelled the defendant's attorney to disclose to the

22. Id. at 248, 250.

23. 455 P.2d 776 (Cal. 1969).

24. 466 P.2d 673 (Cal. 1970).

prosecution the names, addresses and expected testimony of
defense witnesses. Concluding that the "trial court failed to
inquire into the incriminatory nature of the information sought,"²⁵
the Supreme Court of California was apparently influenced by the
limited and conditional nature of the provisions of Rule 16(c)
of the Federal Rules of Criminal Procedure.²⁶ The court may also
have been cautiously anticipating a negative decision by the
United States Supreme Court on the constitutionality of
prosecutorial discovery.²⁷ Thus having substantially advanced the
concept of prosecutorial discovery, the California court in
Prudhomme, after carefully reviewing the policy consideration
underlying the privilege against self-incrimination, retreated
from its vanguard position.

Ironically perhaps the case which may have influenced the
California court to draw back in Prudhomme was decided the other

25. 466 P.2d at 678.

26. Regarding Fed. R. Crim. P. 16(c), the court stated:

Thus, federal rule 16, subdivision (c) is limited to the "reasonable" disclosure of physical evidence; there is no provision authorizing disclosure of names, addresses or expected testimony of defense witnesses.

Id. at 675-76 (footnote omitted.)

27. Regarding the forthcoming United States Supreme Court decision on notice-of-alibi statutes, the court observed:

Finally, the United States Supreme Court recently granted certiorari in Williams v. Florida (C.A. Fla.) 224 So.2d 406, which had upheld Florida's alibi statute against the claim that it violated the accused's Fifth Amendment rights.

466 P.2d at 676.

way by the United States Supreme Court. The Court in
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Williams v. Florida 29 upheld a Florida notice-of-alibi rule
against a claim of fifth amendment privilege, adopting the
rationale of Jones v. Superior Court of Nevada County. In that
case, the defendant in a robbery prosecution challenged the
constitutionality of a Florida rule of criminal procedure which
compelled him in advance of trial to provide the prosecution with
the names and addresses of prospective alibi witnesses as well as
information pertaining to the place where he claimed to have been.
Rejecting the defendant's fifth amendment claim, the Supreme
Court cited Jones v. Superior Court of Nevada County and
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Justice Traynor's law review article. Speaking for six
members of the court, Justice White concluded that:

However "testimonial" or "incriminating" the
alibi defense proves to be, it cannot be
considered "compelled" within the meaning of
the Fifth and Fourteenth Amendments. 31

Accepting Justice Traynor's rationale in Jones that pretrial
prosecutorial discovery merely accelerated the defendant's mid-

28. 399 U.S. 78, 26 L.Ed.2d 446 (1970).

29. For state cases that have upheld notice-of-alibi
defense and alibi witnesses requirement, see State v. Stump,
119 N.W.2d 210, 219-20 (Iowa), cert. denied, 375 U.S. 853, 11 L.Ed.2d
80 (1963); State v. Baldwin, 221 A.2d 199, 204-05 (N.J.), cert.
denied, 385 U.S. 980, 17 L.Ed.2d 442 (1966); People v. Rakiec, 23
N.Y.S.2d 607, 612-13 (App. Div. 1940); Commonwealth v. Vecchiolli,
208 A.2d 96, 99 (Pa. Super. 1966).

30. 399 U.S. at 83, n. 13, 26 L.Ed.2d at 451.

31. Id. at 84, 26 L.Ed.2d at 451.

trial strategy decisions, Justice White reasoned that:

[T]he notice-of-alibi rule by itself in no way affected petitioner's crucial decision to call alibi witnesses or added to the legitimate pressures leading to that course of action. At most, the rule only compelled petitioner to accelerate the time of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial. Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself. 32

The holding of the court squarely upheld the prosecution right in advance of trial to obtain the names of witnesses and the location of defendant's alibi against his claim of self-incrimination.

We decline to hold that the privilege against compulsory self-incrimination guarantees the defendant the right to surprise the State with an alibi defense. 33

Justice Black, with whom Justice Douglas concurred, forcefully dissented from the majority's holding on the prosecutorial discovery question. According to Justice Black, the Florida notice-of-alibi rule violated the defendant's fifth amendment privilege against self-incrimination, and the majority's decision constituted a dangerous move towards the

32. Id. at 85, 26 L.Ed.2d at 452.

33. Id. at 86, 26 L.Ed.2d at 452.

erosion of a constitutional scheme which imposes upon the prosecution the complete burden of proof. Justice Black reasoned:

Although this case itself involves only a notice-of-alibi provision, it is clear that the decision means that a State can require a defendant to disclose in advance of trial any and all information he might possibly use to defend himself at trial. This decision, in my view, is a radical and dangerous departure from the historical and constitutionally guaranteed right of a defendant in a criminal case to remain completely silent, requiring the State to prove its case without any assistance of any kind from the defendant himself. 34

The dissenting justices disputed the central premise upon which the court based its holding.

The core of the majority's decision is an assumption that compelling a defendant to give notice of an alibi defense before a trial is no different from requiring a defendant, after the State has produced the evidence against him at trial, to plead alibi before the jury retires to consider the case That statement is plainly and simply wrong as a matter of fact and law, and the Court's holding based on that statement is a complete misunderstanding of the protections provided for criminal defendants by the Fifth Amendment and other provisions of the Bill of Rights. 35

The rationale of Justice Black's objection to the majority's reasoning is that a defendant's "pretrial decision cannot be analyzed as simply a matter of 'timing,' influenced by the same factors operating at trial itself." ³⁶ Moreover, Justice

34. Id. at 107-08, 26 L.Ed.2d at 480.

35. Id. at 108, 26 L.Ed.2d at 480-81 (footnote omitted).

36. Id. at 110, 26 L.Ed.2d at 482.

Black expressed his concern that the "timing" rationale employed by the Court would predictably be applied to justify the prosecutorial discovery of other information in the defendant's possession.

The rationale of today's decision is in no way limited to alibi defenses, or any other type or classification of evidence. The theory advanced goes at least so far as to permit the State to obtain under threat of sanction complete disclosure by the defendant in advance of trial of all evidence, testimony, and tactics he plans to use at that trial. In each case the justification will be that the rule affects only the "timing" of the disclosure, and not the substantive decision itself. This inevitability is clearly revealed by the citation to *Jones v. Superior Court* 37

A substantial number of states in addition to Florida have by rule or statute imposed upon the defendant an obligation to disclose his defenses to the prosecution in advance of trial. Almost without exception provisions of this type have been upheld. In reaching that result the courts have grounded their decision on a variety of reasons. Some of the decisions would seem to apply notice-of-alibi provisions without discussing the constitutional considerations. *E.g.*, *State v. Baldwin*, 221 A.2d 199, 204-05 (N.J. 1966); *State v. Thayer*, 176 N.E. 656, 657 (Ohio 1931); *Commonwealth v. Vecchiolli*, 224 A.2d 96, 99 (Pa. Super. 1966); *State v. Kopacka*, 51 N.W.2d 495, 498 (Wis. 1952). Still other decisions do not extensively discuss or analyze the constitutional problems but subordinate the issues to matters of procedure. *E.g.*, *State*

37. *Id.* at 114, 26 L.Ed.2d at 484 (citation omitted).

v. George, 414 P.2d 730, 733 (Ariz. 1966); People v. Shulenberg, 112 N.Y.S.2d 374, 375 (App. Div. 1952).

One state decision which does squarely face the constitutional issues arising out of a notice-of-defense statute is State ex rel. Sikora v. District Court of the Thirteenth Judicial District, 462 P.2d 897, decided by the Supreme Court of Montana in 1969. Sikora arose under the following circumstances. Under Montana law the defendant in a criminal case is required to give advance notice of his intention to interpose the defenses of insanity, self-defense or alibi and to file with the clerk names and addresses of supporting witnesses. Marie Sikora and two others were charged with murder. After an unfavorable ruling on a pretrial motion, the defendants filed petitions with the Supreme Court of Montana challenging the constitutionality of the statute. Addressing itself first to the notice provision of the statute, the court found no apparent constitutional infirmity. This was so, the court reasoned, since merely giving notice of an intended defense at a procedural stage is ordinarily not
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incriminating. Turning to the statutory requirement compelling pretrial disclosure of supporting witnesses, the court concluded

38. Justice Haswell dissented in part contending that required disclosure of claims of self defense or insanity violated the constitutional privilege against self incrimination.

that not all information obtained from a defendant is privileged
under the fifth amendment.³⁹ Nevertheless, the court recognized
that the application of the statute might itself lead to an
invasion of the privilege against self-incrimination. Essentially,
the court's holding comes down to this: while much of the statute
requiring a defendant to make a pretrial disclosure of his defense
and his witnesses may not be on its face unconstitutional, the use
or application of the statute may lead to an unconstitutional result.
The principal significance of Sikora is that it points out
the difficulty in upholding disclosure provisions when courts do
attempt to deal directly with constitutional issues of self-
incrimination arising out of compelled pretrial disclosure.

The rather extended review which we have taken furnishes
a backdrop against which we are prepared to consider the question
in the light of our own state's legal history and our own state's
constitution.

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In Baker v. City of Fairbanks, we acknowledged our
responsibility to depart whenever necessary from constitutional
interpretations enunciated by the United States Supreme Court
and to develop rights and privileges under the Alaska constitution
in accordance with our own unique legal background. In particular,
we stated:

39. This has been widely recognized. E.g., Gilbert v. California, 388 U.S. 263, 18 L. Ed.2d 1178 (1967); United States v. Wade, 388 U.S. 218, 18 L. Ed.2d 1149 (1967); Schmerber v. California, 384 U.S. 757, 16 L. Ed.2d 908 (1966); Roberts v. State, 458 P.2d 340 (Alaska 1969).

40. 471 P.2d 386 (Alaska 1970).

While we must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court's interpretation of the Fourteenth Amendment, we are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage. We need not stand by idly and passively, waiting for constitutional direction from the highest court of the land. Instead, we should be moving concurrently to develop and expound the principles embedded in our constitutional law. 41

We are not bound to follow blindly a federal constitutional construction of a fundamental principle if we are convinced that the result is based on unsound reason or logic.

We agree with the general principle that the court has a substantial interest in reducing the element of surprise in criminal proceedings. So to this extent at least we must be concerned with the constitutional administration of criminal justice as well as with efficient management of prosecutions and other trial activities. However, we share Justice Black's concern for the integrity of the privilege against self-incrimination and agree with his conclusion that the "timing" rationale employed by the United States Supreme Court in Williams v. Florida to justify pretrial prosecutorial discovery is unpersuasive.

It is our view that a defendant's mid-trial strategy choices are not identical to his pretrial decisions; nor are the

41. Id. at 401-02 (footnote omitted).

problems and opportunities contemplated by an accused in formulating the course of action to be followed during the presentation of his defense at trial identical to the same considerations before trial. The weakness of this "timing" rationale has been accurately pointed out by at least one commentator:

But Justice White's analysis--which equates the defendant's at-trial choice, either to open a source of potentially incriminating information or to forego the opportunity to present a defense, with a parallel choice before trial--confuses one issue and begs a second. Of course, there is some similarity between defendant's pretrial and at-trial choices: in each case the defendant must weigh his critical need to produce exculpatory evidence against the risks of revealing incriminating information. But because of the prosecutor's heavy burden of proof, the defendant is best advised not to open up any source of potentially adverse information unless he feels that the state has in all likelihood proved its case; and it is only after the prosecutor has presented his evidence in court that the defendant can adequately make this judgment. By contrast, there is no way the defendant can know before trial the actual strength of the evidence against him as it will appear to the trier of fact, even if he has himself benefited from extensive discovery; witnesses' testimony under oath and cross-examination may radically depart from their versions of the events as given to the police or defense counsel prior to trial. 42

Our form of government has imposed an extraordinary burden of proof upon the state in criminal litigation.

42. Note, Prosecutorial Discovery Under Proposed Rule 16, 85 Harv. L.Rev. 994, 1007-1008 (1972) (footnote omitted).

We think that the appropriate constitutional analysis is not the mere balancing of the state's interests in facilitating efficient law enforcement with the interest of the citizenry in maintaining

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maximum liberty. As Justice Black observed:

A criminal trial is in part a search for truth. But it is also a system designed to protect "freedom" by insuring that no one is criminally punished unless the State has first succeeded in the admittedly difficult task of convincing a jury that the defendant is guilty. That task is made more difficult by the Bill of Rights, and the Fifth Amendment may be one of the most difficult of the barriers to surmount. The Framers decided that the benefits to be derived from the kind of trial required by the Bill of Rights were well worth any loss in "efficiency" that resulted. 44

43. Cf. Baker v. City of Fairbanks, 471 P.2d 386, 394 (Alaska 1970):

Substantial reasons of policy must play an important part in any disposition of [the question whether petty offenses fall within the right to a jury trial]. These naturally divide themselves into two major groups. On the one hand, we have considerations of convenience or expediency for the state and its legal subdivisions. It imposes a certain burden upon the machinery of government to make every offense triable by jury. . . .

The argument from expediency contains inherent defects. If an individual right is vested by the Constitution, the overriding demands of governmental efficiency must be of a compelling nature and must be identifiable as flowing from some enumerated power. To allow expediency to be the basic principle would place the individual constitutional right in a secondary position, to be effectuated only if it accorded with expediency. (footnote omitted)

44. Williams v. Florida, 399 U.S. at 113-14, 26 L.Ed.2d at 484 (concurring and dissenting opinion).

Nor are we convinced that discovery in criminal proceedings is completely analogous to discovery in civil litigation; pretrial criminal discovery is not a "two-way street." The analogy to civil discovery fails for a number of reasons. A criminal proceeding from its very inception is quite unlike civil litigation. There is ordinarily available to the prosecution substantial and effective avenues of discovery, such as the investigative resources of the police, access to official records, the power to compel testimony by way of grand jury subpoena which are not equally at the hand of the accused. Even more, as Justice Peters noted in his dissent in Jones v. Superior Court:

The simple fact is that our system of criminal procedure is founded upon the principle that the ascertainment of the facts is a "one-way street." It is the constitutional right of the defendant, who is presumed to be innocent, to stand silent while the state attempts to meet its burden of proof, that is, to prove the defendant's guilt beyond a reasonable doubt. (emphasis in original) 45

In our examination of the constitutional issues we found difficulty in accepting the reasoning of Jones v. Superior Court of Nevada County⁴⁶ and Williams v. Florida⁴⁷. The dissenting opinions of Justice Peters in Jones and Justice Black

45. Jones v. Superior Court of Nevada County, 372 P.2d 919, 924 (Cal. 1962) (dissenting opinion). Similarly, in Prudhomme v. Superior Court of Los Angeles County, 466 P.2d 673, 678 (1970) (concurring opinion), Justice Peters stated:

Discovery is not a "two-way street" because of the constitutional rights of defendants not accorded the prosecution

46. 372 P.2d 919 (Cal. 1962).

47. 399 U.S. 78, 26 L.Ed.2d 466 (1970).

in Williams seem to us more logical and better reasoned.

We are therefore persuaded to interpret article I, section 9, of the Alaska constitution more broadly than the United States Supreme Court construed the fifth amendment in Williams. We hold that the privilege against compelled self-incrimination under the Alaska constitution prohibits extensive pretrial prosecutorial discovery in criminal proceedings.⁴⁸

The principles we choose to follow in deciding whether or not compelled disclosure of defenses may undermine the privilege against self-incrimination involve a three-fold test: Is the evidence testimonial; is it incriminating; and is it compelled? Applying this three part rule to the court's discovery order in the case now before us leads to the conclusion that the order is in a large part constitutionally impermissible.

The discovery order directs petitioner to produce "the names and addresses of all prospective defense witnesses, other than the defendant himself," including "the names of [alibi] witnesses upon whom he intends to rely."

48. At least one legal commentator construes the privilege against self-incrimination under the fifth amendment to the United States Constitution in a similar manner.

. . . [T]he policies inherent in the fifth amendment privilege against self-incrimination indicate that the prosecutorial discovery provisions of the proposed amendment to [federal criminal] Rule 16 are unconstitutional and should be rejected . . . [and] that the contention that increased defense discovery must be dependent upon increased prosecutorial discovery exaggerates the risk of defense discovery and is unpersuasive.

Note, Prosecutorial Discovery Under Proposed Rule 16, 85 Harv. L.Rev. 994 (1972).

The requirement that petitioner produce a list of names and addresses of witnesses meets the testimonial or communicative criterion of the constitutional analysis. That is, a document containing such facts transmitted from one party to another constitutes a communication of cognizable information from one source to another. Secondly, we are of the opinion that the list of names of prospective witnesses may, at least in some instances, tend to be incriminating. Although the list might not appear to be incriminating on its face, certain of the persons identified in such a list may be known felons, perjurers, accomplices, co-defendants, or individuals under suspicion or police surveillance. Moreover, the police may possess additional incriminating information about some of the witnesses and an accused's reference to such persons may tend to arouse suspicion about his relationship with the witness or may tend to implicate him in the criminal activities of such witness.

The incriminating nature of requiring a defendant to disclose the names and addresses of his witnesses prior to trial may be more readily understood if placed in another context. We doubt, for instance, whether any court would uphold a statute or rule which would require the defendant to make such disclosure to the police at the station house. It can be said with assurance that such a procedure would be universally found to be a rank violation of the defendant's privilege against self-incrimination. There are, of course, important substantive

differences between the investigatory stage of a criminal proceeding and the point of pretrial procedure. Our purpose in using the example is to make clear the incriminating nature of the disclosure. However, we feel the stage of the proceedings is irrelevant to the analysis of this constitutional privilege. The fundamental right not to incriminate one's self should apply at every stage of criminal inquiry or proceedings regardless of judge-made exclusionary or evidentiary rules. As Justice Erwin noted in his concurring opinion in McConkey v. State:

The privilege extends not only to answers that would in themselves support a conviction but also to those which might furnish "a link in the chain of evidence" leading to a conviction. 49

Finally, we agree with petitioner's contention that the names and addresses of the witnesses would by the terms of the order be "compelled" from him in a constitutional sense. Since the production of a list of names and addresses of witnesses is testimonial in nature, incriminating, and compelled by court order, we hold that this portion of the superior court's discovery order violates petitioner's privilege against self-incrimination under article I, section 9, of the Alaska constitution.

The discovery order next commands "the production or inspection and copying of any written or recorded statements in

49. 504 P.2d 823, 826 (Alaska 1972) (footnote omitted).

defendant's possession of prospective defense or government witnesses" Again, we are of the view that written or recorded statements are "testimonial" or "communicative" in nature. Nor do we think it inconceivable that some, although not necessarily all, of such statements will be incriminating and will tend to furnish a link in the chain of evidence leading to a conviction. The potential incriminating nature of such statements was recognized by the Supreme Court of California in Prudhomme v. Superior Court:

The concerns which lead us to the conclusion that compelled disclosure of defense witness names prior to trial may tend to incriminate apply with greater force to disclosure of witness statements. For example, a defense witness in a rape prosecution might be prepared to testify, as a "last resort", that other forms of criminal abuse but not rape occurred. 50

As in the case of the list of names and addresses of witnesses, we conclude that the witness statements are being "compelled" in a constitutional sense. Indeed, we are of the opinion that among the species of information sought to be discovered by respondent, disclosure of pretrial recorded statements of defense witnesses presents the most serious infringement upon petitioner's privilege against self-incrimination. Hence, we hold that this section of the superior court's discovery order is unconstitutional under article I, section 9 of our constitution.

50. See Prudhomme v. Superior Court of Los Angeles County, 466 P.2d 673, 677 (Cal. 1970).

Finally, the discovery order requires petitioner to produce "advance notice of an alibi defense, together with information indicating the place or places defendant claims to have been" As with the list of witnesses' names, addresses and recorded statements, information going to alibi is, in our opinion, "communicative" or "testimonial." Again, the information is verbal rather than physical, direct rather than indirect, and immediately cognizable. Documents containing written information are simply not fingerprints, voice samples, physical appearances or line-up identifications. Additionally, for the reasons set forth above, we conclude that the information commanded by this portion of the discovery order is "compelled" in a constitutional sense from petitioner. And we are of the view that information pertaining to an alternate location where an accused claims to have been tends to be uncriminating and may provide the state with another "link" in its chain of evidence. The information sought could be particularly incriminating if the state were able to demonstrate that no one else in such alternative location had seen the accused during the relevant time period. Further, compelled disclosure of the place the defendant claims to have been is as constitutionally infirm as coerced disclosure of witnesses' names, for it may serve to identify the witnesses. Often the place a defendant will specify will be a residence or a place of business, and in many instances the residents of the home or the proprietor of the place of business will have been present. These persons may be able to provide the police with information probative of the

defendant's guilt--information the police might never have found but for the compelled disclosure.

It is no answer to say that the defendant would have to disclose the same facts at trial anyway if he intended to rely on an alibi defense, for the state's case may be so weak that the defendant will choose not to expose himself to further criminal liability by revealing incriminating evidence which was nonetheless exculpatory of the crime for which he stands charged. Hence, we hold that the portion of the superior court's order which commands the production of alibi information concerning the place or places the accused claims to have been also offends petitioner's privilege against self-incrimination under the Alaska constitution.

Whether the mere notice of an alibi defense tends to be incriminating to an accused, however, is more questionable. We find it difficult to conceive how a notice of this particular defense, standing by itself, might tend to be incriminating. Nor has petitioner persuasively demonstrated to us how such notice alone would disclose the substance of his defense theory or any incriminating weaknesses or inconsistencies therein. Rather, we are of the view that the advance notice of an alibi defense is in the nature of any pretrial plea, much like a plea of "not guilty." We find nothing incriminating about this inquiry. Accordingly, we hold that the portion of the superior court's discovery order which calls upon petitioner to furnish respondent with advance notice of an alibi defense does not violate article I, section 9, of the Alaska constitution.⁵¹

51. We do not, however, mean to express our view of the constitutionality of portions of Criminal Rule 16(c) or other pretrial prosecutorial discovery orders not presently before us.

We do not believe that our decision in the instant case will leave respondent in a disadvantaged posture during future prosecutions. Certainly in the past, the state has experienced no substantial inability to conduct prosecutions without the benefit of extensive pretrial discovery. We anticipate that it will continue to perform as effectively in the future. In the event that the state should be unfairly surprised or prejudiced at trial by unexpected defense witnesses, statements or theories, we assume that the trial courts will exercise sound discretion in the regulation of trial proceedings and grant the state a continuance or other appropriate remedy. We recognize that in some cases this may result in delays and inconvenience at trial, but we are not prepared to exchange a fundamental constitutional right for expediency.

We vacate the superior court's pretrial order and
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remand the case for further proceedings.

52. Due to our holdings and disposition in this petition for review, we decline to reach petitioner's claim that the discovery order violated his right to effective confrontation and cross-examination under article I, section 11 of the Alaska constitution or the sixth and fourteenth amendments to the United States Constitution.

THE SUPREME COURT OF THE STATE OF ALASKA

MAX RAY MARTIN, RICHARD CARL)
SNYDER, ALOYISUS STEPHAN)
FABIAN,)

Appellants,)

v.)

STATE OF ALASKA,)

Appellee.)

File No. 1785

O P I N I O N

[No. 983 - January 2, 1974]

Appeal from the Superior Court of the State of
Alaska, Third Judicial District, Anchorage,
C. J. Occhipinti, Judge.

Appearances: Herbert D. Soll, Public Defender,
and Larry A. Jordan, Assistant Public Defender,
Anchorage, for Appellants. John E. Havelock,
Attorney General, Juneau, Seaborn J. Buckalew,
Jr., District Attorney, and Stephen G. Dunning,
Assistant District Attorney, Anchorage, for
Appellee.

Before: Rabinowitz, Chief Justice, Connor, Erwin,
Boochever, and Fitzgerald, Justices.

FITZGERALD, Justice.

These cases come to us as a consolidated appeal seeking
declarations of the rights of the defendant in criminal proceedings
to bail under the constitution and laws of Alaska and the
constitution of the United States. Although the factual
circumstances of each case are somewhat different, all three
cases challenge the concept of preventive detention.

On June 7, 1972, appellant Richard Snyder was arraigned
in the superior court on a charge of forgery. At the time of

this arraignment, Snyder was free on bail following three in-
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dictments issued previously on other charges.

At his arraignment and at a later hearing for plea, Snyder requested the court to set bail on the forgery charge. The trial court refused to set bail finding that Snyder was "a danger to society." On August 10, 1972, a notice of appeal was filed on the decision denying bail. However, on November 9, 1972, the court on the motion of the prosecutor dismissed the forgery
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charge against Snyder.

Appellant Max Martin was arraigned August 3, 1972 in the superior court on a petition to revoke probation. Almost two years earlier, Martin had been convicted of larceny in a building. For that offense he received a five-year sentence, but four years were suspended upon conditions of probation.

At his arraignment and at a hearing four days later, Martin requested the court to set bail for his release pending the revocation hearing. The court refused to set bail, reasoning that there was a high probability of truth in the allegations, and that it was within the court's discretion to deny bail after

1. The appellant was charged in a four-count federal indictment for conspiracy, robbery, and possession of firearms by a convicted felon, a one-count Alaska indictment for burglary not in a dwelling, and a nine-count Alaska indictment for burglary not in a dwelling. Both state indictments postdated the alleged date for commission of the forgery.

2. On September 14, 1972, Snyder filed a motion pro se with this court requesting release on his own recognizance. By order dated November 17, 1972, Justice Boochever denied the motion on the basis that the intervening dismissal of charges rendered the question moot.

conviction.

Notice of appeal from the denial of bail was filed on August 10, 1972. On September 18, 1972, Martin's probation was revoked, and he was ordered to serve the remaining four years on his larceny conviction.

Appellant Aloyisus Fabian was arraigned in the superior court on May 18, 1972, on a charge of burglary not in a dwelling. Following arraignment, he was released on his own recognizance to participate in the Salvation Army alcoholic rehabilitation program. On May 25, 1972, the state moved that Fabian's recognizance release be revoked, and that bail be set at \$500 because he was no longer participating in the Salvation Army program. Fabian, through his counsel, admitted violating the conditions of his release but requested to be released again on recognizance, contending that his financial status would make any bail amount prohibitive.

Rejecting the suggestion that Fabian re-enroll at the Salvation Army, the court offered to release him to the custody of the Anchorage Native Program for Alcoholic and Drug Abuse. Fabian's counsel agreed to attempt to enroll him in the native program, and the appellant was incarcerated in the meantime. Attempts to enroll him in the native program failed. Since his counsel did not reapply for bail, the appellant remained in jail until his trial.

Notice of appeal from the ruling of the superior court was filed August 10, 1972. On October 3, 1972, Fabian appeared

in superior court and was convicted upon his plea of guilty and was sentenced to a term of one year of confinement.

The appellants claim a substantive right to bail arising from the Alaska Bail Reform Act, from Article I, sections 11 and 12 of the Alaska Constitution, and from the eighth amendment of the United States Constitution.

We cannot ignore, however, the preliminary procedural difficulties which these cases present. In each case before us, it is argued that the issues arising on appellant's application for bail have been mooted by either a subsequent dismissal, a conviction, or a revocation of probation. An application for review of an order of the trial court denying bail should be promptly filed. The Alaska procedures for review of a denial for bail are designed to ensure speedy consideration at the appellate level. Although in this appeal the slower appellate

3. AS 12.30.010 et seq.

4. See App. R. 23, 24. The need for rapid review of bail orders is also reflected in the Alaska Bail Reform Act of 1966, AS 12.30.030:

" (a) A person who remains in custody after a review provided for in §20(f) of this chapter may move the court having original jurisdiction over the offense to amend the order. The motion shall be determined promptly.

(b) When a court denies a motion under (a) of this section or conditions of release have been imposed by the court having original jurisdiction over the offense, an appeal may be taken to the court having appellate jurisdiction over the court denying the motion or imposing the conditions subject to the rules of the Supreme Court of Alaska, and the District Court Rules of Criminal

(continued)

process was utilized, we undertake to consider the substantive claims raised by appellants because they involve important recurring issues of law which may be capable of evading review.⁵

Appellants would have us interpret the eighth amendmant⁶ of the federal constitution to create a right to bail. The eighth amendment provides in pertinent part: "Excessive bails shall not be required" Appellants' argument raises two questions for consideration: 1) whether the fourteenth amendment⁷ due process clause⁸ incorporates the excessive bail provision of

4. (continued)

Procedure. The order of the lower court shall be affirmed unless it is found that the lower court abused its discretion. If it is held that the lower court did abuse its discretion, the appellate court may modify, vacate, set aside, reverse, remand the action for further proceeding, or remand the action directing entry of the appropriate order, which may include ordering the person to be released under §20(a) of this chapter. The appeal shall be determined promptly."

5. See Doe v. State, 487 P.2d 47 (Alaska 1971).

6. U.S. Const. amend. VIII.

7. U.S. Const. amend. XIV, §1.

8. For literature on the application of the federal bill of rights to the states through the fourteenth amendment see Emerson, Haber & Dorsen, Political and Civil Rights In The United States 1379-80 (3d ed. 1967). See also Countryman, The Role of a Bill of Rights in a Modern State Constitution, Why a State Bill of Rights?, 45 Wash. L.Rev. 453, 454-474 (1970).

the eighth amendment; 2) whether the excessive bail provision includes the unqualified right to bail.

As to the first question, the United States Supreme Court has not ruled on whether the eighth amendment bail provision applies to the states through the fourteenth amendment.⁹ The most recent discussion on this subject by the Supreme Court occurred in Schilb v. Kuebel, 404 U.S. 357, 30 L.Ed.2d 502, reh. denied, 405 U.S. 948, 30 L.Ed.2d 818 (1971). In Schilb the issue before the Supreme Court related to the constitutionality of Illinois' bail statutes which permitted a defendant in some instances to post 10% of the bail directly to the court, of which the state retained 10% of the posted security as administrative "bail bond costs." Justice Blackman, in the course of defining the issue before the court, stated:

" Bail, of course, is basic to our system of law . . . and the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment. . . . But we are not at all concerned here with any fundamental right to bail or with any Eighth Amendment-Fourteenth Amendment question of bail excessiveness." 404 U.S. at 365, 30 L.Ed.2d at 511 (citations omitted).

The question of incorporation by the fourteenth amendment would seem to await a more definitive answer in future adjudication.

9. In Robinson v. California, 370 U.S. 660, 8 L.Ed.2d 758 (1962), the Supreme Court held that a California statute, which made addiction to the use of narcotics a criminal offense, inflicted a cruel and unusual punishment in violation of the eighth and fourteenth amendments. The court has yet to rule whether the provision against excessive bail is similarly incorporated by the due process clause of the fourteenth amendment.

There remains a substantial controversy over the eighth amendment's inclusion of an unqualified right to bail.¹⁰ Much of the discussion on the issues appears prompted by the District of Columbia Court Reform and Criminal Procedure Act of 1970. The Act allows courts of the District to detain a defendant without bail for up to 60 days prior to trial if the court concludes that the defendant's release would constitute a danger to the community. D.C. Code Ann. §§23-1321 to 1332 (1973).

Perhaps the most widely cited case for supporting a right to bail under the eighth amendment is Stack v. Boyle, 342 U.S. 1, 96 L.Ed. 3 (1951)¹¹ Stack, however, is not convincing authority for supporting an unconditional eighth amendment right to bail. Although the opinion speaks to the right of release before trial, this discussion relates to federal statutes providing

10. For a discussion of this controversy see Foote, The Coming Constitutional Crisis in Bail (pts. 1-2), 113 U. Pa. L.Rev. 959, 1125 (1965); Meyer, Constitutionality of Pretrial Detention, 60 Geo. L.J. 1140 (1972); Mitchell, Bail Reform and the Constitutionality of Pretrial Detention, 55 Va. L. Rev. 1223 (1969); Tribe, An Ounce of Detention: Preventive Justice in the World of John Mitchell, 56 Va. L. Rev. 371 (1970).

11. In Stack, twelve petitioners were charged with violating the Smith Act, 18 U.S.C. §371, 2385 (1970). Bail was first set for each defendant in varying amounts ranging from \$2,500 to \$100,000. Subsequently, bail was uniformly fixed at \$50,000. In an effort to reduce bail, petitioners presented uncontroverted evidence concerning financial resources, family relationships, prior criminal records and other information. The government, on the other hand, presented evidence showing that four persons previously convicted under the Smith Act had forfeited bail. In vacating the lower court order denying petitioners' writs of habeas corpus, the Supreme Court held that the lower court had not followed proper criteria delineated in the Federal Rules of Criminal Procedure in fixing a reasonable bail.

a right to bail following arrest for a noncapital offense.

Once this statutory right to bail is recognized, then the eighth amendment excessive bail provision assures a reasonable bail.

In Carlson v. Landon, 342 U.S. 524, 96 L.Ed. 547 (1952) the Supreme Court in a case involving the deportation of certain aliens classified as dangerous held that in such circumstances, the eighth amendment did not require the petitioners to be released on bail.

" The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept." 342 U.S. at 545, 96 L.Ed. at 563 (footnotes omitted).

Carlson, however, is a special case involving the Internal Security Act of 1950, 8 U.S.C. §137 (1970).

It is, however, not necessary in this appeal to decide whether appellants were entitled to bail under the eighth amendment to the United States Constitution.

Article I, §11 of the Alaska Constitution provides:

" In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve, except that the legislature may provide for a jury of not more than twelve nor less than six in courts not of record. The accused is entitled to be informed of the nature and cause of

12. It is clear from the opinion that this right to bail referred to the Federal Judiciary Act of 1789, 1 Stat. 73, 91 and Federal Rules of Criminal Procedure, Rule 46(a) (1), not the eighth amendment.

the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption great; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." (emphasis supplied)

Article I, section 11 was originally introduced as section 12 of Committee Proposal No. 7, offered by the Committee on the Preamble and Bill of Rights to the Alaska Constitutional Convention in December, 1955.¹³ Section 12 of the committee proposal read in part:

" The accused is also entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses"

The commentary attached to the proposal indicated that section 12 was intended to give defendants "the opportunity to be released on bail except in capital offenses."¹⁴ When the committee's proposal was discussed on the floor of the convention, Delegate Victor Fischer introduced an amendment to qualify the right to bail in cases involving capital offenses by adding the words "when the proof is evident or the presumption great."¹⁵ The delegate's comments on this amendment clearly indicate the guarantee of a right to bail:

"The language in the Federal Constitution reads generally to the effect that excessive bail shall not be required. A number of states have changed that language to provide more or less the language we have, that the accused may be released

13. 6 Alaska Constitutional Convention, Minutes, Appendix V, at 65 (1963) [hereinafter cited as Minutes].

14. Minutes, supra, Appendix V, at 72.

15. 2 Minutes, supra, at 1344.

on bail except for capital offenses. But in practically every case where this new language is used, the words, 'when proof is evident and the presumption great' and that is a necessary protection for the accused and we shall follow the majority of the states in this case. It has proven a desirable practice. The actual determination of when a person is released on bail, if charged with a capital offense, is still up to the judge." 16

Our study of Article I, section 11 thus compels a conclusion that the Alaska Constitution without doubt guarantees to every accused person the right to be released on bail except for capital offenses where the proof is evident or the presumption great.

16. 2 Minutes, supra, at 1344-345. See American Law Institute, Code of Criminal Procedure 338-41 (1930) which indicates that 40 states had similar constitutional provisions providing for the right to bail except in capital offenses. See also Application of Corbo, 54 N.J. Super. 575, 149 A.2d 828, 833 (1959).

17. Sections 66-16-43 and 66-16-44, ACLA 1949, which provided for the death penalty were repealed by the territorial legislature in 1957. Ch. 132 SLA 1957. Repeal, of course, does not preclude the legislature from ever establishing capital offenses, but since there are no capital offenses in Alaska at this time, every criminal offense carries the right to bail.

18. " The early common law did not permit bail in felony cases; later on bail was permitted before trial, but not during trial. When bail was permitted, it was a matter of discretion with the court, not a matter of right. . . .

. . . .
Most states have limited the judicial discretion of the common law by guaranteeing, by constitutional or statutory provision, that all persons shall be bailable by sufficient sureties except in certain cases." 8 Am.Jur. 2d Bail and Recognizance §§22, 23, at 796-797 (1963) (footnotes omitted).

Some jurisdictions with similar bail provisions have created an implied limitation on this constitutional right. But in Alaska such an implied limitation would necessarily contravene both the plain language of this constitutional provision and its intended purpose as stated at the constitutional convention.

In Reeves v. State, 411 P.2d 212 (Alaska 1966), we held that indigent defendants did not have an absolute right to be released on personal recognizance prior to trial. In Reeves, the defendant was charged in a four count indictment of serious offenses, including first degree murder, burglary and robbery. The trial court first set bail at \$50,000, which was later reduced to \$10,000. On appeal, the issue was limited to a claim that all indigent defendants were entitled to pretrial release as a matter of right. We rejected this contention as unsound and approved the rationale of Pilkinton v. Circuit Court,

19. See, e.g., State v. Johnson, 61 N.J. 351, 294 A.2d 245, 250 (1972). New Jersey has a similar constitutional bail provision to that of Alaska. There the court said in part:

"Expressed in pragmatic terms this right to bail means that the accused has the right to pretrial liberty on such bond in such amount as in the judgment of the trial court under the circumstances of the case will insure his appearance at the trial. If, however, the court is satisfied from the evidence presented on the application for bail that regardless of the amount of bail fixed, the accused if released will probably flee to avoid trial, bail may be denied."

324 F.2d 45 (8th Cir. 1963). Reeves, however, as was pointed out in Doe vs. State, 487 P.2d 47 (Alaska 1971), should not be taken as denying the right to bail provided under Article I, section 11.

Doe v. State was a delinquency proceedings involving a child. His attorney requested a continuance on a hearing. The court continued the case briefly but ordered the child detained during the interim. In considering the child's right to remain free pending an adjudication, this court discussed the right to bail as it is expressly provided in the Alaska Constitution:

"Under the Alaska Constitution, all persons accused of a criminal offense are entitled to be released on bail except for capital offenses where the proof is evident or the presumption great." 487 P.2d at 51 (footnote omitted).

Apart from Article I, section 11, one additional provision of the Alaska Constitution has to do with bail. Article I, section 12 of the Alaska Constitution provides in part:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

This section was originally section 9 of Committee Proposal No. 7 introduced by the Committee on the Preamble and Bill of Rights

20. Pilkinton provided that a state may require bail in some amount and that the eighth amendment excessive bail provision does not provide a right of pretrial release if the defendant is unable to post bail.

to the Alaska Constitutional Convention in December, 1955.

It is not necessary to determine whether or not Article I, section 12 of the Alaska Constitution guarantees a right to bail and, indeed, such an interpretation would be superfluous in view of the right to bail provision found in Article I, section 11. It is enough to say that the excessive bail provision insures the fixing of a reasonable bail and is to be considered in conjunction with the right to bail provision of Article I, section 11.

We note that California's constitutional provisions for bail are substantially identical with those of Alaska. The Supreme Court of California, applying that state's constitutional provisions, recently rejected the so-called "public safety" exception for bail:

"[4] Our constitutional language expressly providing that all persons shall be bailable except for a capital offense was consciously added to the 'no excessive bail' language adopted from the Eighth Amendment in order to make clear that, unlike the federal rule, all except the one class of defendants were to be bailable. As pertinent statutory provisions may not be read to impose greater limits on the right to bail as guaranteed by the California Constitution, there is no validity in the argument that there is an implied 'public safety' exception in statutory or other provisions guaranteeing the right to bail and we hold that such an exception does not exist in view of the clear direction of article I, section 6. 'If the constitutional guaranties are wrong, let the people change them--not judges or legislators.'"

21. The commentary to the proposal indicated that section 9 was identical with the excessive bail provision of the eighth amendment to the United States Constitution. 6 Minutes, supra, Appendix V, at 72.

In re Underwood, 508 P.2d 721 (Cal. 1973).

In addition to the constitutional guarantee of bail, a right to bail is found in the Alaska statutes. AS 12.30.010 provides that

The defendant in a criminal proceeding is entitled to be admitted to bail before conviction as a matter of right.

This section was part of the original Alaska Bail Reform Act and has remained unchanged. In 1966 AS 12.30.020(a)(b), read as follows:

" (a) person charged with an offense shall, at his first appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer unless the officer determines that the release of the person will not reasonably assure the appearance of the person as required.

22. In his dissent Justice Burke suggests that since the Constitution of California recognizes the inalienable right of all men "to enjoy and defend their life and liberty, and to protect their property, and to pursue and obtain safety and happiness", the courts should exercise an inherent power to achieve a suitable balance between society's rights and the defendant's right to bail. This suggestion rests wholly on the questionable assumption that man's inalienable rights are incompatible with the constitutional right of an accused to bail.

An additional argument for the "public safety" exception advocated by the dissent is that courts may accomplish the same result when the judge fixes an amount of bail which the particular defendant is unable to furnish. According to Justice Burke, this merely evades the issue and does indirectly what may not be done directly, and moreover violates the prohibition against excessive bail. Such an argument furnishes little support for the central thesis in Justice Burke's contentions. To the extent it suggests that difficulty in application of a constitutional principle provides justification for its rejection, the argument itself evades the issue.

23. SLA 1966, Ch. 20, §1.

(b) If a judicial officer determined under (a) of this section that the release of a person, will not reasonably assure the appearance of the person, the judicial officer may,

(1) place the person in the custody of a designated person or organization agreeing to supervise him;

(2) place restrictions on the travel, association, or place of abode of the person during the period of release;

(3) require the person to return to custody after daylight hours on designated conditions;

(4) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security, a sum not to exceed 10 per cent of the amount of the bond; the deposit to be returned upon the performance of the condition of release;

(5) require the execution of a bail bond with sufficient solvent sureties or the deposit of cash; or

(6) impose any other condition considered reasonably necessary to assure the defendant's appearance as required." (emphasis added)

Since both sections, AS 12.30.010 and AS 12.30.020, were part of the Alaska Bail reform Act, section 12.30.020 must be taken to recognize and to implement the right to bail afforded by AS 12.30.010.

Subsection (a) of AS 12.30.020 requires a defendant to be released on his personal recognizance or upon the execution of an unsecured appearance bond "unless the officer determined that the release of the person will not reasonably assure the appearance of the person as required." The "unless" clause relates only to denial of personal recognizance or an unsecured appearance bond and not to the right of bail. Subsection (b) provides that in the event the judicial officer should determine that a personal recognizance release or an unsecured appearance

bond would not reasonably assure the appearance of a defendant, the judicial officer could impose other requirements to assure the presence of the defendant. Section (b)(6) authorizes a judicial officer to impose any other reasonable conditions to assure the defendant's appearance. But this may not be interpreted so as to empower a judicial officer to absolutely deny the right to bail. Such a construction would not only be inconsistent with the basic purpose of the Bail Reform Act but would be unconstitutional under Article I, section 11 of the Alaska Constitution.

In 1967 the Alaska legislature amended AS 12.30.020 by Ch. 112, SLA 1967. The "unless" clause of subsection (a) was amended to read "unless the officer determines that the release of the person will not reasonably assure the appearance of the person as required, or will pose a danger to other persons and the community." Subsection (b)(6) was amended as follows:

"If a judicial officer determines under (a) of this section that the release of a person will not reasonably assure the appearance of the person, or will pose a danger to other persons and the community, the judicial officer may . . .

(6) Impose any other condition considered reasonably necessary to assure the defendant's appearance as required and the safety of other persons and the community."

The State urges that these amendments permit the detention of defendants without bail when the judicial officer determines that the defendant "will pose a danger to other persons and the community." To support this argument the State refers

to the Judiciary Committee Report on House Bill No. 166:

"This bill provides that a judge in determining the amount of bail to be posted for release of an individual accused but not yet tried may consider the amount necessary to guarantee his appearance for trial and also the safety of other persons and the community. The concept of the safety of other persons and the community is a new matter. This reason may be used to set higher bail or even to refuse bail." 1967 Alaska H.R. Jour. 339.

The committee's intent seemingly was to permit a judicial officer to consider "danger to the community" as a factor in setting bail. The legislature could not, of course, infringe upon the constitutional right of bail.

Thus the amendment to subsection (a) of AS 12.30.020 operates to add another factor to be considered in determining whether an accused person is entitled to be released on personal recognizance or on an unsecured appearance bond. This amendment does not amount to a repeal of the right to bail found in AS 12.30.010. In like manner, the amendment to paragraph (b) (6) of AS 12.30.020 added another factor to consider in determining whether additional conditions should be imposed on a defendant. Neither provision may be read as empowering a judicial officer to deny bail. In reaching this construction, we consider it significant that the legislature did not undertake to amend AS 12.30.010 which we have noted remains as in the original Alaska Bail Reform Act and expressly provides for right to bail. Although the trial court may not deny bail to an accused, the trial judge can consider danger to the community as a factor in assessing the amount of bail or fixing the terms of a conditional

release. We hold therefore that the 1967 amendments, Ch. 112 SLA 1967, to the Bail Reform Act do not permit the detention of persons without bail. Moreover, a legislative enactment expressly permitting the detention of persons without right to bail would be unconstitutional unless a constitutional amendment was adopted.²⁵

It follows that the trial court erred in refusing to grant the right to bail to appellant Richard Snyder afforded by Article I, section 11 of the Alaska Constitution and by the Alaska Bail Reform Act.

It is true unfortunately that crimes including those involving assaults, robbery and the theft of property are all too commonplace. Public safety has become a matter of the most serious concern to all law-abiding citizens. But alternatives other than preventive detention of an accused must be examined in

24. Other factors to take under consideration are enumerated in AS 12.30.020(c).

" In determining the conditions of release under (b) of this section the judicial officer shall take into account

- (1) the nature and circumstances of the offense charged,
- (2) the weight of the evidence against the person,
- (3) the person's family ties,
- (4) the person's employment,
- (5) the person's financial resources,
- (6) the person's character and mental condition,
- (7) the length of the person's residence in the community,
- (8) the person's record of convictions,
- (9) the person's record of appearance at court proceedings,
- (10) the flight of the accused to avoid prosecution or his failure to appear at court proceedings.

25. Note, Preventive Detention, 79 Harv. L. Rev. 1489, 1500 (1966). "In those states [which guarantee the right to bail in noncapital cases], denial of bail in a noncapital case for preventive purposes, no matter how great the dangers posed by release, would be permissible only by constitutional amendment." (footnote omitted)

the efforts to achieve reasonable and adequate public safety.

In the case of appellant Aloyisus Fabian, the trial judge offered to release the defendant to the custody of the Anchorage Native Program for Alcoholic and Drug Abuse. However, efforts to enroll Fabian in the program failed. He remained in jail because his counsel, for reasons unexplained, failed to reapply for bail. In this instance the trial judge afforded an opportunity for defendant to be released. Under these circumstances, the trial court did not deny Fabian his right to bail.

The case of Max Ray Martin presents different considerations. Article I, section 11, as we have said, guarantees the accused in a criminal prosecution the right to bail.

However, a probation revocation hearing is not a criminal prosecution looking toward an adjudication of guilt or innocence. Although this court in Hoffman v. State, 404 P.2d 644 (Alaska 1965), required the appointment of counsel to indigent probationers in a revocation hearing, that decision rested on a statutory interpretation of AS 12.55.110 consistent with the equal protection

26. Criminal Rule 45 requires a trial within four months from the "date the defendant is arrested, initially arraigned, or from the date the charge (complaint, indictment, or information) is served upon the defendant, whichever is first." This rule is intended to make effective the right of the accused to a speedy trial as well as bringing about a prompt disposition permitting incarceration of a dangerous offender hopefully for rehabilitation. In recognition of this policy, trial courts should grant continuances of criminal trial sparingly and only when necessary.

27. Trumbly v. State, Opinion No. 957 (November 9, 1973). Gagnon v. Scarpelli, ___ U.S. ___, 36 L.Ed.2d 656, 651-662 (1973) ("Probation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty." (footnote omitted)). Cf., Morrissey v. Brewer, 408 U.S. 471, 33 L.Ed.2d 484 (1972).

28. AS 12.55.110 governs revocation of probation proceedings.

clauses of both the Federal and Alaska Constitutions. Hoffman does not hold that probation revocation hearings are to be equated to a criminal prosecution.²⁹

We do not interpret Article I, section 11 of the Alaska Constitution to extend the right of bail to probation revocation proceedings. While the Alaska Constitution and statutes insure to the accused in all criminal prosecutions a right to bail, Martin was not the accused in a criminal prosecution at the time he requested bail from the trial court.³⁰

Nor do we find that appellant was entitled to bail under the Alaska Bail Act. His reliance on AS 12.30.010 is misplaced, because the right to bail under this statute is guaranteed prior to conviction. When a defendant reaches the status of a probationer, he can no longer claim the right to bail protected by AS 12.30.010. Nor can he claim bail under the probation statutes,³¹ since they fail to mention bail, and AS 12.30.040,

29. Efforts to broadly interpret Hoffman as eliminating the technical classifications between administrative and criminal proceedings for purposes of the double jeopardy clause, were rejected by this court in Alex v. State, 484 P.2d 677 (Alaska 1971). We rejected this argument by noting that Hoffman only involved an equal protection analysis, not the expansion of any substantive rights as claimed by the defendant.

30. Cf. In re Law, 109 Cal. Rptr. 573, 513 P.2d 621 (1973) (where the California Supreme Court denied a parolee's right to bail pending a hearing investigating alleged violations of parole).

31. AS 12.55.080 and AS 12.55.110.

which provides for release after trial is limited in application to convicted persons awaiting sentence or whose appeal is pending.

While we hold that appellant Max Ray Martin was neither entitled to bail under the Alaska Constitution nor the Alaska Bail Act, we suggest bail should be withheld pending revocation proceedings only in unusual cases. Trial judges have wide latitude in imposing suitable conditions for prehearing release, other than the denial of bail. The denial of bail may constitute a needless disruption of the probation process negating the program's objectives of rehabilitation and eventual integration into society. Furthermore, the recent expansion in the area of probationer's rights by the United States Supreme Court in Gagnon v. Scarpelli, ___ U.S. ___, 36 L.Ed.2d 656 (1973) suggests the granting of bail. In Gagnon, the Court, inter alia, required as a matter of due process that a probationer be afforded a prompt preliminary hearing to determine whether probable cause' exists to believe a violation of probation has occurred. Following this preliminary hearing, a final hearing must be allowed prior to an ultimate determination concerning the revocation of probation.

The Gagnon due process requirements were adopted by this court in Trumbly v. State, Opinion No. 957 (November 9, 1973). Both Trumbly and Gagnon evinced a concern for considering the rehabilitative treatment afforded by probation as a factor in determining whether probationary status should be revoked.

As this court stated in Trumbly,

"The requirement that probation revocation follow after a showing of 'good cause' requires the trial judge to find that continuation of probationary status would be at odds with the need to protect society and society's interest in the probationer's rehabilitation. Revocation should follow violation of a condition of probation when that violation indicates that the corrective aims of probation cannot be achieved." Trumbly v. State, Opinion No. 957 (November 9, 1973) (footnotes omitted).

In Martin's case, there has been no showing that there was abuse of the trial judge's discretion in refusing to allow Martin's release on bail pending a revocation hearing.³²

We conclude that appellant Richard Snyder was entitled to bail. The appeals of Aloyisus Stephan Fabian and Max Ray Martin are dismissed.

32. We note that federal probationers are by court rule provided with an opportunity for release pending a hearing. Federal Rule of Criminal Procedure 32(f).

Memorandum

Alaska Court System

TO: [Hon. Clem R. Tillion
Chairman, Judiciary Committee
Alaska House of Representatives
Pouch V
Juneau, Alaska 99801

DATE : March 7, 1974

FROM: Sheldon S. Sprecker *SSS*
Magistrate
Box 86
Glennallen, Alaska 99588

SUBJECT: Plea Bargaining and
Mandatory Sentences

I would like to offer my personal opinion upon the two subjects at hand. Due to the recent increase in concern of the ability of the courts to handle the criminal element of our state, I would like to comment on plea bargaining as a useful tool in the disposition of cases and I would like to point out its severe limitations.

In light of the experiences that I have had in sitting the bench in Anchorage, Glennallen, Valdez and Tok I have seen the effects of plea bargaining upon the populous of a large city, a small municipality, a native village and rural areas of sparse population. My experience has shown that the populous of all four areas have learned plea bargaining is a very effective means of avoiding punishment or consequences of their criminal acts. The native people have learned through the offices of the Public Defender Agency that simply by agreeing to plea guilty to a much lesser charge that they can leave the court room without financial losses, harm to reputation or punishment. The sophisticated criminals of the larger cities with highpowered attorneys experience the same.

Plea bargaining in itself serves a fundamental means of clearing the court case load. However, somewhere in the past we have lost the objective of prosecution. My personal legal training is extremely limited but my personal sense of right and protection of society has received sufficient training and experience. Can you justify turning loose upon society a person charged with a serious crime (take your pick from the gauntlet of drunken driving to murder)? This person agrees to plea guilty to a reduced charge (example: charged with armed robbery and agrees to plea guilty to petty larceny; or is charged with drunken driving and agrees to plea guilty to speeding; or is charged with first degree murder and agrees to plea guilty to assault with a dangerous weapon; or is charged with statutory rape and agrees to plea guilty to contributing to the delinquency of a minor child). These examples are cases that I have had personal involvement with.

Hon. Clem R. Tillion

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These are some of the tremendous shortcomings of plea bargaining. I do not advocate doing away with plea bargaining but it must be severely restricted to bargaining and negotiation of the sentence to be received, not the reduction of a charge dealing with serious impacts upon society. This practice borders on the absurd and criminal negligence.

The most criticism seems to fall upon the District Attorney's office and the judge sitting the bench and well it should. By rule of court the judges do not have to accept the plea bargains offered by the prosecution and defense and yet we have become rubber stamps for practicing attorneys. The District Attorney must face the responsibility of agreeing to accept and even suggest the lesser charges with inconsequential sentences. It seems to me that the State must take the position that if a man is charged with a crime of a serious nature and is found guilty of the charge upon his own admission he must be prepared to face the consequences of his action. Though the District Attorney may be overworked and understaffed and underpaid he still has a responsibility to society to see that a fair sentence is placed upon the individual. The judges upon the bench have that same responsibility to issue forth a sentence that is fair and just.

I would strongly recommend to this committee that in your consideration of any bill that would effect plea bargaining that you take into account the criminal can negotiate only for a lesser sentence, not for a lesser charge and sentence. The criminal must receive the message that he is responsible to society for his actions.

Again, I totally support the concept of plea bargaining where a man will agree to plea guilty and negotiate a reduced sentence or a conditional sentence but he should be held accountable for the charge levied against him.

MANDATORY SENTENCES

In regard to any bills considering mandatory sentences, again through personal experiences I feel the judges of the State of Alaska have abused the discretion of sentencing that they enjoy. I have repeatedly seen drunken drivers released back out on the highway with their driver's license intact, no financial loss and no incarceration. I have seen men charged with assault and battery, assault with a dangerous weapon and other violence related crimes given a lecture and told not to do it again and turned upon the streets.

5/4 COTTON FIBER

Hon. Clem R. Tillion

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March 7, 1974

Perhaps if we had a mandatory minimum some people would get the message that crime does not pay. As it is now, the message is exactly the opposite. Crime does pay and pay very well and if you're caught it is just an inconvenience. I would recommend, as a practicing judge, some minimum mandatory guide lines in sentencing.

Thank you very much for allowing me to take this time to comment upon the pending legislation before your committee.



Supreme Court

State of Alaska

CHIEF JUSTICE
JAY A. RABINOWITZ

JUSTICES
ROGER G. CONNOR
ROBERT C. ERWIN
ROBERT BOOCHEVER
JAMES M. FITZGERALD

February 14, 1974

POUCH U, CAPITOL BUILDING
JUNEAU, ALASKA
99801
907-586-5380

The Hon. Clem V. Tillion
Chairman, House Judiciary Committee
Alaska House of Representatives
Capitol Building
Juneau, Alaska 99801

Re: HB 452, 460, 512, 513,
515, 563, 564, 565, 566,
570, HJR 67, 71

Dear Mr. Tillion:

The Supreme Court of Alaska has reviewed the bills to be considered at public hearings to be conducted by the House Judiciary Committee on Wednesday and Thursday, February 13 and 14, 1974. We did not feel that it was appropriate to comment on all of the bills, but it did seem desirable for us to express our views on certain subjects set forth in some of the bills and resolutions. Specifically, we have the following comments:

HBs 452, 460, 512, 513 and 465--All of these bills involve mandatory minimum sentence provisions. Enclosed herewith is a copy of our letter addressed to the Hon. Lowell Thomas, Jr. dated January 30, 1973 with reference to a provision for a mandatory minimum prison term. While the letter pertains to SB 15, the comments are equally applicable to other bills containing similar provisions. For the reasons set forth in the letter of January 30, 1973, the Supreme Court disapproves of statutory requirements compelling mandatory minimum prison sentences. HBs 452, 460, 512, 513 and 565 involve mandatory minimum sentence provisions and the Supreme Court accordingly recommends that those requirements of the bills be deleted.

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February 14, 1974
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HB 563--The Supreme Court endorses this bill requiring the transmittal of criminal records and data to the place where a criminal is confined, and recommends its passage.

HB 564--We recommend against passage of this bill, which in effect prohibits plea agreements between the prosecuting attorney and defense counsel. We do not believe that any such agreements should be binding on the court; but under the present system of handling criminal cases, plea agreements between prosecuting attorneys and defense counsel as to recommended sentences are a necessary tool. Without plea agreements, many cases now disposed of by plea would in all probability require full trial at a great deal of unnecessary expense and loss of time by court personnel, prosecuting attorneys, defense counsel and witnesses.

HB 566--This bill requires a mandatory pre-sentence investigation report by the Probation Service within the Department of Health and Social Services before a court imposes sentence on a convicted felon. It would amend Criminal Rule 32(c) which presently provides for such reports when directed by the court.

Good
The Supreme Court is willing to modify its rule so as to require a pre-sentence investigation report in all cases if the court can be assured of adequate funds for implementation of such a rule. If the legislature does decide to proceed with this bill, we would recommend that the words "by the Probation Service within the Department of Health and Social Services" be deleted since there is a likelihood that such reports may be obtained from other reliable sources as well as the Probation Service. The bill would, in effect, prohibit the use of reports by other personnel.

HB 570--We oppose this bill which requires restitution or reparation to aggrieved parties through the Alaska Court System for actual damages or loss caused by a crime for which a conviction is had. This bill would necessitate lengthy trials on unrelated damage issues as a part of criminal proceedings. Often damage issues are among the most involved and time consuming portions of civil litigation. The bill would further place a heavy burden on administration of the Alaska Court System with reference to the collection of such damages and payment to aggrieved parties. While in some cases a requirement of reparation is a valuable sentencing tool to be used by a trial judge, the mandatory requirement of the statute would place an unnecessary financial burden on the judicial system. Unfortunately, in the vast majority of criminal cases, the defendant has no funds with which to meet damage awards; and in the cases where the defendant is financially responsible, civil remedies are available. The court does feel that the present laws providing for compensation to victims of crime could well be broadened in scope so as to increase the amount of payments.

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HJR 67--This resolution proposes an amendment to the constitution so as to except from bailable offenses those having a penalty of imprisonment in excess of eight years to be imposed upon conviction. We are enclosing herewith a copy of the opinion of the court in the case of Martin, et al v. State, No. 1785. You will note that the opinion specifically refers to the 1967 amendment of AS 12.30.020 permitting judicial officials to consider "danger to the community" as a factor in setting bail. We stated at Page 17 of the opinion:

Although the trial court may not deny bail to an accused, the trial judge can consider danger to the community as a factor in assessing the amount of bail or fixing the terms of a conditional release.

We thus believe that the trial judges have adequate power to consider danger to the community as a factor in setting bail and it thus appears to us that there is no necessity for amending the constitutional provision relating to release on bail.

HJR 71--We oppose this proposed amendment to the constitution which would add to the criteria for penal administration, now based on "the principle of reformation and the need for protecting the public," the further provision "and the need for proper punishment as a deterrent to the commission of future crimes". We have construed the Alaska Constitutional provision pertaining to punishment in the case of State v. Chaney, 477 P.2d 441 (1970). You will thus note that in holding that the sentence imposed by the trial court was too lenient we specifically construed the existing constitutional provision as including consideration of:

deterrence of the offender himself after his release from confinement or other penological treatment, as well as deterrence of other members of the community who might possess tendencies toward criminal conduct similar to that of the offender, and community condemnation of the individual offender, or in other words, reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves. 477 P.2d at 444.


Thus, deterrence of the offender and others from commission of future crimes has been construed by our court as being encompassed in the present constitutional provision. We therefore do not believe that the proposed amendment is necessary. We enclose a copy of our opinion in the case of State v. Chaney.

The Hon. Clem V. Tillion
February 14, 1974
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Our failure to discuss some of the proposed legislation is not intended to indicate either approval or disapproval, nor are we intending to give any indication as to whether or not any of the bills or portions thereof may be invalid for any reason. The views expressed in this letter are those of the Supreme Court and are not of the trial judges within the Alaska Court System.

We appreciate the opportunity of presenting these comments to you.

Very truly yours,


Jay A. Rabinowitz
Chief Justice
Alaska Supreme Court

cc: Sen. Robert H. Ziegler, Chairman
Senate Judiciary Committee

March 14, 1974

The Honorable Terry Miller,
President Alaska State Senate
State of Alaska
Capitol Building
Juneau, Alaska 99801

The Honorable Tom Fink,
Speaker Alaska State House
State of Alaska
Capitol Building
Juneau, Alaska 99801

The Honorable Robert Ziegler,
Chairman Judiciary Committee
Alaska State Senate
State of Alaska
Capitol Building
Juneau, Alaska 99801

The Honorable Clem Tillion,
Chairman Judiciary Committee
Alaska State House
State of Alaska
Capitol Building
Juneau, Alaska 99801

The Honorable Richard McVeigh,
Chairman Alaska Legislative Council
State of Alaska
Capitol Building
Juneau, Alaska 99801

Gentlemen:

Fully realizing the importance of establishing some priorities out of the list of some 67 law and order bills currently pending in the Legislature, a meeting was held at the office of Trooper Colonel Ed Dankworth at Anchorage, Wednesday, March 13, 1974. A group of top law enforcement officers and prosecuting attorneys, as well as private citizens, and a representative of the trial court judges were present. This group of individuals, whose names appear below, reviewed the package of law and order bills in order that a priority list could be submitted to you by this group for your consideration.

- 2 -
The meeting was attended by:

Bob Atwood, Editor Anchorage Times
Joe Balfe, District Attorney Anchorage
Ed Dankworth, Colonel Alaska State Troopers
Earl Hibpshman, Anchorage Police Chief
Dan Hickey, District Attorney Juneau
Mark Hogan, Captain Anchorage Police Department
Eben Lewis, Superior Court Judge
John Spencer, Anchorage City Attorney
Harold Sydnam, Captain Alaska State Troopers
Bill Tobin, Anchorage Times
Pat Wellington, Commissioner Public Safety

After a complete review of the law and order bills, the following list was extracted as being the tools to accomplish the most good in curbing the raging criminal activities in our State. Comments are set out by each bill if amendments were suggested and adopted by the group.

BILL NO.

COMMENTS

SB 297 - by Lewis

An Act relating to the making of false reports to a peace officer.

Endorsed as amended - copy attached.

SB 313 - by Rules Committee - Governor

An Act relating to bail; and providing for an effective date.

Endorsed as introduced.

HRJ 66 - by Fisher

Proposing an amendment to the Constitution of the State of Alaska relating to release on bail.

SB 321 - by Rules Committee - Governor

An Act amending the Uniform Narcotic Drug Act; and providing for an effective date.

Recommend the deletion of the mandatory provisions under subsection (a) (1) (line 14 and 15) substitute to read as follows: by imprisonment for a term of not more than 10 years.

SB 322 - by Rules Committee - Governor

An Act relating to operating a motor vehicle while under the influence of intoxicating liquor or narcotic drugs; and providing for an effective date.

Endorsed as introduced.

<p>SB 323 - by Rules Committee - Governor An Act concerning immunity of a witness from prosecution related to court ordered testimony; and providing for an effective date.</p>	<p>Endorsed as introduced.</p>
<p>SB 335 - by Rules Committee - Governor An Act relating to the crime of resisting arrest; and providing for an effective date.</p>	<p>"</p>
<p>SB 336 - by Rules Committee - Governor An Act relating to unlawfully obtained property; and providing for an effective date.</p>	<p>"</p>
<p>SB 338 - by Rules Committee - Governor An Act relating to the crime of conspiracy; and providing for an effective date.</p>	<p>"</p>
<p>SB 446 - by Rules Committee - Governor An Act relating to homicide; and providing for an effective date.</p>	<p>"</p>
<p>SB 391 - by Hartig and Hackney An Act relating to disorderly conduct; and providing for an effective date.</p>	<p>Endorsed as amended - copy attached.</p>
<p>SB 512 - by Fisher, Hackney and Huber An Act relating to the imposition of minimum penalties for the conviction of certain crimes; and providing for an effective date.</p>	<p>Endorsed; suggest amending by adding at line 13 between the words "possession or" the words "purpose of sale".</p>
<p>HB 513 - by Fisher, Hackney and Huber An Act relating to the commission of a felony while released on bail; and providing for an effective date.</p>	<p>Endorsed, suggest amending by deleting at line 16 and 17 the words "provided that he is convicted on the initial felony charge".</p>
<p>HB 633 - by Urion An Act relating to the carrying of firearms in places licensed to sell intoxicating liquor.</p>	<p>Endorsed as amended - copy attached.</p>

HB 562 - by Rules Committee - Legislative Council by request of the Interim Committee on Correstions and Probation. Endorsed as introduced.

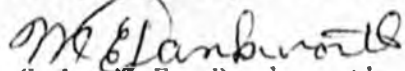
An Act relating to increased punishment for prior criminal conviction.

HB 543 - By Rules Committee - Governor Endorsed as introduced.
An Act relating to unfair trade practices and consumer protection; and providing for an effective date.

HJR 93 - Judiciary Committee " Proposing an amendment to the grand jury section of the Constitution of the State of Alaska.

We urge you to consider these bills in the light of the unanimous support given by the named officers and officials. Our support of these particular bills is not a demonstrative effort to minimize the need of any other bills or to reflect adversely on them. This list is our attempt at sifting through the total package and determining the laws we feel are most needed at the present time in order to effect the necessary curbing of the inordinately high percentage increase in crime in Alaska.

Respectfully submitted,


Col. M.E. Dankworth
Director
Alaska State Troopers

ED:JRS:gml:saa
Enclosures
cc: Members listed above.

IN THE SENATE

BY LEWIS

SENATE BILL NO. 297

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the making of false reports to a peace officer."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 11.30 is amended by adding a new section to read:

Sec. 11.30.215. MAKING A FALSE REPORT TO A PEACE OFFICER.

(a) Except as provided in (b) of this section, a person who wilfully and knowingly makes, or causes another to make, a false report of an alleged criminal offense to a peace officer or a law enforcement agency is guilty of a misdemeanor, and upon conviction is punishable by a fine of not more than \$1,000, or by imprisonment for not more than one year, or by both.

(b) A person who wilfully and knowingly makes, or causes another to make, a false report of an alleged criminal offense to a peace officer or a law enforcement agency is guilty of a felony if the false report causes an innocent person to be wrongfully charged with, or convicted of, a criminal offense or if a person is physically injured as a result of the false report. A person convicted under this subsection is punishable by imprisonment for not less than one year nor more than 15 years, or by a fine of not more than \$25,000, or by both.

(c) In addition to the penalties prescribed in (a) and (b) of this section, the court may, in its discretion, require restitution by the convicted person to the law enforcement agency involved for all expenses incurred as a direct result of the false report.

IN THE HOUSE

BY HARTIG AND HACKNEY

HOUSE BILL NO. 391

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to disorderly conduct; and providing
for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 11.45.030(a) is amended by adding a new paragraph
to read:

(5) in a public or private place addresses language to
anyone present which would be likely to provoke a violent reaction in
a person of ordinary sensibility.

*Sec. 2. This Act takes effect on the day after its passage and approval
or on the day it becomes law without approval.

March 7, 1974

Representative Glen Tillion
Pouch V
Juneau, Alaska

Dear Glen:

Re: Law & Order legislation.

It seems to me that our judicial branch of state government is exerting undue pressure on the legislative branch in an effort to suppress effective law and order legislation.

Certainly anyone living in our state for the past few years can see the dismal failure of our judicial system, in fact, the failure of the legal profession in general to adequately protect the law abiding segment of our society.

Well do I remember the sad day when capital punishment was abolished in Alaska. It was after the conviction of a man who confessed to the assault and rape of one woman and the rape and murder of another. He was sentenced to hang on the rape and murder charge and sentenced to 15 years on the assault and rape. He got off the hanging conviction on a technicality and served 6 years of the other sentence after which he was released. In three weeks he was back in jail for another violation of the same nature.

It has gotten to the point now where organized groups must patrol their neighborhoods to protect themselves and neighbors from the muggers, rapists, and burglars. Residences and cabins in remote areas are almost impossible to protect and when a criminal is arrested, he is back on the street almost immediately.

The administrator of our judicial system says he needs more money - money for what? To finance the Public Defenders office so they can turn the hoods out faster?

I say if the first and second offenders were properly taken care of, we would not have the third, fourth, fifth, etc. offenders to worry about and our judicial system could operate on less money - not more.

I hope that you and your colleagues in our state legislature will work hard for the passage of legislation that will guarantee society adequate protection from the criminal element.

Sincerely yours,



Bob Barrett

P.S. I also think that "pushers" of hard drugs should be on the list for capital punishment.

March 10, 1974

The Honorable Clem Tillion,
Alaska State Representative
Pouch V
Juneau, Alaska 99801

Dear Clem:

I am enclosing a copy of the resolutions our committee came up with at the convention yesterday. (Time did not permit much in the way of quantity as we finished the whole convention in the afternoon). You will note #4, on capital punishment. This brought on considerable debate the opposition being led by Don Oberg. He swung only three votes to his side in spite of much emotional input. There were nine members on my committee and Don offered the only opposition.

In reply to Don's disertation on the right of society to take revenge and his effort to put faces on the criminals involved, I said, " We seem to be puting faces on the offender. How about the Victim ? Can we close our eyes to those who suffer at the hands of these criminals ? It is, indeed, a shame that any member of our society must place himself in a position where we have no reasonable alternative but to determine he no longer is able to live amongst decent people. In any event, when it becomes necessary to invoke the death penalty, we should not do it as revenge, but rather with a prayer in our hearts that others of our species will not sink to the dephts which requires such drastic action."

I have talked to many people since receiving a copy on H.B. #675 and have yet to find one who opposed the bill, except as stated above. I have talked to Ministers, Business men, Police officers, Working men, Teachers and others. The public, Clem, is overwhelmingly in favor of this bill.

You may read any part or all of this into the record should you so desire.

Regards,  Earl Westphal

March 9th, 1974

Resolutions approved by the House District 11 Convention.

1. Resolved that OSHA be reduced to an advisory instead of a regulatory agency.
2. Resolved that ASHA (Alaska state housing authority) confine their functions to that of personal, people type housing projects.
3. Resolved that the commissioners of the Dept. of Environmental Conservation exercise the power placed in their hands and that the Department perform greater educational functions and seek public input prior to issuance of any proposed regulations.
4. Resolved that we support the concept of capital punishment for certain specified crimes such as those described in House Bill #675. Also those found guilty of wholesale Distribution of illicit drugs.
Note: (Don Oberg wished it to be noted that he takes exception.)



Earl Westphal, Chairman, Resolutions and Platform Committee

CLEM - PLEASE NOTE #4. THIS PASSED BY AN
OVERWHELMING MAJORITY AFTER MUCH FLOOR DEBATE.
LESS THAN 10% OF THOSE PRESENT VOTED IN THE
NEGATIVE.
Earl.

5360 E. 41st Avenue
Anchorage, AK 99504
March 7, 1974

Hon. Clem Tillion
House Judiciary Committee
Pouch V
Juneau, AK 99801

Dear Mr. Tillion:

The following are some personal observations about how our criminal justice system may be improved, that I wish to present to you and your committee for consideration. Although I am presently employed by the Court System, the comments herein are not necessarily those of the judiciary, but rather are offered strictly as a private citizen interested in making our justice system more responsive to the present and future crime problem. My ideas have been formulated as a result of having been the Director of the Criminal Justice Commission during 1970 and 1971, and since then as a Planner for the Court System.

My recommendations are primarily from the standpoint of management and systems analysis, rather than that of a professional police officer, attorney, or correctional official, and to that extent, may approach the crime problem from a different perspective than most other observers to date.

Rather than comment on the multitude of pending bills, I wish to restrict my observations to what I consider the most pressing problems in our justice system. My comments concern - 1) the need for greater coordination and exchange of information among justice system agencies and among those agencies and the legislature; and 2) the problem of plea bargaining.

Perhaps the area most in need of change, as well as having the greatest potential for improvement, at no additional cost, is greater information exchange and coordination among the justice system agencies and between the justice system agencies and the legislature. We like to think our justice system is indeed a system. I suggest it is a "non-system", comprised of a multitude of independent agencies competing for scarce resources, with little concern or even awareness that they are but a part of a much larger system. If we agree that the goal of the "justice system" is to reduce crime, then the components comprising the system should all strive toward that goal, realizing that each is but an integral part, and that each must work with the other, since each has a vested interest in the activities of the other, in order that as a group, their goal may be realized and society thereby served. In fact, however, coordination and communication, at least at the policy level, is minimal. The sub-goals of each agency seems to be paramount, and the overall goal of the system secondary. Rather than work together, they criticize and point

Hon. Clem Tillior.
March 7, 1974
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the finger of blame at their colleagues, often taking to the public media in the process.

The recent Big Lake conference seems to be nothing less than a public admission that the agencies in the justice system have not and do not periodically meet together to coordinate their activities and resolve differences. Significantly, it took the legislature to get them all together and talk over their problems. The legislature did what they apparently were incapable of doing themselves. The need is obvious - and it will not require an appropriation.

Closely related to, and a part of, the lack of cooperative action by the components of the justice system is the resulting tendency toward independent decision-making by both the legislature and the agencies of the system without concern for the impact of their decision on the other parts of the system. And here is a problem in which the legislature must share in the blame. Perhaps the best and most recent illustration was the appropriation last session of \$350,000 to the State Troopers for additional efforts for apprehension of drug violators. Recognizing a possible problem with such an infusion of money into only the law enforcement sector, without apparent concern for the related needs of additional prosecutors, among other system needs, I wrote to an Anchorage area legislator who is quite concerned about law and order, suggesting that part of the appropriation buy additional prosecutors. To not do this would result in a glut of additional cases on the District Attorney, and the necessity to plea bargain, resulting in the legislative intent being watered-down and thereby relatively ineffective. Just a month or two ago, this fear was realized when the Anchorage District Attorney was quoted in the newspaper as needing more staff to handle the additional drug cases being generated. The lesson seems clear. Both the legislature and the individual agencies must come to realize that their perceived needs must be viewed in the context of the entire system, and that simply adding more cops will not solve the problem.

Another example of independent decision-making concerns the pending vote on March 12 about area-wide police authority for the Anchorage Borough. Whether police protection is extended in that manner, or some other way, there is little doubt that Borough residents will have police protection. While there has been due concern voiced as to how the city police will be affected, I have seen no evidence of attempting to project the number of cases these additional 100 policemen will generate, the impact of that caseload on the District Attorney, the Court System, etc. What will probably happen is that the police will be hired, and after their efforts become noticeable, the District Attorney, the Court System, and possibly Corrections and the Public Defender, will then complain about not having enough money and manpower, when the projected impact should have been worked out before the fact, and the legislature presented with some sort of estimate

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of additional system needs.

Fortunately, a solution for both the lack of coordination and the tendency toward independent decision-making seems to exist, but is not yet being fully utilized. Obviously some forum is needed to bring together the justice system agency heads to plan cooperatively, and in the process, affect greater coordination and information exchange. This forum exists now, in the Governor's Commission for the Administration of Justice, set up in 1970 to administer the Federal Law Enforcement Assistance Administration program. With but slight modification, the Commission members, which include all justice system agency heads and some legislators, could expand their activities to embrace the concept of the cooperative decisional process and exchange of information.

The legislature, on the other hand, could materially assist the justice system process by weighing carefully the consequences of resources allocated to only one segment of the system. It seems that an impact statement might be required of the other system components of any proposed legislative assistance program to individual agencies of the system or of new laws that would affect the entire system. Thus before future monies are allocated for police, the courts, or corrections, an impact statement could be required. In the earlier case of the \$350,000 for drugs, a statement could have been required, estimating the additional prosecutors, public defenders, judges, etc., that would be required to handle the anticipated additional caseload, in much the same way that an environmental impact statement is required before pipelines and roads are constructed.

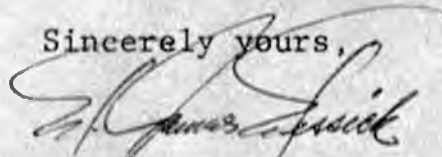
Plea bargaining has both advocates and detractors, and is a subject not generally well understood by the "man on the street". Rather than completely abolish plea bargaining, I would strongly urge that it be authorized only in certain specific situations. It should be used for example when a person has been overcharged (perhaps by frustrated police who hope to get at least one charge to stick), or as a concession to a person who would agree to cooperate with the state in a given case, or to become an informant for the police. Perhaps the only time plea bargaining should not be allowed is when it is used as a device to keep the "system" running. In other words, it should not be permitted simply because we have an inadequate number of prosecutors, or problems with calendaring of cases in the courts, or other similar shortcomings of the justice system. Rather, the system should be flexible enough to handle the increasing caseload, rather than making concessions to an accused simply to get around the problem of inadequate resources. Such action does not meet the problem of inadequate, does not deal firmly with the accused, and certainly does not meet the needs for protecting society. Therefore, I

Hon. Clem Tillion
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suggest retaining some limited plea bargaining, but not permitting it as a means of side-stepping problems of the justice system. Alaskans in general, would be hard-pressed to understand why a person with a valid charge of burglary could end up pleading guilty to trespassing simply because there are inadequate prosecutors to handle the existing caseload.

Hopefully, the foregoing has presented some viable alternatives for legislative consideration, in attempting to improve our justice system machinery. I would be happy to comment further, at your request.

Sincerely yours,



M. James Messick

:pk

February 26, 1974

Representative Clem V. Tillion
Pouch V
Juneau, Alaska 99801

Honorable Sir:

The Alaska Association of Chiefs of Police met February 25, 1974, in Anchorage, Alaska, to discuss the current professional criminal legislation.

The general feeling of the membership was we did not have enough time to carefully analyze each one of the bills dealing with criminal legislation. While some bills were good, others contained severe plans.


The membership felt we should devote our time and efforts to pointing out what we consider major weaknesses in the criminal justice system.

The primary concern of the members is what appears to be a "revolving door policy," in dealing with the repeated criminal offender. We recognize the blame cannot be shouldered by any one agency, but must be shared by all members of the criminal justice system.

In this attached resolution, we have not tried to draft legislation, but merely point out areas of grave concern.

We sincerely hope these matters, as set forth in the resolution, will receive your utmost consideration.

Be assured of our cooperation in matters of mutual concern.



Chief Barry W. Pegram
Secretary/Treasurer
A.A.C.O.P.
Box 3173
Kenai, Alaska 99611

δWP/dl

Attachment

A RESOLUTION OF THE
ALASKA ASSOCIATION OF CHIEFS OF POLICE
CONCERNING THE ADMINISTRATION OF
CRIMINAL JUSTICE IN THE STATE OF ALASKA

WHEREAS, the Legislature of the State of Alaska is currently considering various bills concerning the administration of criminal justice in and the criminal laws of the State of Alaska: and

WHEREAS, the Alaska Association of Chiefs of Police is extremely interested and concerned with the administration of criminal justice in Alaska; and

WHEREAS, the volume of proposed legislation introduced in the Legislature is indicative of the concern felt throughout the State, regarding the administration of criminal justice; and

WHEREAS, the Alaska Association of Chiefs of Police recognizes that the motivation prompting the current proposed criminal legislation is based largely on the concern over the increasing crime rate; and

WHEREAS, recidivism is a prominate factor in the increasing crime rate:


NOW, THEREFORE, the Alaska Association of Chiefs of Police resolve:


1. That the Association urges the Legislature of the State of Alaska to consider the purposes of bail and the current statutes concerning bail, in-as-much as the citizens of the State are not being protected from the repeat criminal while he is out on bail.
2. That Association urges the Legislature to consider amending current State Statutes concerning the charging and sentencing of habitual criminals to provide

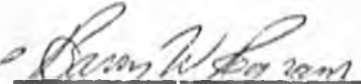
for mandatory charging and sentencing under those Statutes rather than discretionary, as now provided.

3. That the Association urges the Attorney General of the State of Alaska to establish guidelines for the control and exercise of plea-bargaining in criminal prosecutions.
4. That the Association urges the Legislature to make whatever appropriations necessary to insure that the terms and conditions of probation are complied with.
5. That the Association urges the Legislature to provide that the composition of the Board of Parole include as a member a professional in the field of law enforcement and that any pre-parole interview with a prisoner be conducted by a majority of said Board before a decision be made to parole an inmate.
6. That copies of this resolution be sent to both houses of the Alaska Legislature, the Attorney General for the State of Alaska, the Governor of the State of Alaska, news media, mayors and city managers of Alaskan cities and the Justices of the Supreme Court of the State of Alaska.

Passed and approved this 25th day of February, 1974.


President, Alaska Association
of Chiefs of Police


Vice-President, Alaska
Association of Chiefs of
Police


Secretary-Treasurer,
Alaska Association of
Chiefs of Police



Superior Court

State of Alaska

THIRD JUDICIAL DISTRICT

941 FOURTH AVENUE

ANCHORAGE, ALASKA

99501

CHAMBERS OF

C. J. OCCHIPINTI, Presiding Judge

February 21, 1974

House Judiciary Committee
Pouch "V"
Juneau, Alaska 99801

Dear Mr. Chairman:

Your concerned Committee appears to have taken testimony ranging broadly from many witnesses. However, in observing the comments, it reminds me of the story where a group of blind men tried to describe an elephant. Their conclusions were of course limited to the small area of contact which they experienced. Those testifying before your committee appear to have done the same.

One area of testimony touched on the leniency of the Courts as the reason for the escalation of crime in Alaska. Another area faulted placing people in jails, or long sentences. Others blamed the police, probation officers, or the laws themselves. No one, however, in my opinion has brought the combination of factors together to reconcile the various conflicts. I doubt if I can, but would like to make some observations for your consideration.

Initially, the laws themselves as you legislators have passed are substantially adequate with the exception of a need for strong bail requirements, and confirmation as to what is rehabilitation.

A segment of our society feels that rehabilitation is the sole goal of our penal systems. Others feel punishment alone should be the criteria. But neither can adequately or humanely define what they mean. If rehabilitation is interpreted as a series of lectures, or some exposure to psychiatric or psychological treatment, it is obvious that this concept is meaningless. If punishment means warehousing bodies again this can easily be seen as inadequate. Our present system, from the view point of the courts is to combine both punishment and rehabilitation as well as an affirmation to deter others pursuing the same anti-social behavior. Our Supreme Court has set down these concepts, and no one can quarrel with them. The breakdown is in interpreting the methods to accomplish these goals.

Persons pursuing anti-social conduct must be made to understand society will not tolerate such behavior. To accomplish this takes a variety of sanctions. But basically, the message these individuals must get is that "crime does not pay". Once this is established, our system of justice will be respected by all, those it protects as well as those it affects. I believe the reason we have no respect presently may be easily traced to ineffective sentences, and ineffective institutions. No matter what the sentences given by our Courts, it is well known, at least by the judiciary and defense attorneys, as well as the criminals, that the criminal will serve a small part of the sentence. Our system presently allows a defendant to apply for parole immediately upon being sentenced. Although a statute does state that a judge may impose a mandatory service up to one third of the sentence given, this statute has not been followed or upheld as it should be. Thus, a criminal who is given a sentence of 5 years, after a lengthy sentence hearing knows that he can walk out of jail in a few months. How can such a system gain respect? In addition, no matter how long the sentence, work and school releases are doled out without supervision and in most cases, without adequate investigation. It does not take a genius to arrive at the conclusion that a criminal who can obtain such an early release, and actually be further benefited with work or school releases would have little or no respect for the law.

The Courts arrive at a sentence, but have no control thereafter. To further evade what may be considered a reasonable or even lenient sentence makes our system valueless and plays into hands of the criminal. Of all the sentences meted out, none have been fully served, few have served as much as one third, and the vast majority only a token period.

The institution or prisons involved do not function as well as they might because of the failure or complete absence of meaningful programs. Some would suggest clinical type institutions and

almost a one one one ratio for treatment. Assuming this would have value, the cost would be prohibitive, and the element of punishment or persuasion from criminal activity to approved social behavior would be almost totally lacking. Prisons should be completely reorganized, and inmates put to work on projects or industrial vocations. They should be paid regular wages, and part of their wages (25%-50%) used to offset the burden on the taxpayers for their keep. Many products or goods could be manufactured within the prison which could be used by other State agencies. The impact on the private commercial sector would be minimal, and the benefit to all tremendous. Of the earnings, the inmate would then also be able to maintain his family, pay restitution to the victims (forgotten in every way at present), and save, if any funds remain, for his executive release and re-introduction into society.

School programs should be made available in the evening hours within the institutions, not as an escape from prison or alternative to custody as it presently exists. And recreation could be made available, including the companionship of an inmate spouse on a periodic basis. This would tend to eliminate one of the worse conditions existing today, and leading to homosexual or other deviant behavior which frustrates rehabilitation.

Unless sentencing and custodial structures are reinforced, all the well meaning proposals will fall short of accomplishing the aims of our judicial systems. Respect can only be gained by a firm, positive program, to cease making crime pay, to allow the criminal to effecuate some positive expression with the knowledge he has placed himself in the position he finds himself, but allowing him to re-evaluate his values in a positive and dignified manner.

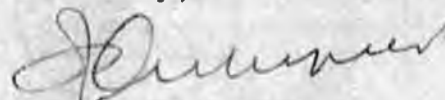
Occasionally we will find the hard core criminal who will scoff at positive programs, and who will probably become institution-alized, or unable to function in society. That person will have to be maintained in a maximum security institution for extended periods of time. At present, however, we do not so segregate, and our costs of maintenance exceed the student fees for our most expensive colleges and universities, and yet the results are negligible.

Finally, a paid professional parole board is essential. Presently, well meaning but ill equiped lay persons are politically appointed. They have other interests, including businesses and various other callings which monopolize their time. A full, professional evaluation is not done, and persons are released with little consideration as to the crimes committed and the impact on society with their early release. Neither can any of the existing board reach any assurance that the person has

learned to function in society, except from recent past behavior in the institution, which is hardly a sufficient basis for evaluation.

I am making these observations to you as a concerned Judge, and do not speak for the entire Court System. Many of my colleagues would agree with me. However, this comes to you as my individual opinion and observation, and is made with a sincere prayer to aid, not to criticize or hinder.

Sincerely,



C. J. Occhipinti

CJO/jm

cc: Senate:

Rettig
Rader
Lewis
Harris
Miller
Groh
Ziegler

House of Representatives:

Fischer
Orsini
McVeigh
Chance
Miller
Fritz
Hartig