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COMMITTEE REPORT

SENATE

5/4/81

FURTHER: None

Date: JANUARY 20, 1982

Mr. President:

The Committee on JUDICIARY has had SB 545
release after conviction of an offense

under consideration and (a majority of the committee) (the committee)
reports it back with the following recommendations:

- do pass do not pass
- do pass with attached amendments(s) same title
- replace with CS for _____ new title
- and recommends _____
- AND attaches a "Letter of Intent" New Fiscal Note
- reports it back without recommendation
- referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

[Signature]
[Signature]

CHAIRMAN

A M E N D M E N T

OFFERED IN THE SENATE:

By: The Judiciary Committee

To: _____ SENATE BILL No. 545

HOUSE BILL No. _____

PAGE: 1

LINE: 12

pt. 12 BETWEEN THE WORD "KIDNAPPING" AND THE PHRASE

"A CLASS A FIDELITY", INSERT THE WORD "OR"

pt. 12 DELETE THE PHRASE "OR A CLASS B FIDELITY"

Aug 13

Introduced: 5/4/81
Referred: Judiciary

1 IN THE SENATE

BY BENNETT

2 SENATE BILL NO. 545

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TWELFTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to release after conviction of an
7 offense."

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

9 * Section 1. AS 12.30.040(b) is amended to read:

10 (b) Notwithstanding the provisions of (a) of this section, if the
11 offense a person has been convicted of is murder [IN THE FIRST DEGREE,
12 ROBBERY IN THE FIRST DEGREE], kidnapping, ~~a class A felony, or a class~~
13 B felony [SEXUAL ASSAULT IN THE FIRST DEGREE UNDER AS 11.41.410(a)(1)],
14 he may not be released on bail either before sentencing or pending
15 appeal.

16
17 Senator Long moves NOBSUTED
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File 8B545

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

MEMORANDUM

February 16, 1982

SUBJECT: Meaning of "conviction" under
AS 12.30.040(b)
TO: Senator Patrick M. Rodey
FROM: Edward H. Hein
Legislative Counsel

You have asked when a person is "convicted for purposes of AS 12.30.040(b).

The term "conviction" is not defined in the statutes or Alaska case law. What constitutes a conviction varies depending upon the context in which the term is used.

In the context of denying or revoking bail under AS 12.-30.040(b), the Alaska Supreme Court has equated "conviction" with adjudication of guilt. State v. Wassillie, 606 P.2d 1279 (Alaska 1980).

Wassillie had been found guilty of rape and was released until sentencing. The trial court denied the state's request that Wassillie be returned to custody before sentencing and entry of a judgment of conviction. The Supreme Court reversed the trial court in part because of its agreement with the state's contention that the right to bail under Article I, Sec. 11 of the Alaska Constitution and AS 12.30.040(b) extends only to the adjudication of guilt or innocence.

Thus, under AS 12.30.040(b) a person has been convicted upon the rendering of a guilty verdict.

EHH:ljb



Official Business

Alaska State Legislature

Senate

Committee on Judiciary

Pouch V
State Capitol
Juneau, Alaska 99811

MEMORANDUM

DATE: January 19, 1982
TO: Senate Judiciary Committee
FROM: Kevin K. Bruce *KB*
RE: SB 545

On January 18th, I contacted Mr. Richard Delaplain, Director of Technical Operations of the Court System, and requested the number of unclassified, Class A and B felons that were on bail awaiting appeal.

He indicated that the court does not normally collect that information, but he was willing to try to select it from Anchorage case files.

In Anchorage alone, for the years 1980 and 1981, he was able to identify 49 cases which were on appeal from a Class A or B felony. Of these, only two were granted a bail continuance following sentencing. One case was an A felony (attempted murder) and the other a B felony (perjury).

STERN:

DAVIS - REPORTS OF SEXUAL ASSAULT RELEASED ON BAIL - COMMITTED
REQUESTS NUMBER OF CASES IN BARRENS

Avoid CONSTITUTIONAL PROBLEM BY

Jim STERNING - APDCA - FAVORS SB545

CASE EXAMPLE - SEXUAL ASSAULT / RELEASED AND COMMITTED



Official Business

Alaska State Legislature

Senate

Committee on Judiciary

Pouch V
State Capitol
Juneau, Alaska 99811

MINUTES OF THE SENATE JUDICIARY COMMITTEE

OF

JANUARY 18, 1982

Butrovich Committee Room, State Capitol Juneau, Alaska

Legislation Before Committee:

- CSSB 399 "An Act relating to adoption; and providing for an effective date."
- SB 535 "An Act relating to the criminal laws of the state."
- SB 545 "An Act relating to release after conviction of an offense."

The meeting of the Senate Judiciary Committee was called to order by Chairman Rodey at 1:40 P.M. Committee members present were: Senators Rodey, Ray, and Parr. Senators Bennett and Hohman were absent.

SB 545 was brought before the committee by Chairman Rodey and after hearing testimony from Barry Stern of the Department of Law, Chairman Rodey held the bill over at the request of Senator Ray for purposes of amendment.

CSSB 399 was brought before the committee by Chairman Rodey. Testimony was heard from Joan Brooks, Department of Health and Social Services. Senator Parr moved adoption of the Committee Substitute as amended. Chairman Rodey and Senator Parr signed do pass. Senator Ray signed no recommendation.

SB 535 was brought before the committee by Chairman Rodey. Barry Stern, Dept. of Law, gave an overview of the bill. Senator Ray suggested amending pg. 1, line 15 to read, "he causes physical injury to any person other than himself by means of a dangerous instrument." The amendment was adopted with no objection.

Testimony was also heard from Gordon Evans, representing Multivisions of Anchorage, regarding Section 5. Chairman Rodey directed Mr. Bruce to work with Gordon Evans, representing Multivisions, for language changes to Sec. 5. to meet committee approval.

Chairman Rodey adjourned the meeting at 2:25 P.M.

Sec. 12.30.040. Release after conviction. (a) A person who has been convicted of an offense and is awaiting sentence, or who has filed an appeal shall be treated in accordance with the provisions of AS 12.30.020 unless the court has reason to believe that no one or more conditions of release will reasonably assure the appearance of the person as required or prevent the person from posing a danger to other persons and the community. If that determination is made, the person may be remanded to custody. This section does not affect the right of a person appealing from a judgment of conviction from a district court to the superior court to be released on bail pending appeal under Rule 2(c) of the District Court Rules of Criminal Procedure.

(b) Notwithstanding the provisions of (a) of this section, if the offense a person has been convicted of is murder in the first degree, robbery in the first degree, kidnapping, or sexual assault in the first degree under AS 11.41.410(a)(1), he may not be released on bail either before sentencing or pending appeal. (§ 1 ch 20 SLA 1966; am § 3 ch 24 SLA 1966; am § 3 ch 39 SLA 1974; am § 36 ch 102 SLA 1980)

Effect of amendment. — The 1980 amendment substituted "murder in the first degree, robbery in the first degree, kidnapping, or sexual assault in the first degree under AS 11.41.410(a)(1)" for "first degree murder, armed robbery, kidnapping, or rape (as defined in AS 11.15.130)" in subsection (b).

Legislative history reports. — For report on ch. 20, SLA 1966, see 1966 House Journal, pp. 110, 111. For report on ch. 102, SLA 1980 (HCS CSSB 511), see 1980 Senate Journal Supplement, No. 44 (May 29, 1980) or 1980 House Journal

Supplement, No. 79 (May 29, 1980).

Application of section is limited. — This section, which provides for release after trial, is limited in application to convicted persons awaiting sentence or whose appeal is pending. *Martin v. State*, Sup. Ct. Op. No. 983 (File No. 1785), 517 P.2d 1389 (1974).

Application of Alaska Constitution bail clause. — The bail clause of the Alaska Constitution does not apply after the conviction of a person accused of a crime. *State v. Wassilie*, Sup. Ct. Op. No. 2028 (File No. 3603), 606 P.2d 1279 (1980).

HISTORY OF OFFENSES ON OR/BAIL PENDING FINAL DISPOSITION OF APPEAL



Alaska Judicial Council

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CHAIRMAN, EX OFFICIO
EDMOND W BURKE
CHIEF JUSTICE
SUPREME COURT

January 15, 1982

Kevin Bruce
Office of Senator Rodey
Senate Judiciary Committee
Pouch V
Juneau, Alaska

Dear Kevin:

The following statistics are in response to your request for information regarding the number of violent felony offenders who are free, either on their own recognizance or on bail, after judgement has been entered against them.

The data used in this analysis includes all violent felony offenses committed in Anchorage, Fairbanks or Juneau in 1980 that resulted in conviction. (This definition of "violent felonies" corresponds to offenses classified as Class I or II by the Judicial Council in its sentencing studies.) The custodial status of the offender is determined as of the time of sentencing.

The distributions provided in the table indicate that the proportion of offenders incarcerated at the time of sentencing is greatest among the unclassified (and most serious) felonies. The proportion of offenders free on bail on their own recognizance, conversely, increases as the severity of the class of offense decreases.

Please do not hesitate to contact me if I can be of any further assistance.

Sincerely,

Nicholas Maroules
Executive Director

Enclosures: as stated

<u>Class of Offense:</u>	<u>Offender's Custodial Status At Sentencing:</u>			
	<u>Own Recog.</u>	<u>Bail</u>	<u>Jail *</u>	<u>Totals</u>
<u>Unclassified</u>	0% (0)	11.1% (1)	88.9% (8)	100% (9)
<u>"A" Felony</u>	12.1% (4)	30.3% (10)	57.6% (19)	100% (33)
<u>"B" Felony</u>	12.2% (5)	26.8% (11)	60% (25)	100% (41)
<u>"C" Felony</u>	21.2% (7)	42.4% (14)	36.4% (12)	100% (33)

* Includes cases where offender sent to custody of API



Alaska Judicial Council

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January 14, 1982

CHAIRMAN EX OFFICIO
EDMOND W. BURKE
CHIEF JUSTICE
SUPREME COURT

Melissa Fouse
Office of Senator Sturgulewski
Pouch V
Juneau, Alaska 99811

Dear Melissa:

This is to confirm the statistical information I provided you in our telephone conversation of January 14, regarding the number of serious felony offenders released on their own recognizance. As I explained to you on the phone, the Judicial Council's data includes information on custodial status -- i.e., own recognizance, bail, etc. -- at the time of sentencing. The data includes all offenses committed in 1980 that were originally charged as a felony that resulted in a conviction in Anchorage, Fairbanks, and Juneau.

<u>Offense</u>	<u>Number of Cases</u>	<u>N</u>	<u>Number cases on own recogn. at sentencing % of all cases</u>
Murder 1	5	0	0%
Murder 2	3	0	0%
Kidnapping	1	0	0%
Manslaughter	3	0	0%
Assault 1	10	2	20%
Sex. Assault 1	10	2	0%

Missou Fouse
January 14, 1982
Page Two

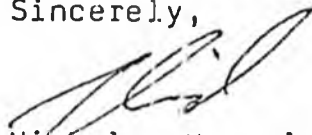
<u>Offense</u>	<u>Number of Cases</u>	<u>N</u>	<u>Number cases on own recogn. at sentencing % of all cases</u>
Robbery 1	13	0	0%
Assault 2	23	3	13%
Sex. Assault 2	1	0	0%
Robbery 2	8	1	12%
Negligent Homocide	1	1	100%

I have enclosed three recent Judicial Council reports that you may find helpful. They include, (1) Alaska Felony Sentences: 1976-1979, (2) "Preliminary Report on Fish and Game Offense Sentences", and (3) "Preliminary Report of 1980 Felony Sentencing Patterns"

I hope the information I have included, above, is helpful. Please do not hesitate to contact me if we can be of any further assistance.

I look forward to meeting with you in Juneau in the near future.

Sincerely,



Nicholas Maroules
Executive Director

Enclosures: as stated



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CHAIRMAN EX OFFICIO
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CHIEF JUSTICE
SUPREME COURT

January 15, 1982

Ms. Julia Coster
House Judiciary Committee
Pouch V
Juneau, AK 99811

Dear Julia:

This is in response to your request for statistical information concerning the relationship between the custodial status (own recognizance, bail, etc.) of felony offenders and income.

The data used in this analysis includes all felony offenses committed in Anchorage, Fairbanks and Juneau in 1980 that resulted in a conviction. Also, the custodial status variable relates to the time of sentencing. Finally, the analysis is limited to violent felony offenses, including those cases described by the Judicial Council in its "Preliminary Report of 1980 Felony Sentencing Patterns" as Class 1 and 2 offenses.

TABLE I
 Custodial Status at Time of
Sentencing by Level of Monthly Income
 (1980 Violent Felonies)

<u>Monthly Income</u>	<u>Custodial Status</u>			<u>Totals</u>
	<u>Own Recogn.</u>	<u>Bail</u>	<u>Jailed</u>	
Less Than \$500	15.8% (16)	28.7% (29)	55.5% (56)	100% n=101
\$500-\$1200	35.7% (5)	57.2% (8)	7.1% (1)	100% n=14
Over \$1200	17.9% (5)	42.9% (12)	39.2% (11)	100% n=28
Totals	(26)	(49)	(68)	N=143

The above distributions indicate that offenders with the lowest monthly income (under \$500) are most likely (55.5%) to have been jailed at the time of sentencing -- i.e., they did not make bail and were not released on their own recognizance. Conversely, offenders with a monthly income over \$500 (including the "\$500 - \$1200" and "Over \$1200" groups) were most likely to have been free on bail at the time of sentencing.

Overall, only 26 or 18% of all violent offenders were free on their own recognizance at the time of sentencing.

Table II, below, provides a distribution of custodial status by race.

Ms. Julia Coster
January 15, 1982
Page Three

TABLE II
Custodial Status at Time of
Sentencing by Defendant's Race
(1980 Violent Felonies)


<u>Defendant's Race</u>	<u>Own</u> <u>Recogn.</u>	<u>Bail</u>	<u>Jaile.</u>	<u>Totals</u>
Black	7.1% (1)	57.1% (8)	35.8% (5)	100% n=14
Native	17.0% (8)	31.9% (15)	51.1% (24)	100% n=47
Caucasian	27.2% (22)	30.9% (25)	41.9% (34)	100% n=81
Other Minority	23.1% (3)	30.8% (4)	46.1% (6)	100% n=13
Totals	(34)	(52)	(69)	

These distributions indicate that Caucasian offenders were most likely, and Black offenders least likely, to have been released on their own recognizance at the time of sentencing. Black offenders, however, were also most likely to have been released on bail at the time of sentencing. Finally, Native and minority offenders were proportionately more likely than Black and Caucasian offenders to have been jailed at the time of sentencing.

I hope these figures are of some help to you. I have also enclosed a copy of a letter I recently sent to Melissa Fouse, Senator Sturgulewski's aide, which includes further information on the topic of custodial status.

Please do not hesitate to contact me if I can be of any further assistance.

Sincerely,



Nicholas Maroules
Executive Director

Enclosure

TERMS OF IMPRISONMENT AND AUTHORIZED FINES IN REVISED CRIMINAL CODE

	FIRST FELONY CONVICTION	SECOND FELONY CONVICTION	THIRD FELONY CONVICTION
"A" Felony	0-20 3-[6]*-20	5-[10]-20	7 1/2-[15]-20
"B" Felony	0-10	0-[4]-10	3-[6]-10
"C" Felony	0-5	0-[2]-5	0-[3]-5

MAXIMUM FINES - PERSONS

Murder or kidnaping - \$75,000
 A, B, or C Felony - \$50,000
 A misdemeanor - \$ 5,000
 B misdemeanor - \$ 1,000
 Violation - \$ 300

MAXIMUM FINES - ORGANIZATIONS

All offenses - \$100,000 or
 3 X pecuniary gain
 - whichever is greater

KEY

Number in bracket is presumptive sentence.
 Number to left is lowest mitigated
 sentence. Number to right is highest
 aggravated sentence.

Six year presumptive term applies if first
 A felony conviction, other than manslaughter,
 and defendant used or possessed a firearm
 during the offense or caused serious physical
 injury.

MAXIMUM TERMS OF IMPRISONMENT
 FOR MISDEMEANORS

A misdemeanor - 1 year
 B misdemeanor - 90 days

CLASSIFICATION OF OFFENSES IN REVISED CRIMINAL CODE

UNCLASSIFIED FELONIES

Murder in the First Degree

AS 11.41.100

20-99 years

X Murder in the Second Degree

AS 11.41.110

5-99 years

Kidnapping

AS 11.41.300

5-99 years

CLASSIFIED FELONIES

2-2

A	B	C
X Attempted Murder or Kidnapping AS 11.31.100(d)(1)	Attempted A felony AS 11.31.100(d)(2)	Attempted B felony AS 11.31.100(d)(3)
X Solicitation of Murder or Kidnapping AS 11.31.110(c)(1)	Solicitation of A felony AS 11.31.110(c)(2)	Solicitation of B felony AS 11.31.110(c)(3)
X Manslaughter AS 11.41.120	Assault II AS 11.41.210	Criminally Negligent Homicide AS 11.41.130
Assault I AS 11.41.200	Sexual Assault II AS 11.41.420	Custodial Interference I AS 11.41.320
Sexual Assault I AS 11.41.410	Unlawful Exploitation of a Minor AS 11.41.455	Sexual Assault III AS 11.41.430

CLASSIFIED FELONIES

A	B	C
Robbery I AS 11.41.500	Robbery II AS 11.41.510	Sexual Abuse of a Minor AS 11.41.440
X Arson I AS 11.46.400	Extortion AS 11.41.520	Incest AS 11.41.450
X Escape I AS 11.56.300	Theft I AS 11.46.120	Coercion AS 11.41.530
X Criminal Possession of Explosives with Intent to Commit Murder or Kidnapping AS 11.61.240(b) (1)	Issuing a Bad Check, \$25,000 or more AS 11.46.280(d) (1)	Theft II AS 11.46.130
2-3	Burglary I AS 11.46.300	Concealment of Merchandise, \$500 or more AS 11.46.220(c) (1)
	Arson II AS 11.46.410	Removal of Identification Marks, \$500 or more AS 11.46.260(b) (1)
	Criminal Mischief I AS 11.46.480	Unlawful Possession (of Altered Property), \$500 or more AS 11.46.270(b) (1)
	Forgery I AS 11.46.500	Issuing a Bad Check, \$500 or more AS 11.46.280(d) (2)
	Scheme to Defraud AS 11.46.600	Fraudulent Use of a Credit Card, \$500 or more AS 11.46.285(b) (1)
	Defrauding Creditors, \$25,000 or more AS 11.46.730(c) (1)	

CLASSIFIED FELONIES

B

Bribery
AS 11.56.100

Receiving a Bribe
AS 11.56.110

Perjury
AS 11.56.200

Escape II
AS 11.56.310

Intereference with
Official Proceedings
AS 11.56.510

Receiving a Bribe by a
Witness or Juror
AS 11.56.520

Criminal Possession of
Explosives with Intent
to Commit A felony
AS 11.61.2(b)(2)

Promoting Prostitution I
AS 11.66.110

C

Obtaining a Credit Card by
Fraudulent Means
AS 11.46.290(a)(1),(2)

Burglary II
AS 11.46.310

Criminal Mischief II
AS 11.46.482

Forgery II
AS 11.46.505

Criminal Possession of Forgery
Device
AS 11.46.520

Criminal Simulation \$500 or
more
AS 11.46.530(b)(1)

Offering a False Instrument
for Recording
AS 11.46.550

Falsifying Business Records
AS 11.46.630

Commercial Bribe Receiving
AS 11.46.660

Commercial Bribery
AS 11.46.670

CLASSIFIED FELONIES

C

Defrauding Creditors, \$500
- \$25,000
AS 11.46.730(c)(2)

Endangering Welfare of Minor
AS 11.51.100

Perjury by Inconsistent State-
ments
AS 11.56.230

Escape III
AS 11.56.320

Permitting an Escape
AS 11.56.370

Promoting Contraband I
AS 11.56.375

Jury Tampering
AS 11.56.590

Misconduct by a Juror
AS 11.56.600

Tampering with Physical Evidence
AS 11.56.610

Hindering Prosecution I
AS 11.56.770

Terroristic Threatening
AS 11.56.810

2-5

2-5

CLASSIFIED FELONIES

C

Riot

AS 11.61.10 ;

Misconduct Involving Weapons I

AS 11.61.200

Criminal Possession of Explosives with Intent to Commit

B Felony

AS 11.61.240(b) (3)

Unlawful Furnishings of Explosives

AS 11.61.250

Promoting Prostitution II

AS 11.66.120

Promoting Gambling I

AS 11.66.210

Possession of Gambling Records I

AS 11.66.230

2-6

that had been criticized by another of panel of that court.

Petition for rehearing granted; decision of Superior Court reversed.

Courts ⇌ 95(1)

In deciding case under law of Texas, Supreme Court could not, in absence of decision on the question by Texas Supreme Court, consider as a "controlling decision" a decision of one panel of the Texas Court of Civil Appeals that had been criticized by another panel of that court.

Millard Ingraham, Rice, Hoppner, Hedland, Fleischer & Ingraham, Fairbanks, for appellant.

Andrew J. Kleinfeld, Fairbanks, for appellee.

Before CONNOR, BURKE and MATTHEWS, JJ., and DIMOND, Senior Justice.

PER CURIAM.

The Bank has petitioned for a rehearing. The petition is granted.

In its petition for rehearing, the Bank argues that in our determining that the Bank was not a holder in due course of Wear's promissory note, we overlooked a controlling decision. The decision the Bank refers to is *First Nat'l Bank v. Bell*, 28 S.W.2d 119 (Tex.Civ.App.—Fort Worth 1935). The *Bell* decision was criticized as not being a sound construction of the Negotiable Instruments Law by another panel of the Texas Civil Court of Appeals in *Estrada v. River Oaks Bank & Trust Co.*, 550 S.W.2d 719, 726 (Tex.Civ.App., Houston [14th District] 1977). Thus, in the absence of a decision by the Texas Supreme Court on this question, the *Bell* decision cannot be considered as a "controlling decision," as the Bank asserts.

In reaching our decision that the Bank was not a holder in due course of Wear's

note in 1963, we applied the Uniform Commercial Code, which was adopted by the State of Texas in 1966. A holding that the Bank did become a holder in due course would be inconsistent, in our opinion, with Texas statutory law in 1968. We will presume that the *Estrada* view in 1977, and not that in the *Bell* case in 1935, regarding the question of written contracts to assignments as endorsements of notes, would be the view that the Supreme Court of Texas would have adopted in 1968 if the matter had been presented to it.

The Bank also reiterates its argument that Wear forfeited his right to commissions by "twisting," i. e., by inducing Century policyholders to cancel their Century policies and insure instead with another insurance company represented by Wear so that he could get the higher first-year commissions. As we held in the original opinion in this case, that argument is untenable and without merit.

We adhere to our original decision which reverses the judgment of the superior court.

RABINOWITZ, C. J., and BOOCHEVER, J., not participating.



STATE of Alaska, Petitioner,

v.

Teddy WASSILLIE, Respondent.

No. 3603.

Supreme Court of Alaska.

Feb. 29, 1980.

The State petitioned for review of decision of the Superior Court, Fourth Judicial

District, Christopher R. Cook, J., denying its motion for an order revoking convicted defendant's presentencing release. The Supreme Court, Matthews, J., held that bail clause in Alaska Constitution does not afford a right to postconviction bail.

So held.

Rabinowitz, J., dissented and filed opinion.

Bail ⇐42

Bail clause in Alaska Constitution does not afford a right to postconviction bail. Const. art. 1, § 11.

Norman A. Cohen, Legal Intern, Victor C. Krumm, Dist. Atty., Bethel, Avrum M. Gross, Atty. Gen., Juneau, for petitioner.

Allan Beiswenger, Asst. Public Defender, Bethel, Brian Shortell, Public Defender, Anchorage, for respondent.

Before BOOCHEVER, C. J., and RABINOWITZ, CONNOR, BURKE and MATTHEWS, JJ.

OPINION

MATTHEWS, Justice.

Respondent Teddy Wassillie was indicted for the crimes of assault with a dangerous weapon, assault with intent to commit rape, and rape. Guilty verdicts were returned as to each count. The superior court then ordered that a presentence investigation be

conducted and a presentence report filed. Sentencing was scheduled to be held in approximately thirty days.

Following the return of the jury's verdicts, Wassillie requested that he be continued on release status until sentencing. The request was granted. Shortly thereafter, the state moved for an order revoking Wassillie's release and remanding him to custody. The state based its motion on the provisions of AS 12.30.040(b). That statute provides:

Notwithstanding the provisions of (a) of this section, if the offense a person has been convicted of is first degree murder, armed robbery, kidnapping, or rape (as defined in AS 11.15.130), he may not be released on bail either before sentencing or pending appeal.

The superior court denied the state's motion on the ground that the statute "as applied to this case . . . is an unconstitutional infringement of the right to bail" and upon the further ground that under Alaska Rule of Criminal Procedure 41(a), it was vested with discretion to continue Wassillie on release status.¹

Thereafter the state petitioned for review, asserting that the constitutional right to bail terminated upon the adjudication of guilt and that Alaska Rule of Criminal Procedure 41(a),² mandates that AS 12.30.040(b) apply. We have granted review in full recognition of the fact that Wassillie has now been sentenced.³ Substantively, this petition "involve[s] [an] important recurring issues of law which may be capable of evading review."⁴ We have therefore decided to exercise our discretionary review

was then immediately remanded to custody to begin serving his term of imprisonment. An opinion was issued in connection with the state's sentence appeal from the sentence given Wassillie. See *State v. Wassillie*, 578 P.2d 971 (Alaska 1978).

1. Alaska R.Crim.P. 3(a) provides in relevant part that "[f]ollowing sentence the court may commit the defendant or continue or alter the bail."

2. Alaska R.Crim.P. 41(a) provides that "[t]he defendant in a criminal proceeding is entitled to be admitted to bail pursuant to AS 12.30.010-12.30.080."

3. On September 23, 1977, Wassillie was sentenced to a term of imprisonment of eight years with six and a half years suspended. He

4. *Martin v. State*, 517 P.2d 1389, 1391 (Alaska 1974) (footnote omitted). See *Doe v. State*, 487 P.2d 47 (Alaska 1971); *In re G.M.B.*, 163 P.2d 1006 (Alaska 1971); *RLR v. State*, 487 P.2d 27 (Alaska 1971).

authority despite the fact that the case is moot as to Wassillie.

We limit our review to the question whether the bail clause of the Alaska Constitution applies after the conviction of a person accused of a crime.⁵ The alternative basis for the decision of the superior court, that the court has the discretionary power to admit one convicted of rape to bail under Alaska Rule of Criminal Procedure 32(a), involves the question whether the right to bail is procedural within the meaning of article IV, section 15 of the Alaska Constitution,⁶ and, if so, whether Alaska Rule of Criminal Procedure 41(a) which was promulgated in 1973 may be interpreted as encompassing subsequent changes in the statutes which it has incorporated. The briefing on these points is entirely inadequate, and therefore this aspect of the superior court's decision will not be reviewed.⁷

5. Alaska Const. Art. I, § 11 provides:

Rights of Accused. 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 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.

6. Alaska Const. Art. IV, § 15 provides:

Rule-Making Power. The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

7. The state's "Petition for Review" does not mention these issues at all. In its "Supplemental Petition for Review" the entire treatment given them is as follows:

The legislature has the authority to extend bail to convicted individuals, and it has done so on certain limited situations. This right of bail is statutory, not constitutional, in origin. It is also substantive in nature, so that courts

In *Martin v. State*,⁸ we held that the right to bail does not extend to probation revocation proceedings. We stated: "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."⁹ In distinguishing the two types of proceedings we noted that "[a] probation revocation hearing is not a criminal prosecution looking toward an adjudication of guilt or innocence."¹⁰ Although this language lends support to the state's position that the right to bail extends only to the "adjudication of guilt or innocence," it is not dispositive of this petition.¹¹

The right to bail was not an original concept of the framers of the Alaska Constitution. Provisions establishing bail as a matter of constitutional right are contained in the constitutions of most, and perhaps

do not have authority to disregard the plain words of the statute, or alter the statute by procedural rules.

This court has repeatedly stated that inadequately briefed issues will not be considered. See e. g., *L.E. Spitzer Co. v. Barron*, 581 P.2d 213, 218 (Alaska 1978); *Wetzler v. Wetzler*, 570 P.2d 741, 742 n.2 (Alaska 1977); *Kristich v. State*, 550 P.2d 796, 804 (Alaska 1976); *Wernberg v. Matanuska Elec. Ass'n*, 494 P.2d 790, 794 (Alaska 1972); *Lewis v. State*, 469 P.2d 689, 691-92 n.2 (Alaska 1970).

8. 517 P.2d 1389, 1398 (Alaska 1974).

9. *Id.* (footnote omitted).

10. *Id.* (footnote omitted). *Martin* was cited in *Gilbert v. State*, 540 P.2d 485, 486 (Alaska 1975) for the proposition that "an order denying bail to one accused of a crime, but not yet convicted," was in violation of Alaska Const. art. I, § 11.

11. This court's definition of "criminal prosecution" as used in Alaska Const. art. I, § 11 does not indicate at what point the right to bail terminates. See, e. g., *Alexander v. City of Anchorage*, 490 P.2d 910 (Alaska 1971); *RLR v. State*, 487 P.2d 27 (Alaska 1971); *State v. Browder*, 486 P.2d 925 (Alaska 1971); *Baker v. City of Fairbanks*, 471 P.2d 386, 397 (Alaska 1970).

all, American states.¹² The usual provision reads, with slight variations from state to state: "All persons shall be bailable by sufficient sureties, except for capital offenses, when the proof of guilt is evident, or the presumption thereof is great."¹³

Such clauses are similar to the bail clause contained in article I, section 11 of the Alaska Constitution which provides: "The accused is entitled . . . to be released on bail, except for capital offenses when the proof is evident or the presumption great . . ." If anything, they lend themselves more readily to a construction that they apply to post conviction bail than does our bail clause, since they refer to "all persons" and ours is limited to "the accused." However, the uniform interpretation they had received when the Alaska Constitution was drafted and approved was that they applied only to bail before a conviction.¹⁴ There is no indication either in the language of the constitution or the minutes of the constitutional convention that the framers of the Alaska Constitution

meant to deviate from this broadly accepted interpretation.¹⁵ If a result at variance with the historic experience of our sister states were intended, the framers would have found the words to express it. Far from doing so, they chose largely customary phraseology which everywhere else had been taken to be a grant of the right to bail only before a conviction. It is plain to us that the framers of our constitution intended the same result.

We reject the argument expressed by the dissenting opinion that each of the rights enumerated in article I, section 11 of the Alaska Constitution must terminate at the same point in the course of a criminal case. We see no compelling reasons why, for example, the right to counsel, the speedy trial right, and the right to bail should share the same point of termination because these rights serve separate and largely unrelated purposes. Moreover, even under the dissenting opinion, they do not share a common termination point because the right to

12. See *State v. Flowers*, 330 A.2d 146, 147 (Del.1974). See also Annot. 19 A.L.R. 807 (1922) and Annot. 77 A.L.R. 1237 (1932).

13. *Ex Parte Herndon*, 18 Okl.Cr. 68, 192 P. 820 (1920). See, e. g., *In re Podesto*, 15 Cal.3d 921, 127 Cal.Rptr. 97, 544 P.2d 1297 (1976); *State v. Flowers*, 330 A.2d 146 (Del.1974); *Ex Parte Heath*, 227 Mo. 393, 126 S.W. 1031 (1910); *Ex Parte Halsey*, 124 Ohio St. 318, 178 N.E. 271 (1931); *State v. Helton*, 72 Wyo. 105, 261 P.2d 46 (1953).

14. "The constitutional provision . . . does not refer to cases wherein a conviction has been had in a court of competent jurisdiction." *Ex Parte Herndon*, 18 Okl.Cr. 68, 192 P. 820, 821 (1920). See e. g., *Ex Parte Voli*, 4 Cal. 29 (1871); *Ex Parte Schriber*, 19 Idaho 531, 114 P. 29 (1911); *Braden v. Lady*, 276 S.W.2d 664 (Ky.1955); *Ex Parte Heath*, 227 Mo. 393, 126 S.W. 1031 (1910); *State v. Bradsher*, 189 N.C. 401, 127 S.E. 349 (1955); *Ex Parte Halsey*, 124 Ohio St. 316, 178 N.E. 271 (1931); *City of Sioux Falls v. Marshall*, 48 S.D. 378, 204 N.W. 999 (1925); *Hicks v. State*, 179 Tenn. 601, 168 S.W.2d 781 (1943); *Ex Parte Berry*, 198 Wash. 317, 88 P.2d 427 (1939); *State v. Helton*, 72 Wyo. 105, 261 P.2d 46 (1953). *Contra*, *New Orleans v. Lucoste*, 169 La. 717, 125 So. 865 (1930) (This decision is based on an express

provision of the Louisiana Constitution providing for post conviction bail as a matter of right).

15. In fact the minutes of the constitutional convention reflect a desire to follow the experience of the other states concerning the right to bail. Thus delegate Victor Fischer stated, in virtually the only recorded comment made to the constitutional convention concerning the bail clause:

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 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" [sic] and that is a necessary protection for the accused and we should 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. [Emphasis added].

2 Proceedings of the Alaska Constitutional Convention 1344-45 (Jan. 6, 1956).

counsel continues through an appeal¹⁶ while, according to the dissent, the right to bail terminates when sentencing has been completed.

For these reasons we hold that the bail clause in our constitution does not afford a right to post-conviction bail.

RABINOWITZ, Justice, dissenting.

I disagree with the majority's holding that the right to bail under the Alaska Constitution extends only to adjudication of guilt. I also disagree with the majority that it need not consider the other basis for the superior court's denial of the state's motion to return Wassillie to custody pending sentencing.

Here the majority concludes that the relevant clause in the Alaska Constitution should be construed in conformity with the bail provisions of most other states. But these jurisdictions have separate sections in their constitution pertaining to the subject of bail. Generally, these provisions regarding the right to bail, as the majority notes, provide that: "All persons shall be bailable by sufficient sureties, except for capital offenses, when the proof of guilt is evident, or the presumption thereof is great."¹

The Alaska constitutional provision is not of this form. Only in Alaska and Connecticut² is the right to bail made part of the constitutional provision enumerating the

various rights of an accused. The Alaska Constitution, article I, section 11 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 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.

I am convinced that this distinctive context calls forth other principles of constitutional construction in determining issues raised in the instant matter.³ For "[t]he general rule in constitutional construction is to give import to every word and make none nugatory." *Hootch v. Alaska State Operated School System*, 536 F.2d 793, 801 (Alaska 1975) (footnote omitted).

It is clear that of the enumerated rights in this section of Alaska's Constitution, other than the right to bail, neither the accused's right to counsel nor the right to a speedy trial is extinguished once a determination of guilt has been made.⁴ Under the Sixth Amendment to the Constitution of

vention made on the floor of the convention to the effect that the Alaska language is similar to that found in the majority of the state constitutions. I find the delegate's remarks are obtuse and directed toward different purposes so that, in my view, they fail to shed any light on the present controversy.

16. *Douglas v. California*, 372 U.S. 353, 356, 13 S.Ct. 814, 816, 9 L.Ed.2d 811, 814 (1963).

1. For a compilation of the state constitutional provisions on the right to bail, see W. Duker, *The Right to Bail: A Historical Inquiry*, 42 Albany L.Rev. 33, 73 n.373 (1975).

2. Conn.Const. art. I, § 8. Connecticut case law suggests that in that state the right to bail terminates at conviction. See *State v. Chisholm*, 29 Conn.Sup. 339, 287 A.2d 389, 390 (1971); *State v. Vaughan*, 71 Conn. 457, 42 A. 640 (1899). However, this interpretation appears to be based on earlier versions of the Connecticut constitution which took the form found in other states as already mentioned. See Conn.Const. art. I, § 14 (1955); Conn. Const. art. I, § 14 (1816).

3. The majority also attaches weight to the remarks of a delegate to the constitutional con-

4. Using the time of adjudication of guilt as a termination point for certain constitutional rights of an accused would have no impact on the rights to be informed of the nature of the accusation or to have an impartial jury. However, the adoption of such a termination point would arguably impinge upon the accused's right to be confronted with the witnesses against him, to a public trial, and to have compulsory process for obtaining witnesses, at least as these rights pertain to sentencing hearings.

the United States, it is provided that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." In *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), the Supreme Court held that the right to counsel in a state criminal prosecution exists at every stage in the proceeding. Subsequently, in *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967), the Court explicitly recognized that sentencing is a critical stage of a criminal prosecution in which the presence of counsel is required.⁶ Concerning the right to a speedy trial, we noted in *Gonzales v. State*, 582 P.2d 630 (Alaska 1978), that the language of the Sixth Amendment to the United States Constitution and article 1, section 11 of the Alaska Constitution is identical. We held in *Gonzales* that sentencing delays are governed by both the federal and Alaska constitutional guarantees of a speedy trial.⁷ These decisions dealing with an accused's rights to a speedy trial and to the assistance of counsel in my opinion point to an appropriate resolution of this petition.

Relevant judicial precedent is sparse. None of the cases I have reviewed treat specifically the phraseology of the "accused" in a "criminal prosecution." Those jurisdictions which have considered the question of bail during the period between an adjudication of guilt and sentencing focus upon "conviction" and not on the mean-

ing of the terms "the accused" in a "criminal prosecution."⁸ Judicial decisions which have adopted the interpretation that one is no longer an "accused" after a determination of guilt has taken place have been based on the following grounds: that the major reasons for pre-trial release, the presumption of innocence and assistance in preparation of defense, are extinguished at this point; that the risk that an accused who has been found guilty will not make future appearances is increased, since the imposition of sanctions is now certain; and that the concern regarding the possibility of punishing one who has not been found guilty is eliminated with the adjudication of guilt.⁹

Judicial precedent holding that the right to bail extends through the sentencing stage of a criminal proceeding emphasize that the presumption of innocence should continue until the court has imposed sentence. After a guilty verdict, the court is not necessarily bound by the verdict and may act to terminate the prosecution or to set aside the adjudication of guilt in response to a variety of authorized post-trial motions. Until sentencing takes place, it remains uncertain whether the sentencing sanction will include any period of incarceration. Even though there is an increased risk to the public that the accused will flee after there has been an adjudication of guilt, the recognition of a right to bail does

5. The text of article 1, section 11 of the Alaska Constitution parallels that of the Federal Sixth Amendment.

6. See also *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from Mempa v. Rhay*, 47 Texas L.Rev. 1, 3 (1968).

7. Our analysis in *Gonzales* did not involve a construction of the particular constitutional text but relied on considerations of policy. In *Gonzales*, we concluded that while not all the policy considerations which support the right to a speedy trial are strictly relevant to sentencing delays, enough are so that the right to a

speedy trial was held to encompass sentencing delays. *Gonzales v. State*, 582 P.2d 630, 632-33 (Alaska 1978).

8. See *State v. Quinn*, 10 Ariz.App. 552, 460 P.2d 658, 661 (1969); *Ex parte Brown*, 68 Cal. 176, 8 P. 829, 830-33 (1885); cf. *State v. Christiana*, 249 La. 247, 186 So.2d 580, 587 (1966), cert. denied, 385 U.S. 835, 87 S.Ct. 77, 17 L.Ed.2d 68 (1967).

9. See, e.g., *State v. Flowers*, 330 A.2d 146, 148 (Del.1974); *Commonwealth v. Fowler*, 451 Pa. 505, 304 A.2d 124, 129-30 (1973).

not foreclose the sentencing court from altering the conditions of the accused's bail to reduce the risk of flight.¹⁰

Additionally, I think it appropriate to note that in *Bradley v. United States*, 410 U.S. 605, 93 S.Ct. 1151, 35 L.Ed.2d 528 (1973), the Supreme Court was confronted with the problem of determining the meaning of "prosecution" in a savings clause, section 103(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, providing that prosecutions, prior to the effective date of the statute, would not be affected. The Supreme Court stated:

Rather than using terms in their everyday sense, '[t]he law uses familiar legal sense.' The term 'prosecution' clearly imports a beginning and an end.

In *Berman v. United States*, 302 U.S. 211, 82 L.Ed. 204, 58 S.Ct. 164 (1936), this Court said, 'Final judgment in a criminal case means sentence. The sentence is the judgment.' In the legal sense, a prosecution terminates only when sentence is imposed. (citations omitted)¹¹

Given the foregoing, I conclude that an accused's right to bail in a criminal prosecution under the wording of article 1, section 11 of the Alaska Constitution extends beyond an adjudication of guilt and continues until sentencing has been completed. Admittedly, the policy considerations both for and against this conclusion are closely balanced. Nevertheless, I think the right to bail under article 1, section 11, of the Alas-

ka Constitution must be so construed to bring it in harmony with other rights which are granted an accused in a criminal prosecution. Interpreting the terms "accused" in a "criminal prosecution" in their familiar legal sense leads to the conclusion that an accused retains the status of an accused until a judgment of conviction is entered,¹² and that a criminal prosecution remains a criminal prosecution which is terminated by the entry of a judgment of conviction, not by an adjudication of guilt.

I thus would hold that insofar as AS 12.30.040(b) purports to limit the right to bail of an accused in a criminal prosecution after an adjudication of guilt, but prior to sentencing, it conflicts with and is contrary to the right to bail as embodied in article 1, section 11 of the Alaska Constitution.

Furthermore, assuming arguendo that the constitutional right to bail does not extend to sentencing, I cannot agree with the majority's conclusion that the legislature may limit the court's discretion to grant bail.

The order of the superior court in denying the state's motion to return Wassillie to custody not only held that AS 12.30.040(b) was in violation of the Alaska Constitution but that the court was obligated to follow the applicable criminal rules pertaining to bail, which supersede any procedural provisions of any inconsistent statute unless the statute was enacted for the specific purpose of changing a court rule.¹³ The superior

10. *People ex rel. Moffitt v. Quinlan*, 69 Misc.2d 1088, 332 N.Y.S.2d 447 (1972).

11. *Bradley v. United States*, 410 U.S. 605, 609, 93 S.Ct. 1151, 1154, 35 L.Ed.2d 528, 532. The footnote to the quoted text in the original reads:

These cases involve determining whether a judgment in a criminal case is final for the purpose of appeal and determining whether the function of the trial judge has been concluded so that he may not alter the sentence previously imposed to include probation. The precise issues are, of course, different from the issue in this case. But these cases do show the point at which a prosecution terminates, and that is the issue here.

12. Black's Law Dictionary at page 38 (4th Ed. 1968) defines "accused" in the following manner:

'Accused' is the general name for the defendant in a criminal case. . . . [t]he person against whom an accusation is made; one who is charged with a crime or misdemeanor. (citation omitted)

13. See Alaska R.Crim.P. 52, which provides:

These rules are promulgated pursuant to constitutional authority granting rule making power to the supreme court, and to the extent that they are inconsistent with any procedural provisions of any statute not enacted

court in its bail decision noted the discretion granted the court by virtue of the provisions of Criminal Rule 32(a), which provides that: "[p]ending sentence the court may commit the defendant or continue or alter the bail." The superior court further held that AS 12.30.040(b), in removing its discretion to continue or alter bail as to certain offenses, was not specifically intended to modify Criminal Rule 32(a) and thus has no effect and is void.

The majority concludes that it need not consider this issue because it was inadequately briefed. This conclusion, I think, fails to consider the procedural context of this case. The superior court ordered Wassillie released from custody and then denied the state's motion to have him returned to custody. The state petitioned for review of the superior court's denial. Thus, once review is granted of the superior court's order releasing Wassillie, it is incumbent upon us to consider both grounds upon which the motion was granted. I do not think that we can selectively permit review of one ground only and not consider others, if they exist.

On appeal, the state does not contend that AS 12.30.040(b) was specifically intended to change Rule 32(a) but that Criminal Rule 41(a) is dispositive procedurally of the matter. This latter rule provides:

The defendant in a criminal proceeding is entitled to bail pursuant to AS 12.30.010-12.30.080.

for the specific purpose of changing a rule, shall supersede such statute to the extent of such inconsistency.

Article IV, section 15, of the Alaska Constitution provides, in part, that this court's rules "may be changed by the legislature by two-thirds vote of the members elected to each house." See *City of Valdez v. Valdez Dev. Co.*, 506 P.2d 1279 (Alaska 1973); *Leege v. Martin*, 379 P.2d 447 (Alaska 1963).

14. "The court of King's bench had the right to bail after, as well as before, conviction." *State v. Flowers*, 330 A.2d 146, 148 n.2 (Del.1974), quoting *Ex parte Ezell*, 40 Tex. 451 (1874). See also *United States v. Stanley*, 152 U.S.App.D.C. 170, 175, 469 F.2d 576, 581 (D.C.Cir.1972) ("application for release pending appeal is a function historically committed to trial judges");

Wassillie notes that Criminal Rule 41(a) was amended prior to the enactment of AS 12.30.040(b) in 1974. Rule 41(a) took its present form by amendment through Supreme Court Order 157, effective February 15, 1973. Although the wording is somewhat ambiguous, I think that Rule 41(a) does not encompass the subsequent change in the Bail Reform Act that resulted with the enactment of AS 12.30.040(b). Reading Criminal Rules 32(a) and 41(a) together precludes alteration by subsequent legislation, absent an express purpose to change the rules. This analysis is based on the assumption that bail is a matter of procedure.

At common law, the question whether an accused was to be released on bail at any stage of the proceedings was one left to be answered by the court in its discretion.¹⁴ It is still generally recognized that courts have the inherent power to make determinations as to bail and bail conditions or revocation when such actions are appropriate to the orderly process of criminal justice, even in the absence of specific statutory authorization. As one court stated:

It is our conclusion that a specific statute granting the trial court authority to revoke bail is not necessary, since a court with jurisdiction over a criminal has the power to enforce its orders as to bail just as it has control over other orders.¹⁵

Despite this traditionally accepted power of the courts with respect to release on bail, most jurisdictions seem to adhere to the

DeAngelis v. State of South Carolina, 330 F.Supp. 889, 891 (D.S.C.1971) ("At common law, courts had the inherent power to grant bail."); *Rose v. Nickeson*, 29 Conn.Sup. 81, 271 A.2d 855, 856 (1970) ("Since bail is not the handmaiden of custody, the power to admit to bail is inherent in the court so long as the prisoner is in its custody.");

15. *Mello v. Superior Court*, 117 R.I. 578, 370 A.2d 1262, 1265 (1977). See also *United States v. Smith*, 441 F.2d 61, 62 (8th Cir. 1971), cert. denied, 405 U.S. 977, 92 S.Ct. 1205, 31 L.Ed.2d 253, 822 (1972); *United States v. Stanley*, 449 F.Supp. 467, 469 (N.D.Cal.1978); *People ex rel. Hemingway v. Elrod*, 60 Ill.2d 74, 322 N.E.2d 837, 840-43 (1975).

view that the legislature may define the scope of non-constitutional rights to bail and those classes of offenses to which those rights apply.¹⁶ One court, for instance, has termed it a "time-honored rule" that "bail is not allowed in any case except in pursuance of some statute."¹⁷ Yet this same court relied on a judicially created doctrine to hold that "a citizen cannot arbitrarily be denied a bail hearing solely because of a lack of statutory authority for release."¹⁸ In *People ex rel. Hemingway v. Elrod*, 60 Ill.2d 74, 322 N.E.2d 837 (1975), the Illinois Supreme Court rejected the Illinois Assembly's attempt to define "capital offenses" subject to only discretionary pre-trial release, in the wake of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, reh. denied, 409 U.S. 902, 93 S.Ct. 89, 34 L.Ed.2d 163 (1972). The Assembly substituted the offenses "murder, aggravated kidnapping or treason" for offenses where "death is a possible punishment" in its statutory provisions defining "capital offenses."¹⁹ The Illinois Court rejected this attempt at "classifications" of offenses, stating:

In our opinion the constitutional right to bail must be qualified by the authority

16. See *Carlson v. Landon*, 342 U.S. 524, 545-46, 72 S.Ct. 525, 536-37, 96 L.Ed. 547, 563 (1952) (eighth amendment does not prevent Congress from classifying offenses into those in which an accused is entitled to bail as a matter of right and those in which bail is discretionary); *Mastrian v. Hedman*, 326 F.2d 708, 710 (8th Cir. 1964), cert. denied, 376 U.S. 965, 84 S.Ct. 1128, 11 L.Ed.2d 982 (1964); *Turco v. State of Maryland*, 324 F.Supp. 61, 63 (D.Md. 1971), aff'd, 444 F.2d 56 (4th Cir. 1971); *People v. Sanders*, 185 Colo. 153, 522 P.2d 735, 736 (1974); *State v. Flowers*, 330 A.2d 146, 149 (Del. 1974); *Critchlow v. State*, 264 Ind. 458, 346 N.E.2d 591, 599-600 (1976); *Hanson v. Gladden*, 34 Or. 494, 426 P.2d 465 (1967).

17. *West v. Janing*, 449 F.Supp. 548, 552 (D.Neb. 1978), quoting *United States v. Curran*, 297 F. 946, 952 (2d Cir. 1924). See also *United States v. Sine*, 461 F.Supp. 565, 567 (D.S.C. 1978); *Emery v. Fenton*, 266 N.W.2d 6, 7 (Iowa 1978).

18. *West v. Janing*, 449 F.Supp. at 552. The court found a judicially-based right to release pending appeal for an "interstate fugitive"

of the courts, as an incident of their power to manage the conduct of proceedings before them, to deny or revoke bail when such action is appropriate to preserve the orderly process of criminal procedure.²⁰

The court held that pre-trial bail release questions were "within the inherent power of the court" and its "inherent authority to enforce its orders and to require reasonable conduct from those over whom it has jurisdiction."²¹

While this conflict, with its overtones of constitutional interpretation, was somewhat weighted in favor of the judicial branch, other cases reveal the difficult nature of this question of governmental power, veiled in "substance" and "procedure."²² A much more relevant case to Wassillie's argument is the decision of the Washington Supreme Court in *State v. Smith*, 84 Wash.2d 498, 527 P.2d 674 (1974), which dealt with the source of authority for the right to release after conviction and pending appeal. The Washington court, finding no constitutional limits on bail in that context, held that the provisions of a criminal rule promulgated by the court, and not a conflicting legisla-

challenging extradition proceedings. The asylum state had no statutory provisions authorizing release in that context.

19. *People ex rel. Hemingway v. Elrod*, 60 Ill.2d 74, 322 N.E.2d 837, 839 (1975).

20. *Id.* 322 N.E.2d at 840.

21. The court adopted various ABA Standards Relating to Pretrial Release (1968) as the law in Illinois. *Id.* 322 N.E.2d at 841-43.

22. See *Smiloff v. State*, 579 P.2d 28, 33 n.19 (Alaska 1978) (recognizing "that the line between substance and procedure is an elusive one.") See also *Padie v. State*, 566 P.2d 1024, 1029-30 (Alaska 1977); *Thomas v. State*, 566 P.2d 630, 636-38 (Alaska 1977); *Gieffels v. State*, 552 P.2d 661, 667-68 (Alaska 1976); *Winegardner v. Greater Anchorage Area Borough*, 534 P.2d 541, 545-46 (Alaska 1975); *Channel Flying, Inc. v. Bernhardt*, 451 P.2d 570, 576 (Alaska 1969); *Ware v. City of Anchorage*, 439 P.2d 793, 794 (Alaska 1968).

tive enactment, were controlling as to questions of bail pending appeal. The Supreme Court of Washington based its conclusion on the distinction between substantive and procedural authority, reasoning that:

Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law[s], rights, and remedies are effectuated.

Since the inherent power to fix bail is grounded in the power to hold a defendant, and thus relates to the manner of ensuring that the alleged offense will be heard by the court, we believe it to be implicit that the right to bail is essentially procedural in nature.

Since the promulgation of rules of procedure is an inherent attribute of the Supreme Court and an integral part of the judicial process, such rules cannot be abridged or modified by the legislature. Thus, the right to bail (and release) after verdict and pending appeal . . . is governed solely by the provisions of [the criminal rule].²³

In so holding, *Smith* gave effect to a criminal rule which provided:

Release After Verdict. A defendant (1) who is charged with a capital offense, or (2) who has been found guilty of a felony and is either awaiting sentence or has filed an appeal, shall be released pur-

23. *State v. Smith*, 84 Wash.2d 498, 527 P.2d 674, 677 (1974) (citations omitted).

24. *Id.* 527 P.2d at 676. The *Smith* court also noted the fact that the legislature had delegated the power to prescribe rules for bail pending appeal was "a second and alternative rationale, but not the principle or basic one." *Id.* 527 P.2d at 677. The legislature could, of course, remove that basis for the court's asserted authority.

25. *People ex rel. Stamos v. Jones*, 40 Ill.2d 62, 237 N.E.2d 495, 496 (1968).

26. *Id.* 237 N.E.2d at 498. Other cases also assert a judicial power to define the right to

suant to this Rule, unless the court finds that the defendant may flee the state or pose a substantial danger to another or to the community. If such a risk of flight or danger exists, the defendant may be ordered detained.

In contrast, the legislative enactment invalidated in *Smith* required that bail be set on appeal in all except capital cases, a provision more charitable than the court's rule.²⁴ Thus, while the *Smith* decision might be seen as consistent with the traditionally inherent power of the courts to deny or revoke bail, it contravenes the principle of legislative authority in defining the right to release on bail.

The Illinois Supreme Court, in *People ex rel. Stamos v. Jones*, 40 Ill.2d 62, 237 N.E.2d 495 (1968), also invalidated a statutory provision which conflicted with its adopted procedural rules. The court's rules provided that a convicted defendant "may be admitted to bail and the sentence . . . stayed by a judge of the trial or reviewing court." The statute provided that one convicted of a forcible felony "shall not be entitled to a continuation of his bail and the sentence of imprisonment shall not be stayed by the trial court."²⁵ The court held that its rules were controlling because "the constitution has placed responsibility for rules governing appeal in the Supreme Court, and not in the General Assembly."²⁶

The *Jones* context parallels the situation presented in the instant case and furnishes support for the invalidation of AS 12.30.-

bail. In *Commonwealth v. Fowler*, 451 Pa. 505, 304 A.2d 124 (1973), the Pennsylvania Supreme Court held that the existing state law as to bail after conviction was that embodied in the court's criminal rules. *Id.* 304 A.2d at 126. After an analysis of the societal values involved, the court concluded;

In the exercise of our supervisory capacity we hold that bail should not be granted to one convicted of murder in the first degree between entry of the verdict and the imposition of formal sentence.

Unlike the situation in *Smith* and *Jones*, the *Fowler* court noted no statutes in conflict with either its criminal rules as to bail or its "supervisory" holding.

04(b) on the grounds that it encroaches on an "inherently judicial function" by completely eliminating the possibility of release on bail pending appeal, with regard to enumerated offenses.²⁷

The argument for judicial discretion is strong in the case of release pending sentencing. It is anomalous to allow a court to decide not to impose a term of confinement as a sentence for these offenses (a result contemplated by both the relevant statutes and case law, though unlikely in most cases for these offenses), and yet not allow that same court the discretion to release the convicted person pending imposition of that sentence. This would effectively result in a mandatory minimum sentence of confinement for the several weeks or months often necessary to obtain the information necessary for sentencing. Further, there is also the possibility that a court might set aside the verdict and grant a new trial, creating a situation in which the defendant was unjustly incarcerated for at least some period of time as a result of the unavailability of an individual consideration of bail.

I am persuaded that the matter of bail is a procedural power inherent in the judicial function. As the District of Columbia Court of Appeals noted in *United States v. Stanley*, 152 U.S.App.D.C. 170, 175, 469 F.2d 576, 581 (D.C.Cir.1972) (footnotes omitted):

Not surprisingly, then, initial resolution of an application for release pending appeal is a function historically committed to trial judges. It cannot be gainsaid

that "the keynote to successful administration of any system of bail is the adequacy of the information upon which the decisions are based." The need for ample information is particularly acute in investigations of potential danger to the community, findings relative to which, as has aptly been said, "must rest on a 'scrupulous inquiry' into appellant's past, his prospects if released, and conditions of release to mitigate the danger." The trial court is not only the traditional but also the superior tribunal for the kind of information-gathering which a sound foundation for a bail ruling almost inevitably requires. For it is there that, at a hearing, the judge can come face-to-face with the primary informational sources, and probe for what is obscure, trap what is elusive, and settle what is controversial. It is there, too, that the judge has at his disposal "the judicial machinery necessary to marshal the facts typically relevant to the release inquiry."

Findings on the risks of danger or flight, and on the efficiency of particular conditions of release to sufficiently minimize those risks, are obviously enriched by a feel of the case that comes only from participation in the live trial. The respect we customarily accord the district judge's determinations attests the value of his appraisal of the intangibles which ultimately make or break the case for bail.

27. Florida has gone through various changes with respect to this question. The Florida Supreme Court, in *Greene v. State*, 238 So.2d 296 (Fla.1970), recited the statutory basis of bail rights. However, a later opinion, *Bernhardt v. State*, 288 So.2d 490 (Fla.1974), invalidated statutory provisions which precluded bail in certain probation and parole revocation situations on the grounds that bail in that context was essentially procedural in nature and, thus, amenable only to court rule-making authority.

Several Florida intermediate appellate court cases interpreted *Bernhardt* as necessarily invalidating a statute which eliminated bail on appeal for one with a prior felony conviction, in contrast to the discretionary language provided

for bail in precisely that context in the court's rules of criminal procedure. See *Rolle v. State*, 314 So.2d 624 (Fla.App.1975); *State ex rel. Harrington v. Genung*, 300 So.2d 271 (Fla.App.1974); *Bamber v. State*, 300 So.2d 269 (Fla.App.1974). The principle in these cases was subsequently cited with approval by both the majority and the dissent in *Johnson v. State*, 336 So.2d 93 (Fla.1976).

However, the legislature, pursuant to its authority under Florida law, repealed the conflicting court rules, and the Florida Supreme Court subsequently conformed the rules to the statute. *The Florida Bar re Florida Rules of Criminal Procedure*, 343 So.2d 247, 1250, 1267 (Fla.1977).

Though this court has recognized that the legislature has more than minimal authority to define the nature of the right to post-conviction release in Alaska,²⁸ I think the complete abolition of individualized judicial determination of the suitability for release cannot be accomplished without an explicit statutory revision of the applicable rules²⁹ of criminal procedure pertaining to bail.

Thus, even if the constitutional right to bail does not extend until sentencing, I am

28. See *Carman v. State*, 564 P.2d 361, 363 (Alaska 1977) ("Through subsequent amendments of Alaska's Bail Reform Act, in determining bail and conditions of release, our courts are now empowered to take into consideration whether the person charged with an offense will pose a danger to other persons and

convinced that Criminal Rule 32(a) mandates individualized bail decisions.



the community'"); *Martin v. State*, 517 P.2d 1389, 1395 (Alaska 1974) ("In addition to the constitutional guarantee of bail, a right to bail is found in the Alaska Statutes.").

29. See note 17 *supra*.