
HB
1411

Box 919
Palmer, Alaska 99645

February 3, 1986

Senator Patrick Rodey
Chairman, Senate Judiciary Committee
Alaska State Legislature
Pouch V (MS3100)
Juneau, Alaska 99811

Dear Senator Rodey:

After some time of careful consideration in regard to CSHB 141, I wish to follow my initial contact and communication with the remarks that follow.

At the present time, we are faced with a burgeoning prison population which will continue to grow. We continually look for ways of dealing with this problem. We extend further financial help and look at requests for further funding. Yet, as often happens, we may have some of the answers close to us, maybe already in effect.

There already is a system of "Good Time" that has been a part of the Department of Corrections to be used as a tool of management. During the First Session of the 14th Legislature, the Governor sponsored HB 104, "An Act relating to computation, forfeiture and restoration of statutory good time; and providing for an effective date." The bill as initially proposed would have been retroactive to the beginning date of each person's sentence. This caused concern to some and an amendment was added by Representative Pettyjohn and Representative Gruenberg.

After due consideration, this amended bill, CSHB 104 (Jud), was passed. It was hoped that this amendment would take away objections to the bill.

In fact, the amendment may have presented very serious problems which will no doubt, if passed in its present form, will cause this to be an immediate entry on the court dockets. More than that, it may well interfer with the very purpose of the intent of "Good Time".

"Good Time" is considered as a management tool by correctional personnel. It is one of the few effective tools available to them at no cost to the taxpayer. It allows them to offer to the prisoner an incentive for good behavior. This also allows the person an earlier release and thereby saving additional tax dollars at little risk to the public. There is little doubt that it should be continued and even extended.

However, a close reading of the amendment takes from correctional administrators and personnel a good degree of this desired

control by placing the final decision in the hands of the Board of Parole. Even HB 141, the most recent legislation regarding the Board of Parole does not indicate that this is the intent or the purpose of the Board of Parole. This bill effectively, that is the amendment to the bill, gives a share of this tool to the Board of Parole. It thereby, effectively destroys the full impact of this tool for correctional personnel.

Further, there is a serious legal question involved. The bill in no way indicates the process by which such "Good Time" will be withheld by the Board of Parole. In this State, parole is both discretionary and mandatory. "Good Time" does not fall in that category since it is mandatory by the wording of the statute. It is a right given by law and therefore is a "liberty interest" protected by the 14th Amendement of the U.S. Constitution.

In Wolff v. McDonnell, 418 U.S., 94 S. Ct. 2963 (1974), a benchmark was set in regard to procedural due process regarding good time.

> "But the State having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the state-created right is not arbitrarily abrogated....
>
> We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of government."

"Good Time" has been established as a right in this State. It follows that it is subject to any "Due Process Procedure" before there can be any interruption in its applicability. Many additional cases can be noted which indicate fault with the latter part of the amendment. A few to be noted which deal with "Due Process" would be Kozlowski v. Coughlin, 539 F. Supp. 852, 855 (S.D.N.Y. 1982),district court found a liberty interest based on State judicial decisions and prison regulations.

Gaballah v. Johnson, 629 F.2d 1191 (7th Cir. 1980) describes and defines the two elements needed in "due process". Keenan v. Bennett, 613 F. 2d 127 (5th Cir. 1980) and Johnson v. Hardy, 601 F. 2d 172 (5th Cir. 1979) both indicate that this could be and is a Federal question dealing with "due process". In our own State, Pash v. Endell, U.S. A84-189, the Federal Court will rule on such "procedural due process"violations.
The bill as originally written was a good and needed bill. It was the intent of the bill to overcome much of the confusion that is presently found in computing "Good Time" within three different systems. It could still be a good bill.

We could accept the amendment without any danger if all the wording following ....effective date of this Act... were eliminated.

The present wording is ....effective date of this Act, unless the Board of Parole determines that, with reasonable probability the prisoner will not live and remain at liberty without violating any laws. Cf. attached copy of amendment.
If these underlined words were omitted and a period placed after ACT, the bill would meet the questions of rectroactive opponents and fulfill the intent of the "Good Time" concept.

I would urge passage of this bill if these changes were made to correct its present form. At a low price, it will give the Department much needed bed space with little or no danger to the protection of the public.

Sincerely,

Harry Depp

Harry C. Depp

Offered: 3/22/85
Referred: Rules

Original sponsor: Rules/Governor

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 104 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to computation, forfeiture and restoration of statutory good time; and providing for an effective date."

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

* Section 1. AS 33.20.010 is repealed and reenacted to read:

Sec. 33.20.010. COMPUTATION OF GOOD TIME. Notwithstanding AS 12.55.125(f)(3) and 12.55.125(g)(3), a prisoner convicted of an offense against the state or a political subdivision of the state and sentenced to a term of imprisonment that exceeds three days is entitled to a deduction of one-third of the term of imprisonment rounded off to the nearest day if the prisoner follows the rules of the correctional facility in which the prisoner is confined.

* Sec. 2. AS 33.20.050 is amended to read:

Sec. 33.20.050. FORFEITURE FOR OFFENSE. If during the term of imprisonment a prisoner commits an offense or violates the rules of the <u>correctional facility</u> [INSTITUTION], all or [ANY] part of the prisoner's [EARNED] good time may be forfeited <u>under regulations adopted by the commissioner of corrections. The amount of good time forfeited shall be related to the severity of the offense or rule violation</u>.

* Sec. 3. AS 33.20.060 is repealed and reenacted to read:

Sec. 33.20.060. RESTORATION OF FORFEITED GOOD TIME. The commissioner of corrections may restore all or a portion of a prisoner's forfeited good time, under regulations adopted by the

commissioner, if the prisoner demonstrates progress in faithfully observing the rules of the correctional facility in which the prisoner is confined. The amount of forfeited good time restored by the commissioner shall be related to the severity of the offense or rule violation committed by the prisoner and the length of time of good conduct that followed the offense or rule violation.

* Sec. 4. Section 1 of this Act takes effect immediately in accordance with AS 01.10.070(c).

* Sec. 5. Sections 2 and 3 of this Act take effect January 1, 1986.

AMENDMENT #1

OFFERED IN THE HOUSE: BY: Gruenberg & Pettyjohn

To: Committee Substitute for HOUSE BILL No. 104 (Judiciary)

SENATE BILL No. _____

PAGE: 1 LINE: 11

1. Line 11 - After "," and before "notwithstanding" add "(a) Except as provided in (b) of this section and"

2. After line 17 add a new (b) to read:

(b) A prisoner sentenced to a term of imprisonment of more than one year before the effective date of this Act who was entitled to a deduction of less than one-third of the term of imprisonment is entitled to a deduction of one-third of the portion of the term of imprisonment remaining to be served as of the effective date of this Act, unless the Board of Parole determines that, with reasonable probability, the prisoner will not live and remain at liberty without violating any laws.

3 70

MSG 85-00000706 PRTY 1 04/22/85 12:57:33 ORIG: LJE7 IN= 0001 OUT= 0001
FROM: JUNEAU LIO TO: ALL SITES
TARGET: LMH0 SUBJ: ACTION

TO: ALL SITES

DATE: APRIL 22, 1985 ROLL CALL: 37 PRESENT

MESSAGES FROM THE GOVERNOR - NONE

MESSAGES FROM THE SENATE:

S PASSED CSHB 14 - AK TERRITORIAL GUARD BURIAL ALLOWANCE - TO GOV

COMMUNICATIONS - NONE

REPORTS OF STANDING COMMITTEES

L&C: CSSB 53 TITLE AM - RELEASE OF UNEMPLOYMENT INSUR RECORDS - TO JUD

L&C: HR 8 - SISTER-STATE RELATN W/ TAIWAN - NO MORE RFRLS

RES: HJR 14 - NAVIGABILITY OF LAKES & RIVERS - REC CS(TRANS) - NO MORE RFRLS

JUD: HB 31 - OBSTRUCTING OR HINDERING HUNTING, FISHING - ADD OFN - TO RES

FIN: HB 147 - DIVISION OF EEO - REC CS(FIN), NEW TITLE, ADD FN - NO MORE RFRLS

HESS: HB 191 - STATE AID FOR SCHOOL CONSTRUCTN - REC CS(HESS), ADD FN - TO FIN

JUD: HB 218 - LEGISLATIVE ETHICS - REC CS(JUD) - ADD FIN RFRL

FIN: HB 231 - GEN ASSISTANCE FOR NEEDY PERSONS - ADD FN - NO MORE RFRLS

JUD: HB 240 - PASSING STOPPED SCHOOL BUS PROHIBITED - REC CS(JUD), NEW TITLE - NO MORE RFRLS

SA: HB 252 - PERS: CONTRIB/RETIRMT AGE/BENEFITS - REC CS(SA), ADD FN - TO FIN

REPORTS OF SPECIAL COMMITTEES - NONE

INTRODUCTION OF RESOLUTIONS - NONE

INTRODUCTION, FIRST READING AND REFERENCE OF BILLS:

SSHB 11 BY DAVIS - MUNICIPAL TAXATION OF AGRICULTURAL LAND - TO C&RA, RES, FIN

HB 393 BY JUD - RIGHTS OF PHYSICALLY AND MENTALLY DISABLED - TO JUD, FIN

CONSIDERATION OF DAILY CALENDAR:

HB 104 - COMPUTATION, FORFEITURE & RESTORATION OF GOOD TIME
CS(JUD) ADOPTED U/C
AM 1 BY GRUENBERG, PETTYJOHN ADOPTED U/C
MOVED TO 3RD READING
PASSED 22Y - 16 N (NOS: COTTEN, DAVIS, FRANK, GRUENBERG, HANLEY, JENKINS, MARTIN, M W MILLER, PEARCE, PETTYJOHN, PIGNALBERI, RIEGER, RINGSTAD, SCHULTZ, SZYMANSKI, UEHLING)
EFF. DATE PASS 33Y - 5 N
REP. UEHLING GAVE NOTICE OF RECONSIDERATION

AT PRESENT THE HOUSE IS DISCUSSING THE SECOND BILL ON THE CALENDAR. PEGGY WILL TAKE OVER FOR ME IN LISTENING TO THE ACTION AND WILL SEND YOU THE REMAINDER OF THE HOUSE ACTION, PERHAPS IN INSTALLMENTS IF THE SESSION STRETCHES OUT.

ALL OTHER MATTERS UP FOR FINAL ACTION:

UNFINISHED BUSINESS:

ADJOURNMENT:

Edwards
5/3/85

Original sponsor: Rules/Governor

IN THE HOUSE BY THE JUDICIARY COMMITTEE

SENATE CS FOR CS FOR HOUSE BILL NO. 141 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the parole of offenders; amending the sunset date for the parole board; and providing for an effective date."

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

* Section 1. AS 12.55 is amended by adding a new section to read:

Sec. 12.55.115. FIXING ELIGIBILITY FOR DISCRETIONARY PAROLE AT SENTENCING. The court may, as part of a sentence of imprisonment, further restrict the eligibility of a prisoner for discretionary parole for a term greater than that required under AS 33.16.090 and 33.16.100.

* Sec. 2. AS 33 is amended by adding a new chapter to read:

CHAPTER 16. PAROLE ADMINISTRATION.

Sec. 33.16.010. PAROLE. (a) A prisoner who is serving a term or terms of at least 181 days is eligible for either discretionary or mandatory parole.

(b) A prisoner who is eligible under AS 33.16.090 may be granted discretionary parole by the board of parole.

(c) A prisoner who is not eligible for discretionary parole, or who is not released on discretionary parole, shall be released on mandatory parole for the term of good time deductions credited under AS 33.20, if the term or terms of imprisonment exceed 180 days.

(d) A prisoner released on discretionary or mandatory parole is subject to the conditions of parole imposed under AS 33.16.150. Parole may be revoked under AS 33.16.220.

Edwards
5/3/85

Original sponsor: Rules/Governor

Rodey
Attn: Roger Lewis

IN THE HOUSE BY THE JUDICIARY COMMITTEE

SENATE CS FOR CS FOR HOUSE BILL NO. 141 (Judiciary)

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(d) A prisoner released on discretionary or mandatory parole is subject to the conditions of parole imposed under AS 33.16.150. Parole may be revoked under AS 33.16.220.

Sec. 33.16.020. BOARD OF PAROLE. (a) There is in the Department of Corrections a board of parole consisting of five members appointed by the governor, subject to confirmation by a majority of members of the legislature in joint session.

(b) Members of the board serve for staggered terms of five years and until their successors are appointed.

(c) The governor shall choose the presiding officer of the board from among the membership.

(d) The governor shall make appointments to the board with due regard for representation on the board of the ethnic, racial, sexual, and cultural populations of the state.

(e) The governor shall appoint at least one member who resides in the First Judicial District, one member who resides in the Third Judicial District, and one member who resides in either the Second or Fourth Judicial District.

Sec. 33.16.030. SELECTION CRITERIA FOR BOARD MEMBERS. (a) The governor shall appoint board members on the basis of their qualifications to make decisions that are compatible with the welfare of the community and of individual offenders. The governor shall appoint members who are able to consider the character and background of offenders and the circumstances under which offenses were committed.

(b) At least one person appointed to the board must have experience in the field of criminal justice.

(c) Officers or employees of the state may not be appointed to the board.

Sec. 33.16.040. COMPENSATION AND EXPENSES. A board member is entitled to compensation at an amount to be set by the governor for each day the member is participating in business of the board, and is also entitled to the per diem and travel allowances provided under

AS 39.20.180.

Sec. 33.16.050. MEETINGS OF THE BOARD. (a) The board may meet as often as it considers necessary to carry out its responsibilities, but shall meet at least four times a year.

(b) Three members of the board constitute a quorum for the conduct of business.

(c) Decisions and orders of the board require the affirmative votes of a majority of the members present.

(d) The board may conduct meetings by the use of teleconferencing facilities.

Sec. 33.16.060. DUTIES OF THE BOARD. (a) The board shall

(1) serve as the parole authority for the state;

(2) upon receipt of an application, consider the suitability for parole of a prisoner who is eligible for discretionary parole;

(3) impose parole conditions on all prisoners released under discretionary or mandatory parole;

(4) under AS 33.16.210, discharge a person from parole when custody is no longer required;

(5) maintain records of the meetings and proceedings of the board;

(6) recommend to the governor and the legislature changes in the law administered by the board;

(7) recommend to the governor or the commissioner changes in the practices of the department and of other departments of the executive branch necessary to facilitate the purposes and practices of parole;

(8) upon request of the governor, review and recommend applicants for executive clemency; and

(9) execute other responsibilities prescribed by law.

(b) The board shall adopt regulations under the Administrative Procedure Act (AS 44.62)

(1) establishing standards under which the suitability of a prisoner for discretionary parole shall be determined;

(2) providing for the supervision of parolees and for recommitment of parolees; and

(3) governing procedures of the board.

Sec. 33.16.070. PROCESS. The board or a member of the board may issue subpoenas and subpoenas duces tecum in the performance of board duties under AS 33.16.060(a). Subpoenas issued under this section are enforceable in Superior Court.

Sec. 33.16.080. EXECUTIVE DIRECTOR. The board shall hire an executive director to serve the board in the discharge of its duties. The executive director must have had training and experience in the field of criminal justice. The executive director may employ additional staff to assist the board.

Sec. 33.16.090. ELIGIBILITY FOR DISCRETIONARY PAROLE. (a) A prisoner who is serving a term of at least 181 days, and who is not otherwise ineligible under (b) of this section, may, in the discretion of the board, be released on discretionary parole subject to AS 12.55.086(b), 12.55.115, and AS 33.16.100(c) and (d).

(b) A prisoner is not eligible for discretionary parole during the term of a presumptive sentence; however, a prisoner is eligible for discretionary parole during a term of sentence enhancement imposed under AS 12.55.155(a) or during the term of a consecutive or partially consecutive presumptive sentence imposed under AS 12.55.025(e) or (g).

(c) A prisoner eligible for discretionary parole during a period of sentence enhancement imposed under AS 12.55.155(a) or during a consecutive or partially consecutive presumptive sentence imposed

under AS 12.55.025(e) or (g) shall serve the unenhanced portion of the sentence or the initial presumptive sentence before being otherwise eligible for discretionary parole under AS 33.16.100(c) or (d). For purposes of this subsection, the sentence for the most serious offense in the case of consecutive or partially consecutive presumptive sentences shall be considered the initial presumptive sentence. The unenhanced sentence or the initial presumptive sentence is considered served for purposes of discretionary parole on the date the unenhanced or initial presumptive sentence is due to expire less good time earned under AS 33.20.010.

(d) In determining the eligibility of a prisoner for discretionary parole, the board may rely on the verbatim written transcript of the judge's sentencing remarks under AS 12.55.025(a)(1), and any other portion of the sentencing proceeding, as well as the judgment entered by the court.

Sec. 33.16.100. GRANTING OF DISCRETIONARY PAROLE. (a) The board may authorize the release of a prisoner on discretionary parole if it determines a reasonable probability exists that

(1) the prisoner will live and remain at liberty without violating any laws or conditions imposed by the board;

(2) the prisoner's rehabilitation and reintegration into society will be furthered by release on parole;

(3) the prisoner will not pose a threat of harm to the public if released on parole; and

(4) release of the prisoner on parole would not diminish the seriousness of the crime.

(b) If the board finds a change in circumstances in a prisoner's parole release plan submitted under AS 33.16.130(a), or discovers new information concerning a prisoner who has been granted a parole

release date, the board may rescind or revise the previously granted parole release date. In reconsidering the release date, the procedures set out in AS 33.16.130(b) and (c) shall be followed.

(c) Except as provided in (d) of this section, a prisoner may not be released on discretionary parole until the prisoner has served at least one-fourth of the period of confinement imposed, one-fourth of an enhanced period of confinement imposed under AS 12.55.155(a), or any minimum term set under AS 12.55.115 at sentencing, whichever is greater.

(d) A prisoner who is sentenced for a term under AS 12.55.125(a) or (b) may not be released on discretionary parole until the prisoner has served the mandatory minimum term under AS 12.55.125(a) or (b), at least one-third of the period of confinement imposed, or any minimum term set under AS 12.55.115 at sentencing, whichever is greater.

Sec. 33.16.110. PREPAROLE REPORT. (a) In determining whether a prisoner is suitable for discretionary parole, the board shall consider the preparole reports including,

(1) the presentence report made to the sentencing court;

(2) the recommendations made by the sentencing court, by the prosecuting attorney, and by the defense attorney, and any statements made by the victim or the prisoner at sentencing;

(3) the prisoner's institutional conduct history while incarcerated;

(4) recommendations made by the staff of the correctional facilities in which the prisoner was incarcerated;

(5) reports of prior crimes, juvenile histories, and previous experiences of the prisoner on parole or probation;

(6) physical, mental, and psychiatric examinations of the prisoner;

(7) information submitted by the prisoner, the sentencing court, the victim of the crime, the prosecutor, or other persons having knowledge of the prisoner or the crime;

(8) information concerning an unjustified disparity in the sentence imposed on a prisoner in relation to other sentences imposed under similar circumstances; and

(9) other relevant information that may be reasonably available.

(b) The board shall provide information available under (a)(3) and (a)(6) of this section when requesting comments on the discretionary parole of a prisoner from the sentencing court.

Sec. 33.16.120. RIGHT OF VICTIM TO COMMENT ON PAROLE OF PRISONER. (a) Upon request of the victim, notice of a hearing to review or consider discretionary parole for a state prisoner who is convicted of a crime against a person shall be sent to the victim of the crime at least 30 days before the scheduled hearing.

(b) It is the responsibility of the victim to keep the board apprised of the victim's most current mailing address. The board shall send the notice required under (a) of this section to the last known address of the victim. The address of the victim may not be disclosed to the prisoner or the prisoner's attorney.

(c) The victim has a right to comment in writing on the proposed action of the board. Copies of the comments shall be provided to the prisoner and the prisoner's attorney before action by the board.

(d) The board shall consider the comments presented under (c) of this section in deciding whether to release the prisoner on parole.

(e) Upon request of the victim, if the board decides to release on parole a prisoner who is convicted of a crime against a person, the board shall make every reasonable effort to notify the victim before

the prisoner's release date. Notification under this subsection must include the expected date of the prisoner's release, the geographic area in which the prisoner is required to reside, and other pertinent information concerning the prisoner's conditions of parole that may affect the victim.

(f) Upon request of the victim, if a prisoner is released under AS 33.16.010(c), the board shall make every reasonable effort to notify the victim before the prisoner's release date. Notification under this subsection must include the expected date of the prisoner's release, the geographic area in which the prisoner is required to reside, and other pertinent information concerning the prisoner's conditions of parole that may affect the victim.

Sec. 33.16.130. APPLICATION FOR DISCRETIONARY PAROLE. (a) A prisoner eligible for discretionary parole may apply to the board for discretionary parole. As part of the application for parole, the prisoner shall submit to the board a parole release plan that includes the prisoner's plan for employment, residence, and other information concerning the prisoner's rehabilitative plans if released on parole.

(b) Before the board determines a prisoner's suitability for discretionary parole, the prisoner is entitled to a hearing before the board. The prisoner shall be furnished a copy of the preparole reports listed in AS 33.16.110, and permitted access to all records that will be considered by the board in making its decision except those that are made confidential by law. The prisoner may also respond in writing to all materials considered by the board, be present at the hearing, and present evidence to the board.

(c) The board shall issue its decision in writing and provide the basis for a denial of discretionary parole. A copy of the decision shall be provided to the prisoner.

Sec. 33.16.140. ORDER FOR PAROLE. An order for parole issued by the board, setting out the conditions imposed under AS 33.16.150(a) and AS 33.16.150(b), and the date parole custody ends, shall be furnished to each prisoner released on discretionary or mandatory parole.

Sec. 33.16.150. CONDITIONS OF PAROLE. (a) As a condition of parole, a prisoner released on discretionary or mandatory parole shall refrain from conduct punishable by imprisonment under state or federal law or municipal ordinance.

(b) The board may require as a condition of discretionary or mandatory parole that a prisoner released on parole

(1) meet family obligations;

(2) pursue employment, education, counseling, or training;

(3) remain within stated geographic limits unless written permission to depart from the stated limits is granted the parolee;

(4) report upon release to the parole officer assigned to the parolee;

(5) report as required to the parole officer assigned to the parolee;

(6) reside at a stated place and notify the board of any change in place of residence;

(7) not possess or control firearms or other dangerous weapons;

(8) refrain from possessing or consuming alcoholic beverages;

(9) submit to reasonable searches and seizures by a parole officer, or a peace officer acting under the direction of a parole officer;

(10) submit to appropriate medical, mental health, or controlled substance or alcohol examination, treatment, or counseling;

(11) submit to periodic examinations designed to detect the use of alcohol or controlled substances;

(12) make restitution ordered by the court to a victim of the prisoner's crime, according to a schedule established by the board;

(13) refrain from opening, maintaining, or using a checking account or charge account;

(14) refrain from entering into a contract other than a prenuptial contract or a marriage contract;

(15) refrain from operating a motor vehicle;

(16) refrain from entering an establishment where alcoholic beverages are served, sold, or otherwise dispensed;

(17) refrain from participating in any other activity or associating with any other person that the board determines is reasonably likely to diminish the rehabilitative goals of parole, or that may endanger the public.

(c) Except for a condition imposed under (b)(4), (7), (9), (11) or (12) of this section, the board may generally delegate imposition of special conditions under (b) of this section to the discretion of the parole officer.

(d) The board may require a prisoner released on parole to comply with special conditions imposed under (b) of this section for any period up to the maximum term under which the prisoner is subject to the custody and jurisdiction of the board.

Sec. 33.16.160. CHANGE IN PAROLE CONDITIONS. (a) Upon application of the state or the parolee, the board may change a condition of parole previously imposed under AS 33.16.150(b).

(b) If the proposed change in conditions of parole is more restrictive of a parolee's liberty, the parolee is entitled to notice

of the proposed change, the reasons for the proposed change, a hearing before the board, and an opportunity to respond to the proposed change and to present evidence.

(c) Notwithstanding (a) and (b) of this section, when a parole officer determines that an emergency situation requires an immediate change in a condition of parole, or the imposition of a new condition, the parole officer may impose the change or new condition immediately, without a hearing. The parole officer shall immediately notify the board of the imposition of the emergency change or new condition and shall provide a written report setting out the basis for the change or new condition and the nature of the emergency. The effective period of a change in condition or imposition of a new condition under this subsection may not exceed 15 working days.

(d) A condition of parole may be changed, a new condition of parole may be imposed, or a new or changed condition imposed under (c) of this section may be extended by a member of the board or the board's designee if, after a preliminary hearing, an emergency situation is found that requires a change in condition. The effective period of a change in condition under this subsection, the imposition of a new condition under this subsection, or the extension under this subsection of a new or changed condition imposed under (c) of this section may not exceed 90 days.

Sec. 33.16.170. CONFIDENTIALITY OF RECORDS AND INFORMATION. (a) Except as provided in (b) of this section, the preparole reports listed in AS 33.16.110, and other information obtained and used by the board under this chapter, are confidential and may not be disclosed to anyone other than the board, the sentencing judge, the prosecuting and defense attorneys, the prisoner, the prisoner's attorney, the attorney for the board, the staff of the board, or others granted access to

this information under this chapter.

(b) Notwithstanding (a) of this section and AS 33.16.130(b), in a preparole proceeding under AS 33.16.130 the board may not disclose to the prisoner or the prisoner's attorney

(1) diagnostic opinions that, if made known to the eligible prisoner, could lead to serious disruption of the prisoner's institutional program;

(2) portions of a document that reveal sources of information obtained upon a promise of confidentiality; or

(3) other information that, if disclosed, may result in physical harm to any other person.

(c) When the board withholds information from a prisoner or the prisoner's attorney under (b) of this section, the board shall provide the prisoner with an excised copy of the material or summary of the material withheld containing as much specificity as the circumstances allow.

Sec. 33.16.180. DUTIES OF THE COMMISSIONER. The commissioner shall

(1) conduct investigations of prisoners eligible for discretionary parole, as requested by the board;

(2) supervise the conduct of parolees;

(3) appoint and assign parole officers and personnel;

(4) provide the board, within 30 days after sentencing, information on a sentenced prisoner who may be eligible for discretionary parole under AS 33.16.090;

(5) notify the board and provide information on a prisoner 120 days before the prisoner's mandatory release date, if the prisoner is to be released to mandatory parole; and

(6) maintain records, files, and accounts as requested by

the board.

Sec. 33.16.190. PAROLE AND PROBATION OFFICERS. An officer appointed by the commissioner under AS 33.05.020(a) or under AS 33.16.-180, may discharge duties under AS 33.05 or AS 33.16.

Sec. 33.16.200. CUSTODY OF PAROLEE. Except as provided in AS 33.16.210, the board retains custody of discretionary and mandatory parolees until the expiration of the maximum term or terms of imprisonment to which the parolee is sentenced.

Sec. 33.16.210. DISCHARGE OF PAROLEE. The board may unconditionally discharge a parolee from the jurisdiction and custody of the board after the parolee has completed two years of parole, if the sentence of the parolee does not include a residual period of probation. A parolee with a residual period of probation may, after two years of parole, be discharged by the board to immediately begin serving the residual period of probation.

Sec. 33.16.220. REVOCATION OF PAROLE. (a) The board may revoke parole for conduct in violation of AS 33.16.150(a) or (b).

(b) Except as provided in (e) of this section, within 15 working days after the arrest and incarceration of a parolee for violation of a condition of parole, the board or its designee shall hold a preliminary hearing. At the preliminary hearing, the board or its designee shall determine if there is probable cause to believe that the parolee violated the conditions of parole and, when probable cause exists, whether the parolee should be released pending a final revocation hearing. A finding of probable cause at a preliminary hearing in a criminal case is conclusive proof of probable cause that a parole violation occurred.

(c) In determining whether a parole violator should be released pending a final revocation hearing, the board or its designee shall

consider

(1) the likelihood of the parolee's appearance at a final revocation hearing;

(2) the seriousness of the alleged violation;

(3) whether the parolee presents a danger to the community; and

(4) whether the parolee is likely to further violate conditions of parole.

(d) If the parole violator is released pending a final revocation hearing, the board or its designee may impose additional conditions necessary to ensure the parolee's appearance at the final revocation hearing, and to prevent further violation of conditions of parole.

(e) A preliminary hearing under (b) of this section is not required if the board holds a final revocation hearing within 20 working days after the parolee's arrest and incarceration.

(f) The board shall hold a final revocation hearing no later than 120 days after a parolee's arrest, subject to restrictions arising under AS 33.10.010 and (g) of this section.

(g) When the basis for the revocation proceeding is a criminal charge, the parolee may request, or the board upon its own motion may propose that further proceedings on the revocation be delayed. In making the determination to delay further proceedings, the board shall consider prejudice that may result to the parolee's and the state's interests in the pending criminal case and the parolee's decision to delay final revocation proceedings. If good cause to proceed is found, the board shall consult with the attorney general before continuing the final revocation proceeding.

(h) At a final revocation hearing, a violation of a condition of

parole must be established by a preponderance of the evidence.

(i) If, after the final revocation hearing, the board finds that the parolee has violated a condition of parole imposed under AS 33.-16.150(b), or a law or ordinance, the board may revoke all or a portion of the parole, or change any condition of parole.

Sec. 33.16.230. WAIVER OF HEARING. A prisoner or parolee may waive the right to a hearing provided under AS 33.16.120, 33.16.160, or 33.16.220 by submitting a written waiver to the board.

Sec. 33.16.240. ARREST OF A PAROLE VIOLATOR. (a) A parolee may be arrested, with or without a warrant, for a violation of parole.

(b) A warrant for the arrest of a parolee who is charged with a violation of parole may be issued by the board, or a member of the board, based on probable cause that a violation has occurred.

(c) A parole officer may, without a warrant, arrest a parolee for a violation of parole only if there is danger to the public, if there is a likelihood that the parolee will flee, or if the parolee committed a crime in the presence of the parole officer.

(d) If a parolee is arrested without a warrant, the parole officer shall notify the board no later than the working day immediately following the arrest. The parole officer shall, within five working days after the arrest, provide the board with a written report setting out the alleged violation and circumstances that required immediate arrest of the parolee.

(e) A parolee arrested for violation of parole is not entitled to bail.

(f) Time spent in custody pending revocation proceedings shall be credited toward the unexpired term of imprisonment of the parolee; however, the time the parolee was at liberty on parole does not alter the time the parolee was sentenced to serve.

Sec. 33.16.250. EXECUTION OF WARRANT FOR ARREST OF PAROLEE. (a) A parole officer, or a peace officer acting at the request of a parole officer, shall execute a warrant issued under AS 33.16.240 by arresting the parolee and confining the parolee in a correctional facility designated by the commissioner.

(b) The parole officer or peace officer shall immediately notify the board or a member of the board of an arrest under (a) of this section.

Sec. 33.16.260. DEFINITIONS. In this chapter

(1) "board" means the board of parole;

(2) "commissioner" means the commissioner of corrections;

(3) "controlled substance" means a drug, substance, or immediate precursor included in the schedules set out in AS 11.71.-140 - 11.71.190;

(4) "crime against a person" has the meaning given in AS 33.30.900;

(5) "department" means the Department of Corrections;

(6) "discretionary parole" means the release of a prisoner by the board before the expiration of a term, subject to conditions imposed by the board and subject to its custody and jurisdiction;

(7) "mandatory parole" means the release of a prisoner who was sentenced to one or more terms of imprisonment exceeding 180 days, for the period of good time credited under AS 33.20, subject to conditions imposed by the board and subject to its custody and jurisdiction;

(8) "parolee" means a prisoner, sentenced to one or more terms of imprisonment exceeding 180 days, released by the board or by operation of law before the expiration of the term, subject to the custody and jurisdiction of the board;

(9) "prisoner" means an offender confined for a violation of state law, but does not include a person confined under AS 47;

(10) "victim" has the meaning given in AS 12.55.185.

* Sec. 3. AS 33.20.040(a) is repealed and reenacted to read:

Sec. 33.20.040. RELEASED PRISONER. (a) A prisoner released under AS 33.20.030 shall be released on mandatory parole to the custody and jurisdiction of the parole board under AS 33.16, until the expiration of the maximum term to which the prisoner was sentenced, if the term or terms of imprisonment exceeded 180 days. However, a prisoner released on mandatory parole may be discharged under AS 33.-16.210 before the expiration of the term. A prisoner who was sentenced to an imprisonment of 180 days or less shall be unconditionally discharged, except as provided in (c) of this section.

* Sec. 4. AS 33 20.040 is amended by adding a new subsection to read:

(c) If a prisoner's sentence includes a residual period of probation, a prisoner released under AS 33.20.030 shall immediately begin serving the residual probationary period, except that if mandatory parole is required under (a) of this section, serving the probationary period shall immediately follow discharge from parole.

* Sec. 5. AS 39.50.200(b)(20) is amended to read:

(20) [STATE] Board of Parole (<u>AS 33.16.020</u> [AS 33.15.010]);

* Sec. 6. AS 44.66.010(a)(3) is amended to read:

(3) [STATE] Board of Parole (<u>AS 33.16.020</u> [AS 33.15.010]) -- June 30, <u>1989</u> [1985];

* Sec. 7. AS 33.15 is repealed.

* Sec. 8. Current members of the board of parole appointed under AS 33.15.010, repealed in sec. 7 of this Act, retain their membership on the board of parole under AS 33.16.020. To accomplish the purpose of AS 33.16.020, the governor shall designate one member whose term expires on

January 1, 1987; one member whose term expires on January 1, 1988; one member whose term expires on January 1, 1989; one member whose term expires on January 1, 1990; and one member whose term expires on January 1, 1991.

* Sec. 9. APPLICABILITY. AS 33.16.090(b), enacted in sec. 2 of this Act, shall be applied prospectively, except that prisoners sentenced before the effective date of this Act are eligible for discretionary parole during a term of sentence enhancement imposed under AS 12.55.155(a) or during the term of a consecutive or partially consecutive presumptive sentence imposed under AS 12.55.025(e) or (g) if the sentencing court orders discretionary parole eligibility for that period.

* Sec. 10. This Act takes effect January 1, 1986.

p. 1, line 14, between "under" and "AS" add:

"AS 33.16.090 and"

p. 5, line 21, after "imposed," add

one-fourth of an enhanced period of confinement imposed under AS 12.55.155(a),

DRAFT
Law

Page 4, line 26 renumber existing "(c)" to "(d)" and add:

(c) A prisoner eligible for discretionary parole during a period of sentence enhancement imposed under AS 12.55.155(a) or during the subsequent term of a consecutive or partially consecutive presumptive sentence imposed under AS 12.55.025(e) or (g) must serve the unenhanced portion of the term or the initial presumptive term before being otherwise eligible for discretionary parole under AS 33.16.100(c) or (d). For purposes of this subsection, the most serious offense in the case of consecutive or partially consecutive presumptive sentences, will be considered the initial presumptive term. The unenhanced term or the initial presumptive term is considered served for purposes of discretionary parole on the date the unenhanced or initial presumptive sentence is due to expire [excluding any/less] good time earned under AS 33.20.010.

PAROLE ELIGIBILITY

	DISCRETIONARY PAROLE ELIGIBILITY	MANDATORY PAROLE ELIGIBILITY
Offense		
A felonies Repeat B & C felonies Sexual Assault 1° Sexual Abuse of Minor 1°	not eligible AS 33.16.090(b)	
1st Offenders B&C Felonies misdemeanants with over 180 days	eligible after 1/4 of term AS 33.16.100(c)	If offender is sentenced to serve mor than 180 days, then upon release from incarceration offender is on mandator parole for period of good time earned in prison. If offender is sentenced to serve les than 181 days, then upon release offe der is unconditionally discharged. AS 33.20.040(a)
Murder 1 & 2, Kidnapping, Misconduct involving a controlled substance 1°	eligible after 1/3 of term or mandatory minimum whichever is greater AS 33.16.100(d)	
Aggravated A felonies, repeat B & C offenders Sexual Assault 1° Sexual Abuse of Minor 1°	not eligible during initial pre-sumptive term, but eligible after 1/4 of aggravated portion of sentence AS 33.16.090(b) AS 33.16.100(c)	
Consecutive A felonies repeat B & C felonies Sexual Assault 1° Sexual Abuse of Minor 1°	not eligible during initial pre-sumptive term, but eligible after 1/4 of subsequent term.	

* Sentencing Judge may further restrict discretionary parole eligibility.
AS 12.55.115

as of 11-7-84

Class A Felonies

Manslaughter	43
Assault 1°	51
Robbery 1°	101
Arson 1°	2
Escape 1°	3
Misccnduct Involving Controlled Substance 2°	7

Class B Felonies

	Nonpresumptive	Presumptive
Assault 2°	23	12
Sexual Assault 2°	20	2
Sexual Abuse of Minor 2°	*	*
Unlawful Exploitation of Minor	3	0
Robbery 2°	13	5
Theft 1°	6	0
Burglary 1°	34	32
Arson 2°	5	0
Forgery 1°	2	2
Bribery	1	0
Escape 2°	5	13
Misconduct Involving Controlled Substance 3°	25	9

Class C Felonies

Criminally Negligent Homicide	5	0
Assault 3°	20	9
Sexual Abuse of Minor 3°	*	*
Incest	4	0
Coercion	1	0
Theft 2°	20	18
Burglary 2°	26	25
Criminal Mischief 2°	2	2
Forgery 2°	4	6
Escape 3°	1	0
Misconduct involving weapon 1°	2	5
Misconduct Involving Controlled Substance 4°	4	1

* Sexual Abuse of Minor in 2° and 3° was a combined statistic with:

nonpresumptive	presumptive
37	10

** Nonpresumptive offenders may be parole eligible, but statistics do not reflect further restrictions on parole eligibility which may have been imposed by sentencing court under AS 33.15.230.

PAROLE ELIGIBILITY

Offense	DISCRETIONARY PAROLE ELIGIBILITY	MANDATORY PAROLE ELIGIBILITY
A felonies Repeat B & C felonies Sexual Assault 1° Sexual Abuse of Minor 1°	not eligible AS 33.16.090(b)	
1st Offenders B&C Felonies misdemeanants with over 180 days	eligible after 1/4 of term AS 33.16.100(c)	If offender is sentenced to serve mor than 180 days, then upon release from incarceration offender is on mandator parole for period of good time earned in prison. If offender is sentenced to serve les than 181 days, then upon release offe der is unconditionally discharged. AS 33.20.040(a)
Murder 1 & 2, Kidnapping, Misconduct involving a controlled substance 1°	eligible after 1/3 of term or mandatory minimum whichever is greater AS 33.16.100(d)	
Aggravated A felonies, repeat B & C offenders Sexual Assault 1° Sexual Abuse of Minor 1°	not eligible during initial pre-sumptive term, but eligible after 1/4 of aggravated portion of sentence AS 33.16.090(b) AS 33.16.100(c)	
Consecutive A felonies repeat B & C felonies Sexual Assault 1° Sexual Abuse of Minor 1°	not eligible during initial pre-sumptive term, but eligible after 1/4 of subsequent term.	

* Sentencing Judge may further restrict discretionary parole eligibility, AS 12.55.115

as of 11-7-84

Class A Felonies

Manslaughter	43
Assault 1°	51
Robbery 1°	101
Arson 1°	2
Escape 1°	3
Misconduct Involving Controlled Substance 2°	7

Class B Felonies

	Nonpresumptive	Presumptive
Assault 2°	23	12
Sexual Assault 2°	20	2
Sexual Abuse of Minor 2°	*	*
Unlawful Exploitation of Minor	3	0
Robbery 2°	13	5
Theft 1°	6	0
Burglary 1°	34	32
Arson 2°	5	0
Forgery 1°	2	2
Bribery	1	0
Escape 2°	5	13
Misconduct Involving Controlled Substance 3°	25	9

Class C Felonies

Criminally Negligent Homicide	5	0
Assault 3°	20	9
Sexual Abuse of Minor 3°	*	*
Incest	4	0
Coercion	1	0
Theft 2°	20	18
Burglary 2°	26	25
Criminal Mischief 2°	2	2
Forgery 2°	4	6
Escape 3°	1	0
Misconduct involving weapon 1°	2	5
Misconduct Involving Controlled Substance 4°	4	1

* Sexual Abuse of Minor in 2° and 3° was a combined statistic with:

nonpresumptive	presumptive
37	10

** Nonpresumptive offenders may be parole eligible, but statistics do not reflect further restrictions on parole eligibility which may have been imposed by sentencing court under AS 33.15.230.

Alaska State Legislature

House of Representatives
House Judiciary Committee

Pouch V
State Capitol
Juneau, Alaska 99811
(907) 465-4990

LETTER OF INTENT

CSHB 141(Jud)

In considering CSHB 141 (Jud), the Judiciary Committee of the House of Representatives intends the provisions of AS 33.16.010 relating to Parole to offer a system of discretionary and mandatory parole consistent with the holding in Braham v. Beirne, 675 P.2d 1297 (Alaska 1984), whereby both systems are the same except as to how the offender is placed on parole.

The Committee further intends that the provisions of AS 33.16.090(b) is to have prospective application. Under this section prisoners sentenced to presumptive sentences are eligible for discretionary parole during any period of enhancement imposed for an aggravated offense, or during any period of a subsequent presumptive term imposed simultaneous with and consecutive to a non-eligible presumptive term. However, in that some sentencing courts believed they previously had the ability to make an offender eligible during these periods, and the courts ordered discretionary parole eligibility, the orders of the courts will be recognized. Furthermore, in those situations where the sentencing courts did not consider discretionary parole during such a period, the committee intends that an offender be allowed to petition for post conviction relief under Criminal Rule 35 so that the sentencing court may, in its discretion, order discretionary parole eligibility for that period.

M.M. Miller, Chairman
House Judiciary Committee

Adopted by House 4/30/85

BILL SHEFFIELD
GOVERNOR

HB141

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 28, 1985

The Honorable Ben Grussendorf
Speaker of the House
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Representative Grussendorf:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the administration of parole. The bill updates the statutory authority for parole administration, clarifying apparently conflicting dictates of court decisions, and providing a higher degree of certainty in the parole process. Under the bill, existing AS 33.15, governing parole administration is repealed; the re-organized and revised parole administration statutes are placed in new AS 33.16.

Under this bill, all prisoners sentenced to terms of imprisonment of more than 180 days are eligible for parole. Parole may be granted discretionarily by the parole board for non-presumptively sentenced prisoners, or it may be attained mandatorily through the accumulation of good time credits by the prisoner while incarcerated. The board retains custody and jurisdiction over all paroled prisoners until the expiration of the maximum terms of imprisonment to which the prisoner was sentenced, unless the parolee is discharged early under AS 33.16.210.

This bill clarifies existing law by clearly stating that prisoners with presumptive sentences, with aggravated presumptive sentences, or with consecutive presumptive sentences are not eligible for discretionary parole. Additionally, it clearly sets out that prisoners released on mandatory parole as well as on discretionary parole are subject to the custody and jurisdiction of the board. Attendant to this, the board may set conditions of release which, if violated, can result in the reincarceration of the parolee.

For those prisoners eligible for discretionary parole, the minimum amount of the sentence required to be served has

been retained for individuals convicted of first or second degree murder, or of kidnapping; it is one-third of the sentence. For the remainder of the prisoners potentially eligible for discretionary parole -- misdemeanants serving over 180 days, and first-time class B or C felons -- the minimum term before consideration has been shortened to one-quarter of the sentence. In addition, a judge at sentencing is permitted to set a longer minimum term for these prisoners before they may be considered for discretionary parole.

In setting conditions of release for both mandatory and discretionary parolees, the b requires that the parolee not violate any laws or ordinan and permits the board to set numerous other condition at will reasonably ensure that the parolee attains abilitation and reintegration into society. The board may also require that the parolee pay restitution to the victim of the crime.

Finally, the bill sets out in detail the factors that should be considered when granting discretionary parole; the procedures for granting, revoking, or rescinding parole; and the considerations that must be addressed when deciding whether an alleged parole violator is to be released pending revocation proceedings.

Drafts of the bill have been extensively discussed by members of criminal justice agencies, and this final version addresses the concerns they have regarding our current system of parole. I urge your prompt action on this measure.

Sincerely,

Bill Sheffield
Governor

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

REQUEST

Bill/Resolution No.: SB 141-#1

Title: "An Act relating to the parole of offenders..."

Sponsor: By Request of the Governor

Requestor: Governor's Ofc./OMB

Date of Request: 12/18/84

FISCAL DETAIL

Agency Affected: Department of Law

Program Category Affected: Administration of Justice

BRU, Program or Subprogram(s) Affected: Prosecution

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

This bill would amend the system of parole in Alaska by changing the statutory duties of the parole board and by clarifying the law in light of numerous court decisions on the administration and granting of parole. Because these are post-conviction activities, the bill will not have a fiscal impact on the Department of Law's operations.

Richard L. Pegues

Prepared By: Richard I. Pegues/Director Phone: 465-3672

Division: Administrative Services Date: 12/19/84

Richard L. Pegues/for

Approved by Commissioner: Norman C. Gorsuch Date: 12/19/84

Agency: Department of Law

Distribution (by Agency preparing fiscal note):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

7/1/84

LAW1

STATE OF ALASKA 1985 LEGISLATIVE SESSION
FISCAL NOTE

Revision Date:

REQUEST:
Bill/Resolution No.: SB 144 & 2
Title: "An Act relating to the parole of offenders."
Sponsor: Governor
Requestor: Governor
Date of Request: 12-18-84

FISCAL DETAIL:
Agency Affected: DEPARTMENT OF CORRECTIONS
Program Category Affected: Administration of Justice
BRU, Program or Subprogram(s) Affected: Offender Confinement, Reformation and Supervision

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL	-0-	-0-	-0-	-0-	-0-	-0-
REVENUE	-0-	-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary.

William W. Ladwig

Prepared By: William W. Ladwig, Deputy Commissioner
Phone: 465-3376
Division: Administration and Support
Date: 12-19-84

Approved by Commissioner: Roger Vadell
Date: 12-19-84
Agency: DEPARTMENT OF CORRECTIONS

Distribution (by Agency preparing fiscal note):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency (ies)

7/1/84

Alaska State Legislature

House of Representatives

House Judiciary Committee

CSHB 141(Jud)

Pouch V
State Capitol
Juneau, Alaska 99811
(907) 465-4990

The following is a commentary and sectional analysis prepared by the Department of Law for CSHB 141(Jud) "An Act relating to the parole of offenders; and amending the sunset date for the parole board; and providing for an effective date." It was used by the House Judiciary Committee in its consideration of the bill.

M.M. Miller, Chairman
House Judiciary Committee

Sectional Analysis and Commentary - CSHB 141 (Jud)

For the fourth consecutive legislature, legislation has been introduced to rewrite the Alaska Parole Administration Act. The original Parole Administration Act, AS 33.15, was adopted in 1960. In the ensuing 25 years the criminal justice system in Alaska has undergone radical change, yet the Parole Administration Act has only been amended on a piecemeal basis without the benefit of comprehensive research and careful analysis. Although the current operations of the Board meet or exceed most nationally accepted correctional standards and court decisions, existing law does not reflect this. As noted in the 1984 Legislative Audit on the Parole Board, "[e]xisting statutes relating to the Parole Board are vague, lack specific direction in some areas and are inconsistent in other areas." The vagueness and ambiguities contained in existing law are leading to an ever increasing amount of litigation. CSHB 141 clarifies these ambiguities, while providing clear direction for parole administration in light of the evolutionary changes in the criminal justice system which have resulted from recent case decisions. The bill also embodies many professional standards of the corrections/parole field while setting parameters for the operation of a parole system in Alaska.

Article III, Section 21 of the Alaska Constitution requires that "A parole system shall be provided by law." As an integral part of the criminal justice system, parole can be an invaluable tool in rehabilitating offenders by ensuring that they are reintegrated back into society with assistance and direction. Parole can also enhance public protection by establishing and enforcing conditions of release designed to reduce risk to the public. Finally, parole can be a positive factor in reducing prison overcrowding by releasing low-risk offenders from incarceration under realistic conditions. The dictates of Article III, Section 21 necessitate legislative action to provide clear and predictable direction to the Parole Board in order to fulfill these rehabilitative and protective goals.

Section 1

This provision vests a sentencing court with the power to further restrict eligibility for discretionary parole beyond that which is provided by operation of law. Eligibility for discretionary parole may be restricted in this section up to the maximum term of imprisonment. Similar provisions have always existed in Alaska law, and constitute an appropriate sentencing tool in cases were parole is not foreclosed by presumptive sentencing. In that a court's sentencing authority is derived from statute, there must be affirmative authorization for such a sentencing order. Bovne v. State, 586 P.2d 1250 (Alaska 1978).

Section 2

AS 33.16.010. This section sets forth the two distinct types of parole which exist in current law -- discretionary parole and mandatory parole. Consistent with current law, all state prisoners sentenced to a term of imprisonment of at least 181 days are parole eligible. Presumptively sentenced prisoners are ineligible for discretionary parole under AS 33.16.090, however they are subject to mandatory parole under this section. Under either type of parole, the released prisoner is subject to the imposition of conditions and the supervision of the parole board. Mandatory parole is currently authorized under present AS 33.20.040. See Braham v. Beirne, 675 P.2d 1297, (Alaska 1984). This section provides for uniform supervision for all parolees, whether mandatory or discretionary.

AS 33.16.020 - .040 establishes the parole board in the department of corrections, sets out guidelines and criteria for the selection and appointment of board members, and allows the rates of compensation for board members.

AS 33.16.050 codifies existing practice by setting out requirements for the frequency of board meetings, and quorum and voting requirements necessary to take official action. This section also permits the board to conduct meetings via teleconference facilities. However, this power is limited to situations where no due process considerations, such as the right to confrontation, are in issue.

AS 33.16.060 sets out the duties of the board. The primary change in existing law is the requirement to adopt regulations under the Administrative Procedures Act, AS 44.62. Currently the Board is exempt from this Act. By requiring adherence to the Administrative Procedures Act when adopting regulations, the board will be subject to a greater degree of public scrutiny and input, and information regarding board operations will be more accessible.

AS 33.16.070 authorizes the board to issue subpoenas and specifies those subpoenas as enforceable in superior court.

AS 33.16.080 enables the board to hire an executive director and sets minimum qualifications for this position.

AS 33.16.090 establishes eligibility for discretionary parole. A state prisoner must be sentenced to a term or terms over 180 days, and may not be presumptively sentenced to be eligible. The prisoner must also have served any statutory or

judicially imposed minimum sentence.

Further, this section resolves a major ambiguity present in current law. With the passage of the new criminal code in 1978 and the enactment of Alaska's presumptive sentencing scheme, offenders who were presumptively sentenced were decreed to be ineligible for discretionary parole. However, within this scheme, no statutory provision or legislative intent has defined "presumptive sentence" for the purpose of discretionary parole eligibility. A few sentencing courts have concluded that the law is ambiguous and have declared that after an offender serves one presumptive term, he is thereafter eligible for discretionary parole during subsequent consecutive presumptive terms. In addition some presumptively sentenced offenders have been made eligible for discretionary parole during the period of enhancement when the presumptive sentence was increased because the crime was an aggravated one. The same rationale employed by the courts in these instances could also be used to make a presumptively sentenced prisoner eligible for parole if the presumptive sentence was mitigated. The practice of granting discretionary parole eligibility to subsequent presumptive terms in a consecutive sentence, and to those portions of presumptive terms which are sentence enhancements because the crime was aggravated, is clearly allowed in this section. In order for an offender to be considered ineligible for discretionary parole during any term in excess of the presumptive term, the sentencing court must restrict that parole eligibility under AS 12.55.115.

Finally, this section also codifies case law to allow the board to rely on more than just the judgment of the court in determining if the prisoner is presumptively sentenced. Currently a substantial portion of the judgments entered by courts do not indicate whether a prisoner is presumptively sentenced, therefore it is necessary to review the sentencing record to determine discretionary parole eligibility.

AS 33.16.100(a) sets out the broad general standards that the board should follow when deciding on a grant of discretionary parole. These standards reflect the Chaney criteria and the purposes of sentencing in AS 12.55.005, particularly those concerned with rehabilitation, protection of the public and seriousness of the crime.

Subsection (b) authorizes the board to rescind or revise a grant of parole when new circumstances come to light. Currently the board reviews and approves parole release plans months prior to a prisoner's release date. Subsequently new

information on that prisoner may come to the board's attention. For example, a prospective employment plan may no longer be possible, or the prisoner is unable to immediately enter a residential treatment program upon release, or the prisoner is subsequently involved in a major disciplinary action. With this provision the board can change conditions or decide that the prisoner is not appropriate for discretionary parole, and rescind its previous action or merely delay the prisoner's release date. Due process safeguards are built in to protect the prisoner's liberty interest.

Subsections (c) and (d) set out the minimum amount of a sentence a prisoner must serve before being eligible for discretionary parole. For discretionary parole eligible prisoners, the minimum term is decreased from one-third of the sentence under current law to one-fourth of the sentence, except for an individual convicted of first or second degree murder, kidnapping, or misconduct involving a controlled substance in the first degree. With this latter group, the minimum term remains one-third or the mandatory minimum, whichever is greater. The sentencing court may further restrict parole eligibility under AS 12.55.115. Parole eligibility is reduced by this bill only for first-time non-presumptive Class B or C felony offenders and for misdemeanants.

AS 33.16.110 codifies existing practice by setting out the information which the board must consider when determining a prisoner's suitability for discretionary parole.

AS 33.16.120 was enacted in 1984 as a portion of the Victim's Rights Legislation and gives a victim the right to comment in writing on a pending discretionary parole decision. The board is required to consider those comments. The board also has a duty to notify a victim if a prisoner is released on either discretionary or mandatory parole.

AS 33.16.130 places the responsibility for requesting discretionary parole on the prisoner rather than making the board responsible for reviewing all potentially eligible prisoners. Working with institutional staff, the prisoner would prepare a parole release plan, including the prisoner's plans for employment, treatment, residence and other relevant material, for presentation to the board. A hearing on the granting of parole is required. If the board denies an application for discretionary parole, a written decision must be issued and provided to the prisoner. This section mirrors current practice, but the procedural safeguards are made more specific.

AS 33.16.140 requires the board to issue a written order of parole for any discretionary or mandatory parolee, setting forth all terms and conditions of release including the parole expiration date. This clarifies existing law by providing more specificity.

AS 33.16.150 codifies existing practice by setting out the terms and conditions which the board may impose on a discretionary or mandatory parolee. The prohibition against violating any law is a required condition for all parolees. Subsection (b) lists numerous other conditions that the board may impose in order to fashion an appropriate rehabilitative release plan and supervision for the parolee. Subparagraph (b)(7) would apply only to misdemeanants, because a convicted felon is already precluded from possessing or controlling a firearm under both state and federal law. Conditions may also be imposed by parole officers, except for certain very restrictive conditions listed in subparagraph (c), which may only be imposed by the board.

The board is also empowered under subsection (d) to set a specific time limit on any discretionary condition it imposes.

AS 33.16.160 sets out the mechanism whereby changes in a condition of parole may be accomplished. This provision sets out due process safeguards for the parolee when the condition is more restrictive, and also delineates the methods by which a condition may be changed or imposed in an emergency situation.

AS 33.16.170(a) makes records and information obtained or used by the board confidential under state law. Subsection (b) allows the board to withhold certain potentially harmful information from the parolee. When this type of information is withheld, subsection (c) requires the board to provide to the prisoner or parolee a summary of the material withheld.

AS 33.16.180 sets out the duties of the commissioner of corrections in assisting the parole board.

AS 33.16.190 reflects current law, under which the positions of parole officer and probation officer are interchangeable.

AS 33.16.200 clearly sets out that the board retains jurisdiction over a parolee until the end of the parolee's sentence and results in all parolees being equally treated. This section consolidates current law which sets out three different schemes for determining the board's jurisdiction over a parolee.

AS 33.16.210 allows the board to unconditionally discharge a parolee from parole after two years. The discharge authority would be employed when a parolee has demonstrated rehabilitation and there is no further need for supervision. There is no similar provision currently in law. Alaska is believed to be the only state where the parole board does not possess this authority.

AS 33.16.220 sets out the mechanism for revoking parole. Subsection (a) gives the board the authority to revoke parole if the parolee violates a condition of release. This mirrors current law.

Subsection (b) sets out minimal due process requirements for holding a preliminary revocation hearing. In order to avoid duplicitous proceedings, the board may rely on a judicial determination of probable cause rather than hold a separate preliminary hearing.

In subsection (c), after finding probable cause of a violation, the board then must conduct the dispositive phase, i.e., deciding whether the parolee is to be incarcerated or released pending a final revocation proceeding. If the board decides to release the parolee, additional conditions may be imposed under subsection (d).

Subsections (e) and (f) set out time frames for holding final revocation proceedings. These provisions codify case law to ensure speedy disposition of parole revocation proceedings.

Subsection (g) addresses the situation where a parolee's alleged violation is also a pending criminal charge. Before deciding to proceed to a final revocation proceeding, the board must consider any prejudice that may result to either the parolee or the state. If a decision to hold the revocation proceeding is made, the board then must consult with the Attorney General's office so that immunity issues may be resolved. This provision attempts to balance seemingly inconsistent court decisions.

Subsection (h) establishes the burden of proof necessary to show a violation. This is a codification of case law.

Subsection (i) vests the board with broad discretionary power to fashion a remedy appropriate to the violator and the violation. Numerous options are made available under this subsection. The board may revoke all of the violator's parole, returning the parolee to jail for the full term of the parole; the

board may revoke a part of the violator's parole, returning the parolee to jail for a part of the parole term and extending the period the parolee is under the jurisdiction of the board a commensurate amount. The board may return the parolee to jail for part of the parole term and not extend the parole term. the board may also change a condition of parole to ensure that the rehabilitative goals are met. The board currently holds this power; this subsection merely restates and clarifies this power.

AS 33.16.230 allows a parolee to waive any hearing which is required under due process standards.

AS 33.16.240 sets out the procedure for arresting a parole violator. Subsection (e) precludes bail for a person arrested as a parole violator. The dispositive phase of a preliminary revocation proceeding, under AS 33.16.220(c), addresses a parole violator's release.

Subsection (f) gives credit to a parolee for time in custody toward the unexpired term of the sentence, but denies a parolee credit for street time. This provision is in current law.

AS 33.16.250 sets out how an arrest warrant for a parole violator is executed.

Section 3 amends existing good time release provisions to conform with the concept of a mandatory parole.

Section 4 provides for those situations when a mandatory parolee has a residual period of probation.

Section 5 is a technical, conforming amendment.

Section 6 provides a new sunset date for the parole board.

Section 7 repeals the existing Parole Administration Act.

Section 8 addresses the reappointment of current board members and allows for readjustment of their terms of appointment to achieve staggered terms.

Section 9 is a special application section for AS 33.16.090(b), discretionary parole eligibility during the period of an enhanced or consecutive presumptive sentence. In that some prisoners have previously been ordered to be

discretionary parole eligible during these periods, these court orders are approved in this section. For other prisoners sentenced before the effective date of this Act who have enhanced or consecutive presumptive sentences, and where the court has not made a determination on discretionary parole eligibility, it is intended that those prisoners may petition the court under Criminal Rule 35 for this determination. Absent such a determination, AS 33.16.090(b) is to be applied prospectively.

Section 10 provides for an effective date.

Due Process Considerations

Generally, in determining the procedural safeguards that due process requires in parole proceedings, it is first necessary to distinguish the type of proceeding involved. The decision making functions in parole can be broadly designated as either granting parole or revoking parole, each of which necessiates differing level of safeguards. The question of the necessary levels of safeguards that must be provided is correlative to the liberty interest being considered or acted upon. The greater the liberty interest involved, the higher the level of safeguards mandated. In Alaska, which employs a scheme of both discretionary and mandatory parole, further distinguishment in the safeguards results from the type of parole under consideration.

Clearly, if the procedures under consideration pertain to a revocation function, safeguards are universally applicable, whether parole is mandatory or discretionary. For although parolees have forfeited their right to the full liberty enjoyed by ordinary citizens by virtue of a criminal conviction, they do possess greater freedom than persons incarcerated. This conditional liberty interest possessed by both mandatory and discretionary parolees has been recognized by the United States Supreme Court:

> We see, therefore, that the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a "right" or a "privilege." By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment.

Morrissey v. Brewer, 408 U.S. 471, 482 (1972).

On the other hand, the procedures which apply during the granting phase are not applicable to both classes of parolees, because mandatory parolees are released by operation of law while discretionary parolees are subject to the discretionary decision making function of the parole board. The procedures required under the parole granting function likewise differ from those required in the revocation function, as there is no recognized liberty interest, conditional or otherwise, in discretionary parole. Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979).

A. Parole Granting Function

Due process safeguards in the parole granting function are only required if there is a deprivation of a protected interested held by the prospective parolee. Under the United States Constitution, states do not have a legal obligation to establish a parole system, and there is no federal constitutional or inherent right to parole. However, Greenholtz does recognize that a state may, by constitution or by statute, create such a right, and if the right is created, certain due process safeguards must be afforded the prospective parolee.

Procedural safeguards in the discretionary parole granting process would be required if the Alaska Constitution or statutes created a sufficient expectation of parole to constitute a protected liberty interest, as the establishment of a liberty interest is a condition precedent to the applicability of due process. Sharp v. Leonard, 611 F.2d 136 (6th Cir. 1979).

Article III, Section 21 of the Alaska Constitution provides

> Section 21. Executive Clemency. Subject to procedures prescribed by law, the governor may grant pardons, commutations, and reprieves, and may suspend and remit fines and forfeitures. This power shall not extend to impeachment. A parole system shall be provided by law.

This section directs the creation of a parole system by the legislature; it does not constitutionally guarantee parole, nor does it mandate the type of system of parole that could be created. Rather, it leaves to the discretion of the legislature the type of parole system, and that discretion necessarily includes determining the types of individuals eligible for parole.

Within the context of finding a liberty interest created by statute, courts will focus on the certainty of parole release. If the board has unlimited discretion to grant or deny parole, no liberty interest is present. Conversely, if the statute requires the board to parole a particular person at a certain time, that person has an expectation of release which is a protected liberty interest. As a general rule, the more the board's discretion is limited, the more likely it is that a liberty interest will be found. If there is a presumption that a prisoner will be paroled, courts will tend to find a liberty interest. U.S. ex rel Scott v. Illinois Parole and Pardon board, 669 F.2d 1186 (7th Cir. 1982). This distinction is apparent in comparing AS 33.16.010(b) with AS 33.16.010(c), in that the certainty of parole release under the latter statute is limited only by the amount of good time the prisoner has accumulated under AS 33.-20.030, while the board's discretion governs parole under the former.

Careful analysis of discretionary parole under AS 33.16 is necessary to determine whether there is a sufficient expectation of parole to find a liberty interest. AS 33.16.090(a), which discusses the eligibility of a prisoner for discretionary parole vests the board with wide discretion ("... may, in the discretion of the board, be released on discretionary parole ..."). Less certitude in a prisoner's release on discretionary parole is found in AS 33.16.100(a) ("The board may authorize the release of a prisoner on discretionary parole if ..."). This statutory language is intentionally discretionary, and does not create a liberty interest in the Alaska statutory scheme of discretionary parole.

The incertitude of a grant of discretionary parole has also been recognized by the Alaska Supreme Court, albeit in dicta. For although a prisoner must serve a minimum period before becoming eligible for discretionary parole "... it does not follow from this that there is any certainty that a prisoner ... would actually be paroled at that time." 1/

Only in those situations where state legislatures have limited the parole authority's release discretion have courts found any liberty interest. This was the case in Greenholtz where the Nebraska statutes declared that the parole board

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1/ Huff v. State, 568 P.2d 1014, 1019 (Alaska 1977). See also Hansen v. State, 582 P.2d 1041, 1047 n. 12 (Alaska 1978).

"shall" grant release "unless" one of four designated reasons for not doing so existed. 2/ See also, Williams v. Missouri board of Probation and Parole, 661 F.2d 697 (8th Cir. 1981). However, such mandatory language is a rarity among states, and doesn't exist in Alaska law.

A liberty interest in the parole granting process may also be found in the practices of the board or in administrative rule or regulation adopted under the statute. For example, if the board adopts standards which include guidelines specifying an approximate parole release date for prisoners whose crimes and personal histories fit predetermined categories then a conditional liberty interest might be found to exist. This predictive judgment process will then require procedural safeguards to reduce the risk of error in determining the factual elements and making the subject appraisals. This is the situation intended for the Alaska parole system.

By requiring the adoption of regulations which "establish standards under which the suitability of discretionary parole is determined," a minimal liberty interest is created in the parole granting process. The Parole Administration Act, AS 33.16, therefore grants certain procedural safeguards to prisoners eligible for discretionary parole. This statutory grant of procedural safeguards is intended to give prisoners the assurance of a fair proceeding.

Procedural Safeguards

After applying for parole, the eligible prisoner is entitled to notice and a hearing on the parole application. The prisoner is given access to most material which the board will consider in reaching its decision, and the prisoner is granted the opportunity to respond in writing to the material and present evidence to the board. AS 33.16.130(b). Absent exigent circumstances, the evidence presented by the prisoner should not include the testimonial evidence of third parties, as such evidence can be submitted by means of an affidavit.

Only if the board denies the application for discretionary parole must the basis for the decision be put in writing. A copy of this writing is provided to the prisoner AS 33.16.-130(c). If the denial of the application is a "set off",

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2/ Neb. Rev. Stat. § 83-1, 114

allowing for reconsideration of parole at some future date, the written basis for denial may indicate those areas in the prisoner's proposed release plans which need to be addressed, giving the prisoner adequate notice and direction for the subsequent reconsideration.

Although a prisoner is provided the basis for a denial of parole, this action of the board is not reviewable unless there is a denial of a constitutional right. The judicial review procedures of the Administrative Procedures Act, AS 44.62.330, 560 and 570, do not apply to parole board actions.

When the board has granted an application for parole and set a release date for the prisoner, it may rescind that action before the release date, or even revise the release date. This would occur if a change in circumstances in the prisoner's parole release plan occurred or if new information concerning the prisoner came to light. AS 33.16.100(b).

Having granted a future parole release date, the expectation of parole is sufficient to find a conditional liberty interest. Therefore, certain minimal procedural safeguards are warranted. The same statutorily mandated procedures employed at the parole granting phase are required to rescind parole, as they are sufficient to satisfy constitutional due process requirements.

B. Imposing Conditions of Parole

When imposing conditions of release on a parolee, whether the parole is discretionary or mandatory, the board is limited to imposing conditions which are both consistent with the goals of rehabilitation and protection of the public, and necessary for the proper functioning of the parole system. Morrissey, at 483; Roman v. State, 570 P.2d 1235, 1242 (Alaska 1977). To this end, all prisoners released on parole are required to lead law abiding lives as a condition of release. AS 33.16.150(a). Additionally, the board is empowered to impose special conditions designed for the individual rehabilitative program of each paroled offender. AS 33.16.150(b). Because some of these special conditions are severe limitations on the parolee's conditional liberty interest, imposition must be rationally related to the underlying offense or the parolee's history. Roman, at 1242. Specifically, special conditions that are in the nature of a search, AS 33.16.150(b)(9) & (11), may only be imposed if warranted by the nature or the circumstances surrounding the parolee's crime or social history. For this reason, these conditions may only be imposed by the board. AS 33.16.150(c).

Imposition of two additional conditions are likewise limited, not because they impinge upon the conditional liberty interest, but rather due to the nature of the condition. Precluding a parolee from possessing or controlling a firearms is limited to misdemeanor offenders, as felons are precluded by state law (AS 11.61.200) as well as federal law (Pub. L. 90-618 § 922(h)) from doing so. Imposing this condition upon a parolee would also necessitate a relationship to the crime, e.g. assault or extreme game violations. Finally, restitution as a condition of parole may only occur if restitution was ordered by the sentencing court. Brezenoff v. State, 658 P.2d 1359 (Alaska App. 1983).

After the initial imposition of the conditions of release upon the parolee, a need may arise to change or impose additional conditions, procedural safeguards may then be required. If the parolee is determined to be at liberty on a certain conditional level, a more restrictive level of conditional liberty may be a deprivation of the current conditional liberty status; thus imposition of new conditions may only be accomplished if the parolee is provided notice of the proposed change and the opportunity to be heard on it. Whether procedural safeguards need to be employed when there is a new or changed condition depends on an analysis of whether the new or changed condition is a further infringement of the liberty interest and also whether the change is significant or insignificant. Clearly, if the new condition required the parolee to enroll in a residential treatment program for substance abuse, the current level of conditional liberty enjoyed by the parolee is being curtailed; thus procedural safeguards are warranted. Conversely, if the new condition was a requirement of the parolee to pay child support or not to open a charge account, there is no further curtailment of the current conditional liberty interest, and procedural safeguards are not necessary. Moreover, if the parole officer required the parolee to report twice a month, rather than once a month, such a change is so insignificant as to not require any due process protections.

Situations may also occur which require the immediate imposition of a new or changed condition. Specific procedures are set out which balance the state's interests in rehabilitation and protection of the public with the parolee's conditional liberty interest. AS 33.16.160(c) & (d).

C. Parole Revocation

In Morrissey, after recognizing the conditional liberty interest possessed by parolees, the United States Supreme Court

mandated the employment of procedural guarantees in parole revocation proceedings.

The procedures required could be informal in nature, but must include as a minimum

1) a preliminary revocation hearing at or reasonably near the place of the alleged violation and as promptly as convenient after the arrest;

2) a final revocation hearing with

a) written notice of the claimed violation;

b) disclosure of evidence to be used against the violator;

c) opportunity to be heard in person and to present witnesses and documentary evidence;

d) a limited right to confront and cross-examine adverse witnesses;

e) a neutral and detached hearing body; and

f) a written statement by the fact finders as to the evidence relied on and the reasons for revocation.

Morrissey, at 486, 489.

In essence, Morrissey requires "an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be by an accurate knowledge of the parolee's behavior." Morrissey, at 485.

Clearly the court did not require the full range of rights normally accorded in a criminal proceeding. Subsequent decisions have held that the revocation proceeding is not part of a criminal proceeding, Martin v. State, 517 P.2d 1389 (Alaska 1974), therefore those guarantees normally applicable in the criminal proceeding do not apply in a revocation. State v. Sears, 553 P.2d 907 (Alaska 1976) (exclusionary rule for illegally seized evidence does not apply); Martin v. State, 517 P.2d 1389 (Alaska 1974) (right to bail under Alaska Constitution does not apply); Paul v. State, 560 P.2d 754 (Alaska 1977) (Alaska speedy trial rule does not apply); Roman v. State, 570 P.2d 1235 (Alaska 1977) (warrantless searches are permissible); Davenport v. State, 568 P.2d 939 (Alaska 1977) (different requirements for parole violation arrest warrant); Avery v. State, 616 P.2d 872 (Alaska 1980) (preponderance of evidence standard of proof sufficient for revocation).

1. Preliminary Revocation Hearing

The Morrissey case set the broad standards for the

preliminary revocation hearing in order "to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole." 3/ The hearing needs to be conducted by an independent decision maker, i.e., some person other than one initially dealing with the case.

The finding of probable cause or reasonable grounds may be based on a finding in another forum, as the parolee would be collaterally estopped from relitigating issues previously determined. A criminal conviction, 4/ with the higher "beyond a reasonable doubt" standard of proof, or a finding of probable cause after a preliminary hearing in a pending criminal case, would both constitute conclusive proof of a parole violation. AS 33.16.220(b).

Although there is case law intimating a grand jury indictment may be used in a like manner, 5/ the due process requirement of Morrissey, which grants the parolee the opportunity to refute or explain the alleged violation, would tend to negate use in this way. However, given the standard for a grand jury indictment in Alaska (the evidence presented, if unexplained or uncontradicted, would warrant a trier of fact to find beyond a reasonable doubt that the accused committed the crime charged), the requirements of the prosecutor to disclose exculpatory evidence to the grand jury, 6/ and safeguards of Criminal Rule 6(q), a grand jury indictment does constitute prima facie evidence of a violation. In this situation, the burden is shifted to the alleged violator to disprove the charges in the indictment.

When probable cause or reasonable grounds for a violation are found, the preliminary revocation hearing becomes a

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3/ Morrissey, at 486.

4/ Moody v. Daggett, 429 U.S. 78, 86 n.7 (1976)

5/ See Inmates Councilmatic Voice v. Rogers, 541 F.2d 633 (6th Cir. 1976); Hall v. State, 535 F.Supp. 1121 (S.D. Ohio 1982).

6/ See Tookak v. State, 648 P.2d 1018 (Alaska App. 1982); Frink v. State, 597 P.2d 154 (Alaska 1979).

bifurcated process. Just as in the final revocation process there is an adjudicatory phase (to determine probable cause) and a dispositive phase (where the hearing officer must then determine whether the violator should be released pending a final revocation hearing). The hearing officer is required to consider four factors in making this determination. AS 33.16.220(c). As there is no constitutional right to bail in a parole revocation proceeding, Martin v. State, 517 P.2d 1389 (Alaska 1974), release pending the final revocation hearing may only occur under this subsection. (Bail release is also statutorily denied. AS 33.16.240(e)). The hearing officer, in determining that release is appropriate, may also impose additional conditions on the violator. AS 33.16.220(d). Necessary procedural safeguards, if the additional conditions are more restrictive of the parolee's liberty, are satisfied in the two phases of the bifurcated preliminary revocation hearing process.

2. Final Revocation Hearing

As previously noted, Morrissey set out six specific requirements for a final revocation hearing necessary to meet minimal due process safeguards. These minimal procedures have not been significantly expanded, either in subsequent case law, or by statute. The burden on whether to have a final revocation hearing has been shifted from the parolee: Morrissey implies the parolee must request a final revocation hearing (although the parolee must be notified of the right to such a hearing); by statute, a final revocation will be held unless specifically waived in writing by the parolee. AS 33.16.230. Additionally, the "within a reasonable time" requirement for holding a final revocation proceeding has been established by statute -- within 20 working days after a parolee's arrest and incarceration if no preliminary revocation hearing is held, 7/ or within 120 days after the arrest if a preliminary revocation hearing has been held. 8/ Special safeguards for both the parolee and the state are available in the event the alleged violation is based on a pending criminal charge. AS 33.16.220(g).

If a violation is found, the board is granted significant discretion in fashioning an appropriate remedy. Additional conditions of parole may be imposed upon the violator, who is

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7/ AS 33.16.220(e)

8/ AS 33.16.220(f)

then re-released on parole; the violator may also have the parole revoked in full, or in part, AS 33.16.220(i). A parolee is not given credit towards the original sentence, for time spent on parole, AS 33.16.240(f), so that a revocation may result in reincarceration for the amount of the prisoner's original term not previously served in jail. A partial revocation would result when the board decided the seriousness of the violation did not warrant reincarceration for the remainder of the term, but that some reincarceration was necessary.

Other Considerations

A. Arrest of Parole Violators

Alleged parole violators may be arrested with or without a warrant. A warrant may be issued by the board or a member of the board based upon a probable cause standard. Unlike the standards applicable to arrest warrants in criminal cases, a parole violator warrant does not need to be supported by a written affidavit or complaint. Davenport v. State, 568 P.2d 939 (Alaska 1977). However, to avoid unnecessary litigation on the issue of whether the warrant is supported by probable cause, the warrant is intended to be supported either by a written or recorded statement of the parole officer. Davenport, at 948, n.21.

Likewise, exigent circumstances may exist requiring the immediate arrest of a parolee. However, rather than leaving these exigent circumstances to subsequent court interpretation, the circumstances are enumerated in statute AS 33.16.240(c). If a warrantless arrest occurs, strict reporting requirements on the circumstances of the arrest are mandated. AS 33.16.240(d).

B. Confidential Information

1. Public Disclosure

During the decision making aspects of its duties, the board will be relying upon information derived from a variety of sources. Although some of this information may be public information if is derived from the original source under AS 09.25.110, other portions of this information are confidential, e.g., presentence reports. In order to relieve the board of the responsibility to determine whether this information is otherwise confidential under law, all the information compiled by the board is made confidential. AS 33.16.170(a). This provision therefore exempts that information from the provisions of AS 09.25.110 and AS 09.25.120; however, if the information is otherwise public information, this section does not preclude public inspection and

copying of that material at its original source.

2. Disclosure to the Parolee

In the main, information which is used by the board must be disclosed to the parolee. The due process requirements which attach to the liberty interests held by parolees or potential parolees, dictate that the parolee be given not only notice of a proposed action, but also the opportunity to be heard. To be meaningful, the opportunity to be heard requirement should afford the parolee or prisoner the ability to refute or explain adverse information as well as to ensure that the board considers information which the parolee or prisoner believes is relevant to the decision making function under consideration by the board. As succinctly stated in Morrissey, at 485, the procedural safeguards should be designed to ensure "that the exercise of discretion will be by an accurate knowledge of the parolee's behavior." There are, however, instances and situations wherein full disclosure of all information under consideration is neither appropriate nor required.

The first type of information where disclosure is neither appropriate nor required is the address of a victim who has commented upon a pending discretionary parole under AS 33.16.120. In this instance, the state has undertaken a duty to protect the victim from harm or harassment. AS 12.61.010(a)(3). By not disclosing the victim's residence or location, the state is taking one small measure to protect that victim in the event the prisoner, or any of the prisoner's relatives or associates decides to act in vengeance if the victim has commented adversely on a prospective parole. Furthermore, there is no reason, under due process requirements or otherwise, for the prisoner to have access to that piece of information. Therefore, this information is not disclosed to the parolee. AS 33.16.120(b).

The second type of information that is not appropriate to disclose is previously undisclosed diagnostic reports, confidential informant reports and any other information which, if disclosed, may result in harm to any person. AS 33.16.170(b). The state's interest in the rehabilitation of the prisoner, whether discretionary parole is granted or not, is of paramount importance. In some instances a psychiatric evaluation of the prisoner, if it has not been previously disclosed, may severely undermine the institutional therapy program in which the prisoner is currently enrolled. Although it is rare that such a diagnosis has occurred and has not been subsequently disclosed to the prisoner, a few instances of subsequent disclosure by the board and an attendant disruption of the prisoner's therapeutic program

would lead to the board either not being given access to that information, or to that type of information not being generated. Either alternative would negatively impact the rehabilitative goals of the state.

Furthermore, disclosure of confidential information or any other information which may result in harm to any other person is contrary to the state's duties to properly administer prisons and to protect society.

Although non-disclosure of these types of information, is permitted, due process does mandate the opportunity for the prisoner or parolee to contradict or explain adverse information. In balancing this interest with the state's interest in protecting other members of society from harm and ensuring rehabilitation, the board is therefore required to summarize the information which it does not disclose. This summary will vary with the types of information being considered by the board, but it nonetheless must be capable of conveying to the prisoner or parolee, as completely and as accurately as possible, the content of the information. This will enable the prisoner or parolee to adequately respond. AS 33.16.170(c).

C. Remedial Actions

Numerous duties are required of the board during the parole process. The Parole Administration Act does not set out specific remedies that may result if the board fails to discharge those duties.

1. Parole/Prisoner Remedies

Absent the denial of a constitutional right, the actions of the parole board when it is exercising its discretionary functions are not reviewable in court. Therefore, when in its predictive judgment, the board decides a prisoner is not suitable for discretionary parole, an aggrieved prisoner may not have that decision reviewed. However, in that the Parole Administration Act, and its requirement for the adoption of regulations establishing standards for the determination of the suitability for discretionary parole, grant a perspective parolee a limited liberty interest, review of the board's action for a denial of due process safeguards is more readily available than is apparent. Similarly, revocation of parole which is a recognized liberty interest may give rise to judicial review of the procedures employed to ensure the necessary level of due process procedural safeguards.

If a prisoner or parolee challenges the procedure of the board as a violation of due process safeguards (usually through an action under Criminal Rule 35) the remedy that is nearly universally applied is for the board to redo the proceeding, ensuring that the parolee's or prisoner's due process rights are recognized. Newell v. State, 620 P.2d 680 (Alaska 1980). The courts have recognized that they possess "only limited power to review Parole Board decisions, and cannot usurp the authority of the Board." 9/ This remedy is generally appropriate if the board has violated one of the procedural guarantees set out in Morrissey, at 486, 489, whether it occurs at the preliminary or final revocation stage. See Ford v. Wainwright, F.2d 981 (5th Cir. 1977); Hahn v. Burke, 430 F.2d 100 (7th Cir. 198-70); Petition of Haverty, 618 P.2d 1011 (Wash. 1980). Similarly, a denial of procedural safeguards during the parole granting phase should be entitled to no more severe remedy than an order to redo the faulty hearing.

If the procedural safeguard denied a parolee in a revocation proceeding is the untimeliness of the hearing, the exceptional remedy applied is the reinstatement of the parolee to parole. See State v. Chavez, 607 P.2d 640 (N. Mex. App. Ct. 1979). By statute, Alaska has set specific time limits in which to hold a preliminary revocation hearing, within 15 working days after a parolee's arrest and incarceration for the violation; 10/ in which to hold a final revocation hearing, 20 days if the parolee is arrested, incarcerated and no preliminary revocation hearing on the violation is held; 11/ and in which to hold a final revocation proceeding, 120 days after the parolee's arrest, subject to recognized exceptions. 12/

If the board was to deny a timely hearing under the statute, the resultant remedy should be proportionate to the violation. The purpose underlying the requirement for a timely

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9/ Newell, at 683.

10/ AS 33.16.220(b). A preliminary revocation hearing is not necessary for a parolee charged with a violation who is not arrested and incarcerated if there is no additional deprivation of the parolee's conditional liberty interest.

11/ AS 33.16.220(e).

12/ AS 33.16.220(f).

hearing is to enable the alleged violator to respond to the alleged violation while contrary evidence may still be available and the issue is fresh in everyone's mind. A short delay in the revocation proceeding would result in little prejudice to the parolee, so release from incarceration pending the hearing is an appropriate remedy. However, where the delay is significant and prejudice to the parolee is shown, reinstatement to parole status may be appropriate. This is the exceptional situation. Naturally, in that the prejudice to the parolee is the availability of evidence and the freshness of the incident, even a significant delay of a final revocation hearing pending resolution of pending criminal charges is not prejudicial.

The extraordinary remedy of unconditional release would only result if there was a due process violation and the term of the parolee's sentence would have expired had not the due process violations occurred. See U.S. ex rel. Hahn v. Review, 520 F.2d 632 (7th Cir. 1975); Lawrence v. Smith, 451 F. Supp. 1979 (W.D.N.Y. 1978).

2. Third Party Remedies

If the board fails to notify a victim of its consideration of discretionary parole and the right of the victim to comment on the proceeding under AS 33.16.120(a) this does not invalidate any parole decision. The purpose of this section is to give victims a voice in (as opposed to a veto power over) the parole process, and to provide the board with additional information in considering discretionary parole and special conditions if parole is granted. Therefore any remedy for the victim would have to lie in a tort action.

PWC:eja:Sectional

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Law

Page 1, line 26 renumber existing "(c)" to "(d)" and add:

(c) A prisoner eligible for discretionary parole during a period of sentence enhancement imposed under AS 12.55.155(a) or during the subsequent term of a consecutive or partially consecutive presumptive sentence imposed under AS 12.55.025(e) or (g) must serve the unenhanced portion of the term or the initial presumptive term before being otherwise eligible for discretionary parole under AS 33.16.100(c) or (d). For purposes of this subsection, the most serious offense in the case of consecutive or partially consecutive presumptive sentences, will be considered the initial presumptive term. The unenhanced term or the initial presumptive term is considered served for purposes of discretionary parole on the date the unenhanced or initial presumptive sentence is due to expire [excluding any/less] good time earned under AS 33.20.010.

May 5, 1985

Senator Patrick Rodey
Alaska State Legislature
Pouch V (M & 3100)
Juneau, Alaska 99811

Dear Senator:

Re: CSHB 141

While this Bill contains elements that may be good, there are two items which cause me some concern.

1) Page 3, line 26, # 8, upon request of the governor, review and recommend applicants for executive clemency.

Objection:
The ability of Board Members to again rule on a case upon which they have already ruled and made a decision destroys the element of impartiality that is required in these decisions. Clemency should be a step above all previous decisions. No party in previous judgement or ruling should be a member of the Clemency process. This section should either be deleted or re-written to deny membership of any parole board member to participate in the Clemency process.

2) Page 6, line 3, # 1, the presentence report made to the sentencing court. This line should be deleted.

At present and under current practice, the lack of impartiality and relevancy involved in the writing of these reports brings into question the reliability and honesty of some. Clients have little chance in reality to contest matter found therein.

I can add ~~of~~ a word of commendation for the matter of conduct and interest of the present Legislature. "Capitol 85" has helped to bring this spirit through to the people.

Respectfully,

Harry Depp

Box 919
Palmer, Alaska 99645