

JURY LIST

FROM

PERMANENT

FUND LIST

STATE OF ALASKA  
THE LEGISLATURE

POUCH Y STATE CAPITOL  
JUNEAU ALASKA 99811  
907-465-3600

LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

March 5, 1986

SUBJECT: Preparation of the jury list  
(Work Order No. 14-1965)

TO: Senator Pat Rodey  
Senate Judiciary Committee

FROM: Michael F. Ford *M.F.*  
Legislative Counsel

Your request to amend AS 09.20.050(b) raises a constitutional issue regarding selection of an impartial jury. The above referenced work order would allow the court system to use only persons who file for permanent fund dividends during the preceding year who show Alaska addresses, for the purpose of creating a jury list. Under Article I, section 11 of the Constitution of the State of Alaska, a criminal defendant is entitled to an impartial jury. In Alvarado v. State, 486 P.2d 891 (AK 1971), the Alaska Supreme Court held that to meet this constitutional requirement, the jury must be selected "from a source truly representative of a fair cross section of the community." Alvarado at 903. By using only those individuals eligible for a permanent fund dividend to create the jury list, you permanently exclude those residents who choose not to apply for a dividend. Also, because the dividend list only includes persons who file during the preceding year, you would exclude from jury service persons who live in the community for as long as a year and six months after they move to the community. A jury list based on the dividend program creates a lengthy durational residency requirement. Such a requirement is much longer than is required for voting, or for obtaining a resident hunting, fishing, or trapping license.

While the permanent fund dividend list is closer to representing a fair cross-section of the community than the list of those who vote or who obtain fishing, hunting, or trapping licenses, the residency requirements of the dividend list still raises constitutional questions concerning creation of an impartial jury.

MFF:mkr  
m3/126

14-1965 ✓  
Ford  
3/5/86

1 IN THE SENATE

BY THE JUDICIARY COMMITTEE

2 SENATE BILL NO.

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FOURTEENTH LEGISLATURE - SECOND SESSION

5 A BILL

6 For an Act entitled: "An Act relating to preparation of the jury c."

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

8 \* Section 1. AS 09.20.050(b) is amended to read:

9 (b) The jury list shall be based on the list described in (2) of  
10 this subsection or a combination of the following lists: (1) a list  
11 of all persons who purchased a resident trapping, hunting, or fishing  
12 license during the preceding calendar year who [WHICH] showed an  
13 Alaskan address (to be prepared by the Department of Fish and Game),  
14 (2) a list of all persons who filed for a distribution of Alaska  
15 permanent fund income under AS 43.23 during the preceding calendar  
16 year who [WHICH] showed an Alaskan address (to be prepared by the  
17 Department of Revenue), (3) a list of all persons who have registered  
18 to vote in this state (to be prepared by the director of elections),  
19 and (4) [,] if considered necessary by the administrative director of  
20 courts, a list of all persons who hold a valid Alaska drivers' license  
21 (to be prepared by the Department of Public Safety). The departments  
22 and the director of elections shall submit their respective lists to  
23 the Department of Administration not later than January 15 of each  
24 year. To the extent that it is available, the lists submitted by the  
25 departments and the director of elections shall contain the following  
26 information for each person on the list for the preceding calendar  
27 year: first name, middle initial, and last name; residence address as  
28 well as mailing address, including the zip code for each; birth date;  
29 and the number of years and months the person has been a resident of

1 the state. The lists submitted by the departments and the director of  
2 elections shall be recorded on magnetic tape compatible with  
3 Department of Administration data processing equipment.  
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**Rule 15. Jurors—Predetermination of Qualifications—Service of Summons—Selection of Jury Panel—Periods of Jury Service.**

**(a) Administration.**

(1) The administrative director of the courts shall be responsible for the management of the jury system.

(2) The administrative director may prescribe policies and procedures for efficient and effective jury management.

(3) Computerization may be utilized for the random selection of jurors and for management of the jury system. The administrative director may authorize random selections other than by computer when circumstances warrant.

**(b) Master Jury List.**

(1) By March 15 of each year the administrative director will prepare a statewide master list of prospective jurors in Alaska.

(2) The administrative director will divide the state-wide master list into local master jury lists for each court location. A court location's local master jury list will include the names of all prospective jurors who live in the community and other areas assigned to that court for jury selection purposes. Communities and other areas will be assigned to court locations for the purposes of jury selection according to the following criteria:

(i) Each court location will be assigned its own community and all non-court locations within a 50 mile radius of that court except as provided in (ii) and (iii) below.

(ii) If a non-court location is within the 50 mile radius of two or more court locations, that non-court location will be assigned to that court in the same senate district. If both court locations are in the same senate district, then the presiding judge will assign that non-court location to the court location deemed most appropriate.

(iii) If the non-court location is not within a 50 mile radius of any court, that non-court location will remain unassigned unless the presiding judge orders the non-court location assigned to a court.

(iv) No community will be assigned to more than one court location for the purpose of petit jury selection.

(3) Clerks and magistrates shall send a periodic listing of duplicate names, names of deceased persons or persons who are permanently excused from jury service to the administrative director. This list shall be used to update the annual master jury list to ensure that these names are not again selected for jury service.

**(c) Selection of Prospective Petit Jurors.**

(1) Prospective petit jurors shall be selected from the area defined in (b)(2) unless the court finds that the selection area defined in section (b)(2):

(i) will not provide a petit jury which is a truly representative cross-section of the appropriate community or,

(ii) would cause unreasonable transportation expenses, in which case the trial court, on its own motion or on the motion of the parties, may designate an area other than that specified in section (b)(2) from which the petit jurors shall be selected.

(2) Selection of prospective petit jurors will be from all locations assigned in (b)(2) unless an alternative assignment is specifically authorized by the presiding judge. The presiding judge will forward this authorization to the administrative director by February 1 of each year so that the area of selection can be changed.

**(d) Qualification of Jurors.**

(1) The administrative director shall be responsible for overseeing the mailing of a questionnaire to prospective jurors to determine if they are qualified to serve. Questionnaires may be served by regular mail.

(2) If a prospective juror's response to the questionnaire indicates that he or she is not qualified for service or, in the opinion of the judge or magistrate, the prospective juror has stated grounds sufficient to be excused or deferred, no summons shall be issued or, if already issued, the prospective juror shall be excused or deferred to a later date.

(3) A prospective juror shall not be paid jury fees or be reimbursed for travel expenses incurred and subsistence if the prospective juror appears at the court house:

(i) in response to a questionnaire rather than a summons;

(ii) because he or she failed to call-in as instructed; or

(iii) after having been sent an excusal notice or after having been otherwise notified that he or she was excused.

(e) **Summoning Jurors.**

(1) Summons may be served by regular mail.

(2) The summons shall state the court location, reporting date and reporting time or call-in date and call-in time for jury service.

(f) **Venire List.** The venire list is comprised of all prospective jurors whose responses on a jury questionnaire indicate they meet the minimum statutory qualifications for jury service.

(g) **Jury Panel.**

(1) Under the direction of the court, the clerk shall select a jury panel from the venire list.

(2) The jury panel is that group of prospective jurors who are summoned to report or call-in for a term of jury service.

(3) Persons on the jury panel will be required to be available for actual jury service as specified in section (j) of this rule.

(h) **Trial Panel.** The trial panel is that group of prospective jurors from the jury panel who are sent to a courtroom for possible inclusion on a trial jury.

(i) **Trial Jury.**

(1) A trial jury consists of those prospective jurors selected from the trial panel to hear a trial.

(2) Unless otherwise stipulated by the parties and ordered by the trial judge, a trial jury in superior court shall consist of 12 persons. A trial jury in district court shall consist of 6 persons. An inquest jury and a presumptive death jury shall consist of 6 persons.

(3) When a case is to be tried by jury, the clerk shall randomly select from the names of those on the trial panel a number of names sufficient to name a trial jury and alternate jurors, if the court decides alternate jurors are needed.

(4) The prospective trial jurors shall be examined, challenged, and sworn as provided in Civil Rule 47 and Criminal Rule 24.

(j) **Term of Service.**

(1) Except as otherwise provided by the administrative

director, a juror's term of service is based upon the size of the court's local master jury list as defined in section (b) of this rule. The maximum term of service and maximum length of actual service are shown below:

SIZE OF LOCAL MASTER JURY LIST	MAXIMUM LENGTH OF AVAILABILITY FOR JURY SERVICE (TERM OF SERVICE)	MAXIMUM LENGTH OF ACTUAL ANNUAL COURT ATTENDANCE (SERVICE)
Under 5000	1 year	30 days per year
5000 and over	30 consecutive days per jury year unless interrupted by a deferral	30 days per year

(2) "Term of service" begins the date the juror first appears in court or calls the court as ordered on a summons, unless the term of service is deferred at the request of the prospective juror.

(3) "Service" starts the first day the juror is paid for jury service.

(4) If the commencement of a prospective juror's term of service is deferred to a later date at the juror's request, his or her term of service shall commence on the date to which he or she is deferred. If after beginning a term of service a prospective juror requests a deferral, the court may defer the remaining portion of the term of service.

(5) After a person completes his or her term of service, that person shall not be required to serve as a juror within one year after the last day of actual court attendance for which he or she was paid.

(6) A juror who commences sitting in a trial within the term of service shall continue to serve in that matter until discharged by the trial judge.

(k) Definitions.

(1) Deferral of Jury Service – the postponement of jury service to a later date. This postponement can be no longer than 10 months from the date the initial term of service was to have started. A person may have jury service deferred if he or she shows that jury service at the time when he or she is summoned

will cause hardship to that person or others, or that transportation problems make it impossible to serve. Jury service may be deferred only if the person seeking the deferment agrees to a deferred date.

(2) Excused – a person may be excused from service as a juror if it is shown that his or her health, the health or proper care of his or her family, a physical or mental disability, or other conditions exist which would cause a hardship to the individual. Unless the court specifically authorizes a permanent excusal, all excusals from jury service shall be for the current jury year only.

(3) Jury Panel – that group of prospective jurors who are summoned to report or call in for a term of jury service.

(4) Jury Summons – a court order directing a prospective juror to report or call-in for jury duty.

(5) Jury Year – the term during which a master jury list is in effect; normally, from March 15 of one year (when the list is compiled) until March 14 of the next year (when a new master list must be prepared).

(6) Local Master Jury List – a randomly ordered listing of names of prospective jurors for a court location who may be sent qualification questionnaires for jury service.

(7) Natural Faculties – normal abilities to reason, hear, see, and move about.

(8) Permanent Excusals – a prospective juror may be permanently excused from all jury service if he or she:

(i) is advanced in age. Those people who are over age 70 and request in writing to be permanently excused shall be.

(ii) has a permanent physical disability. The disability must be verified in writing by a physician.

(iii) has a permanent mental disability. The disability must be verified in writing by a physician.

(9) Qualification List – a list of names from the local master jury list to which qualification questionnaires will be mailed in order to create a venire list.

(10) Questionnaire – document used to determine whether a prospective juror meets the statutory minimum qualifications for jury service.

(11) Resident – for jury qualification purposes, a person is a resident of the State of Alaska if he or she:

- (i) has registered to vote in Alaska.
  - (ii) has obtained a resident fish and game permit for Alaska, or
  - (iii) is eligible for the Alaska permanent fund dividend.
- (12) Term of Service – begins the date the juror first appears in the court or calls the court as ordered on a summons unless the term of service is deferred at the request of a prospective juror.
- (13) Trial Jury – those prospective jurors selected from the trial panel to hear a trial.
- (14) Trial Panel – that group of prospective jurors from the jury panel who are sent to the courtroom for possible inclusion on a trial jury.
- (15) Venire List – a list of all prospective jurors whose responses on a jury questionnaire indicate they meet the minimum statutory qualifications for jury service. (Supreme Court Order 531 effective October 1, 1982)

Mike - Karla Forsythe of  
Judicial Council sent  
me the attached  
cases. They seem to  
indicate a lack of  
Constitutional problems  
with a 1 year  
residency requirement  
for juror potential.  
Comments?

SSGP

H 3717

# WORK ORDER REQUEST FORM

N14 - 1987

KEYWORDS: court

ASSIGNED TO Yord

REQUEST FOR: BILL  RESOLUTION  RESEARCH  OTHER

SUBJECT Jury List

REQUESTED FOR BJJ (Sen. Judiciary) BY Suzanne EXT. 3717

\* DELIVER TO Sen. Roder. Can. 504 TAKEN BY Barnes

INSTRUCTIONS, EXPLANATIONS

Draft bill relating to preparation of the jury list.  
See attached Draft.

OBTAIN

SPECIAL DRAFTING INSTRUCTIONS ATTACHED

AUTHORIZED TO CONFER WITH \_\_\_\_\_

RETURN \_\_\_\_\_

TO REQUESTER

APPROVED: TBC Director, Legal Services

REVIEWED \_\_\_\_\_

IN 2/27/86 DUE \_\_\_\_\_

TYPED - Draft \_\_\_\_\_ DATE \_\_\_\_\_

Final \_\_\_\_\_ DATE \_\_\_\_\_

PROOFED \_\_\_\_\_ DELIVERED \_\_\_\_\_

SPECIAL INSTRUCTIONS TO TYPIST/PROOFREADER

DRAFT

FINAL

February 26, 1986

M E M O R A N D U M

TO: Arthur H. Snowden, II  
Administrative Director  
Alaska Court System

FROM: Karla Forsythe *Karla L. Forsythe*  
General Counsel

At the request of Dick Delaplain, Manager of Technical Operations, I have drafted a minor technical amendment to AS 09.20.050, which would permit the court system to compile the jury list from the permanent fund dividend list alone. Use of the permanent fund list is already required by law, but only in combination with lists from other sources.

Under current law, the court system is required to obtain and combine three separate lists to compile the jury lists: the list of all persons showing an Alaskan address who purchased a resident trapping, hunting or fishing license during the past year, the list of registered voters, and the list of all persons who filed for a permanent fund income distribution ..

The process of combining these lists to eliminate duplicate names is time-consuming. Often a person's name appears in a different form on each list, which results in multiple issuance of a jury summons to that person.

There are several advantages to using the permanent fund list as the sole source for the jury list. First, the list contains more names of eligible Alaskans than the other lists. Second, since the list is updated annually, it is current. Most important, use of one list avoids duplicate names and the additional work to eliminate them.

In the event that the permanent fund distribution is repealed, the court system would revert to using the fish and game list and the voter registration list. The draft amendment permits the court to use any combination of the lists, so an immediate statutory amendment to delete the permanent fund reference would not be required.

Please let me know if you have any questions about the proposed amendment.

c: Dick Delaplain

room once confession has been admitted into evidence. rights to equal protection of the laws. U.S. C.A.Const. Amend. 14.

9. Criminal Law ⇐858(3)

In murder prosecution, superior court did not abuse its discretion in permitting taped confession to go to jury room. AS 11.15.010.

10. Criminal Law ⇐1037.1(2)

In murder prosecution, unobjected to alleged error consisting of comment on choice of accused not to testify was a "plain error" which would be determined on appeal. Rules of Criminal Procedure, rule 26(b)(6); U.S.C.A.Const. Amend. 5; AS 11.15.010.

11. Criminal Law ⇐656(7)

In prosecution for murder, superior court's remark, "The defendant does not wish to take the stand?", in context wherein it was uttered, was not tantamount to a comment upon accused's exercise of his privilege not to testify and did not constitute error. AS 11.15.010.

12. Jury ⇐33(1)

Key question addressed in constitutional challenges to jury selection is whether prospective jurors were drawn from a fair "cross-section of the community." U.S.C.A. Const. Amend. 6; Const. art. 1, § 11.

13. Jury ⇐33(1)

Any method of jury selection which "is in reality a subterfuge to exclude from juries systematically and intentionally some cognizable group or class of citizens in the community" must be held invalid. U.S.C.A. Const. Amend. 6; Const. art. 1, § 11.

14. Jury ⇐33(1)

Defendant's Sixth Amendment right to impartial jury was not impaired by exclusion from jury of group of less-than-one-year residents of Alaska. U.S.C.A.Const. Amend. 6; Const. art. 1, § 11.

15. Constitutional Law ⇐42.3(2)

As defendant was not a member of group of less-than-one-year residents of Alaska excluded from jury and as he was not prejudiced by their exclusion, defendant could not assert a violation of that group's

16. Constitutional Law ⇐250.2(4)

Exclusion of less-than-one-year-residents of Alaska from jury that convicted defendant of homicide did not violate his right to equal protection in view of fact that there was no denial of an impartial jury. U.S.C.A.Const. Amend. 6, 14; AS 11.15.010.

17. Criminal Law ⇐531(2)

Subnormal intelligence of an accused is certainly relevant in determining whether there has been a knowing, voluntary and intelligent waiver of constitutional rights and, thus, testimony relevant to issue of subnormal intelligence should be admissible.

18. Criminal Law ⇐1168(1)

In murder prosecution, although testimony sought to be introduced regarding defendant's alleged subnormal intelligence was relevant on issue of waiver, evidence should have been admitted at suppression hearing; where, even if evidence had been admitted and believed, evidence of subnormal intelligence would have been insufficient to support finding of involuntariness on that basis, there was no reversible error. AS 11.15.010.

19. Criminal Law ⇐525

The basic function level of the accused need not be particularly high in order to support a finding that the accused was capable of understanding the meaning of his rights and the consequences of his waiver. U.S.C.A.Const. Amends. 5, 6, 14.

20. Homicide ⇐354

Superior court's imposition of life sentence for crime of murder in first degree was not excessive. AS 11.15.010.

E. J. Fyfe, Anchorage, for appellant.

Glen C. Anderson, Asst. Dist. Atty., and Joseph D. Balfe, Dist. Atty., Anchorage, Avrum M. Gross, Atty. Gen., Juneau, for appellee.

rather innocuous expression of surprise by the trial court.<sup>25</sup>

In the superior court, Hampton challenged the array of both the grand jurors and the petit jurors. In support of this challenge, Hampton submitted the affidavit of the assistant jury clerk for the Third Judicial District in Anchorage. In this affidavit, it is stated:

As part of the qualifications sought of each [of the] petit and grand jurors we ask that they be a resident of the State of Alaska for at least one year prior to jury service. If a prospective juror indicates that he or she has not been a resident for one year we note that fact as a basis for excusing the juror. The jurors are actually excused by the presiding judge, but my experience has been that prospective jurors who indicate on their jury questionnaire that they have been Alaska residents for less than one year have consistently been excused from jury service.

Hampton challenged the jury array on two grounds: that it denied him his constitutional right to an impartial jury,<sup>26</sup> and that potential jurors had been excluded in violation of the equal protection clause of the 14th amendment to the United States Constitution. The motion was denied.

[12, 13] The key question addressed in constitutional challenges to jury selection is whether the prospective jurors were drawn from a fair "cross-section of the community."<sup>27</sup> This court has stated:

We recognize that the contours of a fair cross section of the community are elusive and, indeed, that they may not be susceptible of precise definition.<sup>28</sup>

may have acted without due circumspection, but his behavior was not wrongful.

25. We also note that the trial court instructed the jury:

In this case, the defendant has elected not to take the witness stand. You are hereby instructed that under the law he has the right not to take the witness stand if he so elects, and you are instructed that you are not to draw any unfavorable inference against him on that account.

26. U.S.Const. amend. VI; Alaska Const. art. 1, § 11.

Nevertheless, any method of jury selection which "is in reality a subterfuge to exclude from juries systematically and intentionally some cognizable group or class of citizens in the community"<sup>29</sup> must be held invalid.

The term "cognizable group" was defined by the federal district court in *United States v. Guzman*, 337 F.Supp. 140, 143-44 (S.D.N.Y.), *aff'd*, 468 F.2d 1245 (2d Cir. 1972), *cert. denied*, 410 U.S. 937, 93 S.Ct. 1397, 35 L.Ed.2d 602 (1973), in the following manner:

A group to be 'cognizable' for present purposes must have a definite composition. That is, there must be some factor which defines and limits the group. A cognizable group is not one whose membership shifts from day to day or whose members can be arbitrarily selected. Secondly, the group must have cohesion. There must be a common thread which runs through the group, a basic similarity in attitudes or ideas or experience which is present in members of the group and which cannot be adequately represented if the group is excluded from the jury selection process. Finally, there must be a possibility that exclusion of the group will result in partiality or bias on the part of juries hearing cases in which group members are involved. That is, the group must have a community of interest which cannot be adequately protected by the rest of the populace. (citation omitted)

The Supreme Court of California recently addressed a constitutional challenge to the California statute prescribing a one-year residency requirement for jurors in *Adams*

27. *Avery v. State*, 514 P.2d 637, 641 (Alaska 1973); *Malvo v. J. C. Penney Co., Inc.*, 512 P.2d 575, 580 (Alaska 1973); *Alvarado v. State*, 486 P.2d 891, 898 (Alaska 1971); *Green v. State*, 462 P.2d 994, 997 (Alaska 1969), *cert. denied*, 398 U.S. 910, 90 S.Ct. 1704, 26 L.Ed.2d 70. See also *Kimble v. State*, 555 P.2d 73, 79 (Alaska 1975); *Bachner v. Pearson*, 479 P.2d 319, 333 (Alaska 1970).

28. *Alvarado v. State*, 486 P.2d at 898-99.

29. *Green v. State*, 462 P.2d at 998.

v. *Superior Court*, 12 Cal.3d 55, 115 Cal. Rptr. 247, 524 P.2d 375 (1974). In upholding the requirement, the majority noted that before the process is held unconstitutional there must be "a common thread" uniting the excluded group, that is, "a basic similarity of attitudes, ideas or experience among its members so that exclusion prevents juries from reflecting a cross-section of the community."<sup>30</sup> The court then concluded that, under that standard, the excluded group did not form a cognizable class. The court noted, "[t]he group's membership—cutting across economic, social, religious, and geographical lines—changes day by day, creating a lack of real commonality of interest among the newly migrated."<sup>31</sup> The court went on to consider the equal protection challenge to the procedure, finding a rational relationship between the classification and some conceivable legitimate state purpose, specifically, the one-year resident's "acquaintance with local conditions, customs and mores."<sup>32</sup>

There is a one-year residency requirement for jury service in the federal courts.<sup>33</sup> The legislative history of the provision illustrates that the purpose of the provision is to guarantee "some substantial nexus between a juror and a community whose sense of justice the jury as a whole is expected to

reflect."<sup>34</sup> The constitutionality of the provision has been uniformly upheld.<sup>35</sup>

[14-16] Applying the "cognizable group" standards to less-than-one-year residents, we conclude that Hampton's sixth amendment right to an impartial jury was not impaired. The excluded group is not a static one with definite parameters. There is no common thread, "a basic similarity in attitudes or ideas or experience," except the lack of familiarity with the community. While circumstances can be imagined in which bias against a defendant member of the excluded group might exist, that possibility is too remote to justify reversal in the absence of a more specific suggestion of prejudice.<sup>36</sup>

[17-19] At the suppression hearing, counsel sought to introduce testimony from two lay witnesses to show Hampton's "basic functioning level . . . [as] to whether or not he [could] in fact enter a knowing and intelligent waiver." After listening to a substantial part of the testimony of one of the lay witnesses, the court sustained an objection on the grounds of relevancy. Counsel for the defense made no offer of proof regarding the testimony of both witnesses. The subnormal intelligence of the

protection of the laws. Since he is not a member of the group, Hampton must show that he was harmed by the violation in order to assert the claim on their behalf. See, e. g., *United States v. Garrett*, 521 F.2d 444 (8th Cir. 1975); *In re Kundert*, 401 F.Supp. 822 (D.N.D.1975); *Levshakoff v. State*, 565 P.2d 504 (Alaska 1977). Cf. *Wagstaff v. Superior Court*, 535 P.2d 1220 (Alaska 1975) (counsel has standing to assert rights of unrepresented juveniles). In *Peters v. Kiff*, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972), the United States Supreme Court held that a white had standing to challenge a jury array which excluded Blacks. However, unlike Hampton, Peters was able to show prejudice stemming from the exclusion. Hampton also argues that his right to equal protection of the laws was violated by the exclusion of less-than-one-year residents. Since Hampton was afforded an impartial jury under sixth amendment standards, he has not shown a colorable equal protection claim. Therefore it is not necessary to further scrutinize the jury selection process under the equal protection clause.

30. *Adams v. Superior Court*, 12 Cal.3d 55, 115 Cal.Rptr. 247, 250, 524 P.2d 375, 378 (1974).

31. *Id.*

32. *Id.*, 115 Cal.Rptr. at 252, 524 P.2d at 380.

33. 28 U.S.C. § 1865(b)(1) (1970).

34. 1968 U.S.Code Cong. and Admin.News, pp. 1792, 1796.

35. E. g., *United States v. Owen*, 492 F.2d 1100 (5th Cir. 1974); *United States v. Perry*, 480 F.2d 147 (5th Cir. 1973); *United States v. Ross*, 468 F.2d 1213 (9th Cir. 1972), cert. denied, 410 U.S. 989, 93 S.Ct. 1500, 36 L.Ed.2d 188; *United States v. Gast*, 457 F.2d 141 (7th Cir. 1972), cert. denied, 406 U.S. 969, 92 S.Ct. 2426, 32 L.Ed.2d 668; *United States v. Grey*, 355 F.Supp. 529 (W.D.Okla.1973).

36. The foregoing holding that there was no denial of an impartial jury is dispositive of Hampton's equal protection claim. Hampton argues that there has been a violation of the less-than-one-year residents' rights to equal

## 8. Criminal Law ⇨ 1037.1(4)

Supreme Court would not consider objection, raised for first time more than two months after conviction, to prosecutor's final argument to jury, in effect, that it is difficult to convict an attorney, particularly one who specializes in criminal cases, in absence of plain error. Rules of Criminal Procedure, rule 47(b).

## 9. Criminal Law ⇨ 1037.1(2)

Prosecutorial argument to jury, in prosecution of attorney, that it is difficult to convict attorney, particularly one who specializes in criminal cases, was not plain error. Rules of Criminal Procedure, rule 47(b).

## 10. Constitutional Law ⇨ 90.1(1)

## Criminal Law ⇨ 393(1)

Defendant's lies to police which constituted principal basis for his indictment and conviction were not protected by constitutional guarantees of freedom of speech or privilege not to incriminate himself. U.S.C. A.Const. Amends. 1, 5; Const. art. 1, §§ 5, 9.

## 11. Criminal Law ⇨ 866

Evidence was sufficient to sustain verdict of guilt on charge of being accessory after the fact to first-degree murder, and record did not give rise to suspicion that it was a compromise verdict on theory that count two was erroneously submitted to jury by judge who admitted that evidence in count two was insufficient and that he would have dismissed it regardless of what jury did. AS 11.10.010, 12.15.020.

## 12. Criminal Law ⇨ 1184(1)

Although State has right to cross appeal on ground that sentence was too lenient, Supreme Court may not modify sentence, but can only express approval or

## 1. AS 12.15.020 provides:

*Accessories after the fact.* All persons who, after the commission of any felony, conceal or aid the offender with knowledge that he has committed a felony and with intent that he may avoid or escape from arrest, trial, conviction, or punishment are accessories.

There are no accessories in misdemeanors. AS 11.10.010 states:

disapproval of it. Rules of Appellate Procedure, rule 11(b)(1)(g); AS 12.55.120(b).

## 13. Homicide ⇨ 354

In prosecution of attorney for being accessory after the fact to first-degree murder, trial court's suspension of two-year imprisonments' with defendant being placed on probation was too lenient. Const. art. 1, § 12.

William H. Fuld, Robert L. Woodward and R. Michael Jackson of Kay, Christie, Fuld & Saville, Anchorage, for appellant.

Charles M. Merriner, Asst. Dist. Atty., Joseph D. Balfe, Dist. Atty., Anchorage, and Avrum M. Gross, Atty. Gen., Juneau, for appellee.

Before BOOCHEVER, C. J., CONNOR and MATTHEWS, JJ., and DIMOND, J. Pro Tem.

## OPINION

DIMOND, Justice Pro Tem.

Duncan Webb was convicted of being an accessory after the fact to the first degree murder of John Rich.<sup>1</sup> Webb had been attorney for Wesley Ladd, one of the murderers. Before shooting Rich to death,<sup>2</sup> Ladd forced Rich to sign a power of attorney, giving Duncan Webb the control of all of Rich's assets. After Rich had been murdered, Webb had his secretary witness the power of attorney. However, there was no evidence that Webb had taken part in the murder of Rich or that he had any advance knowledge it was going to happen.

Webb's involvement in the Rich murder consisted primarily of his lying to the police on several occasions. For example, Webb told the police that he had witnessed Rich's

*Parties to crime classified.* The parties to crime are

- (1) principals;
- (2) accessories.

2. A man named Zieger fired the first shot which wounded Rich seriously but did not kill him. A little while later, Wesley Ladd fired the second shot which killed Rich.

signing of the power of attorney, and that he had driven Rich to the airport on August 23, 1973, when in fact Rich had been murdered earlier that day. Webb's principal defense was that he had acted the way he did because of threats on his life by Rich's murderers, Ladd and Zieger.

It is the practice of the Third Judicial District to select as jurors only those persons who have been residents of Alaska for one year or more. Webb contends on appeal that this practice deprived him of his statutory<sup>3</sup> and constitutional right to an impartial jury<sup>4</sup> and was in violation of his rights to equal protection of the laws, which rights are guaranteed by the Fourteenth Amendment to the Federal constitution and Section 1, Article 1 of the Alaska constitution.

Similar arguments were made in *Hampton v. State*,<sup>5</sup> and in *Smiloff v. State*.<sup>6</sup> In rejecting an attack on the jury arrays in those cases, where persons with less than one year's residence in Alaska were excluded from the jury, we stated:

There is a one-year residency requirement for jury service in the federal courts. The legislative history of the provision illustrates that the purpose of the provision is to guarantee "some substantial nexus between a juror and a community whose sense of justice the jury as a whole is expected to reflect." The constitutionality of the provision has been uniformly upheld.

Applying the "cognizable group" standards to less-than-one-year residents, we conclude that Hampton's sixth amendment right to an impartial jury was not impaired. The excluded group is not a static one with definite parameters. There is no common thread, "a basic similarity in attitudes or ideas or experience," except the lack of familiarity with the

community. While circumstances can be imagined in which bias against a defendant member of the excluded group might exist, that possibility is too remote to justify reversal in the absence of a more specific suggestion of prejudice. (footnotes omitted)<sup>7</sup>

In *Smiloff* we referred to the *Hampton* decision, where we stated at page 148:

The term 'cognizable group' was defined by the federal district court in *United States v. Guzman*, 337 F.Supp. 140, 143-44 (S.D.N.Y.), *aff'd.*, 468 F.2d 1245 (2d Cir. 1972), *cert. denied*, 410 U.S. 937, 93 S.Ct. 1397, 35 L.Ed.2d 502 (1973), in the following manner:

A group to be 'cognizable' for present purposes must have a definite composition. That is, there must be some factor which defines and limits the group. A cognizable group is not one whose membership shifts from day to day or whose members can be arbitrarily selected. Secondly, the group must have cohesion. There must be a common thread which runs through the group, a basic similarity in attitudes or ideas or experience which is present in members of the group and which cannot be adequately represented if the group is excluded from the jury selection process. Finally, there must be a possibility that exclusion of the group will result in partiality or bias on the part of juries hearing cases in which group members are involved. That is, the group must have a community of interest which cannot be adequately protected by the rest of the populace. (citation omitted)

Additionally, in *Smiloff*, we rejected the contention that AS 09.20.40 was violated by the one-year residency requirement, by holding that the statutory jury selection

3. AS 09.20.040 provides:

*Compliance with statute.* The selection of jurors shall be made in substantial compliance with the following provisions. A failure in substantial compliance which prejudices the rights of a party is reversible error.

4. U.S.Const. amend. VI; Alaska Const. art. 1, § 11.

5. 569 P.2d 138 (1977).

6. 579 P.2d 28 Opn. No. 1637 (Alaska, 1978).

7. *Smiloff v. State*, 579 P.2d 28, Opn. No. 1637 (Alaska, 1978); *Hampton v. State*, 569 P.2d 138, 149 (Alaska 1977).

Appellate Proce-  
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L. Woodward  
Kay, Christie,  
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Dist. Atty.,  
Anchorage,  
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DIMOND, J.

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procedures were substantially complied with.<sup>8</sup> Similarly, they were substantially complied with in this case.

Despite the *Hampton* decision, at oral argument Webb's counsel still contended that the jury selection procedures deprived him of his constitutional rights. The basis of such argument was that persons like Webb, who are newcomers to Alaska, bring with them their own ideas concerning society and justice, and that such people could have related to Webb's state of mind at the time of his acts and at the time of trial, and that the exclusion from the jury of such persons left Webb with a jury comprised of people who "have been here long enough to 'know the ropes' and be familiar with the community, thus being less sympathetic and understanding with the plight of a new arrival."

[1,2] The gist of such an argument, if we understand it correctly, is that persons who have been residents of Alaska for less than one year have brought with them to this state a different standard of values than is held by residents of more than one year and thus would tend to more readily believe Webb's defense of duress, i. e., that he had acted as he had because of his fear of Rich's killers. Such an argument has no substance. Webb was constitutionally entitled to a trial by an "impartial jury."<sup>9</sup> There is no constitutional right to a jury composed of a cognizable group that would tend to be "partial" or biased or prejudiced against the state and in favor of the accused in a criminal case. Webb's contentions on the jury selection question are without any merit.<sup>10</sup>

[3] Count I of the indictment against Webb provides:

8. *Id.*

9. U.S.Const. amend. VI; Alaska Const. art. § 11.

10. Our decision that Webb was not deprived of his constitutional right to an impartial jury is dispositive of his claim that he was denied due process of law under the Federal and State constitutions.

11. Crim.R. 7(c) states in part:

That between the dates of August 23, 1973, and December 3, 1973, at or near Anchorage, in the Third Judicial District, State of Alaska, Duncan Webb did unlawfully and feloniously after the commission of a felony, to-wit: murder, conceal or aid the offender or offenders with knowledge that he or they had committed a felony, to-wit: murder, and with intent that he or they may avoid escape from arrest, trial, conviction or punishment.

All of which is contrary to and in violation of AS 11.10.050 and against the peace and dignity of the State of Alaska.

Webb claims that Count I of the indictment should have been dismissed because it did not contain a "plain, concise and definite written statement of the essential facts constituting the offense charged," as required by Criminal Rule 7(c).<sup>11</sup>

Webb had two trials. The first resulted in a mistrial in August, 1974, when the jury could not agree on a verdict. The second trial resulted in a jury verdict in May, 1975, finding Webb guilty on Count I of the indictment and not guilty on Count II.<sup>12</sup> Count III of the indictment was dismissed.<sup>13</sup> In August, 1975, Webb received a sentence of two years, with all of that time suspended subject to supervised probation.

Prior to the first trial, in June, 1974, Webb filed a motion to dismiss all counts of the indictment. The motion alleged that Count I did not state a crime of which Webb could be convicted. The memorandum in support of that argument dealt with the allegation that Count I was based on hearsay evidence. No assertion was made

The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.

12. Count II of the indictment accused Webb of violating AS 11.30.190, which deals with compounding or concealing a crime.

13. Count III of the indictment accused Webb of a violation of AS 11.30.315, which has to do with destroying, altering or concealing evidence.

OPINION

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

RABINOWITZ, Justice.

Appellant Mike Smiloff was indicted for the crime of lewd and lascivious acts towards a child in violation of AS 11.15.134. Prior to trial Smiloff moved to dismiss the indictment on the grounds that AS 11.15.134 is unconstitutionally void for vagueness, and that the grand jury selection procedures did not comport with either applicable statutory requirements or constitutional mandate. Smiloff also filed a pretrial motion in which he sought to prevent the prosecution's exercise of any peremptory challenges to petit jurors. The three motions were subsequently denied.

After the jury had been selected and immediately prior to opening statements, Smiloff's counsel requested the superior court to examine the accused's competency to stand trial in light of the problems he had encountered in attempting to obtain assistance from Smiloff. The superior court, relying on the prior reports of the examining physician, concluded that there was "no evidence to suggest Mr. Smiloff is other than competent to stand trial." After trial, the jury returned a verdict of guilty, and the superior court sentenced Smiloff to a term of imprisonment of 5 years. This appeal followed.

1. AS 11.15.134(a) provides:

A person who commits a lewd and lascivious act, including an act constituting another crime, upon or with the body of a child under 16 years of age, intending to arouse, appeal to, or gratify his lust, passions, or sexual desires, or the lust, passions, or sexual desires of the child is punishable by imprisonment for not more than 10 years nor less than one year.

2. *Anderson v. State*, 562 P.2d 351, 353 (Alaska 1973).

In the case at bar, appellant adopted and incorporated by reference appellant's briefs in the *Anderson* case.

3. AS 09.20.050(b) provides:

The jury list shall be based on a list of all persons who purchased a resident trapping, hunting or fishing license during the preceding calendar year which showed an Alaskan

[1] Before this court, appellant has asserted five separate specifications of error. We turn first to Smiloff's contention that AS 11.15.134 is unconstitutionally vague and overbroad.<sup>1</sup> This specification of error is controlled by *Anderson v. State*, 562 P.2d 351 (Alaska 1977). There, in the face of assertions of vagueness and overbreadth, we upheld the constitutionality of AS 11.15.134(a), stating, in part:

However, the State argues that AS 11.15.134(a) is meant to punish only lewd and lascivious physical contact with children. We agree. We construe the words 'lewd or lascivious act . . . upon or with the body of a child' to require physical contact of the child's body by the adult or by some instrumentality controlled by the adult.<sup>2</sup>

[2] Smiloff next contends that the superior court erred in denying his motion to dismiss the indictment because unlawful and unconstitutional procedures were utilized in selecting grand jurors. Smiloff's assertions of illegality are bottomed on the contention that the Area Court Administrator from the Third Judicial District added an additional requirement for jury service, namely, that the prospective jurors have lived in the State of Alaska for at least one year. In appellant's view, this one year residency requirement is violative of AS 09.20.050(b)<sup>3</sup> and the equal protection pro-

address (to be prepared by the Department of Fish and Game), a list of all persons who filed a state income tax return during the preceding calendar year which showed an Alaskan address (to be prepared by the Department of Revenue), and a list of all persons who have registered to vote in this state (to be prepared by the lieutenant governor). The departments and the lieutenant governor shall submit their respective files to the Department of Administration not later than January 15 of each year. To the extent that it is available, the files submitted by the departments and the lieutenant governor shall contain the following information for each person on the list for the preceding calendar year: his first name, middle initial, and last name; his residence address as well as his mailing address, including the zip code for each; his social security number; his birth date; and the number of years and months



visions of both the Federal and Alaska Constitutions. In *Hampton v. State*, 569 P.2d 138 (Alaska 1977), we were presented with a challenge that went to the array of both the grand and petit jurors. Parallel arguments were advanced in that case to these now urged by Smiloff. In rejecting Hampton's attack upon the jury array, we said, in part:

There is a one-year residency requirement for jury service in the federal courts. The legislative history of the provision illustrates that the purpose of the provision is to guarantee 'some substantial nexus between a juror and a community whose sense of justice the jury as a whole is expected to reflect.' The constitutionality of the provision has been uniformly upheld.

Applying the 'cognizable group' standards to less-than-one-year residents, we conclude that Hampton's sixth amendment right to an impartial jury was not impaired. The excluded group is not a

he has been a resident of the state. The files submitted by the departments and the lieutenant governor shall be recorded on magnetic tape compatible with Department of Administration data processing equipment.

4. *Hampton v. State*, 569 P.2d 138, 149 (Alaska 1973).

In *Hampton*, at 148, we further stated:

The term 'cognizable group' was defined by the federal district court in *United States v. Guzman*, 337 F.Supp. 140, 143-44 (S.D.N.Y.), *aff'd*, 468 F.2d 1245 (2d Cir. 1972), *cert. denied*, 410 U.S. 937, 93 S.Ct. 1397, 35 L.Ed.2d 602 (1973), in the following manner:

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static one with definite parameters. There is no common thread, 'a basic similarity in attitudes or ideas or experience,' except the lack of familiarity with the community. While circumstances can be imagined in which bias against a defendant member of the excluded group might exist, that possibility is too remote to justify reversal in the absence of a more specific suggestion of prejudice.<sup>4</sup> (footnotes omitted)

Thus, we conclude that *Hampton* is dispositive of Smiloff's constitutional attack on the grand jury selection procedures employed in the case at bar. As to the contention that the jury selection procedures were also violative of AS 09.20.050(b),<sup>5</sup> we hold that *Hampton*, as well as the provisions of AS 09.20.040 mandate that Smiloff's assertions of statutory violation be rejected.<sup>6</sup>

[3-5] Smiloff also challenges the constitutionality of Criminal Rule 24(d)<sup>7</sup> insofar

5. See note 3, *supra*, for the text of AS 09.20.050(b).

6. AS 09.20.040 provides:

The selection of jurors shall be made in substantial compliance with the following provisions. A failure in substantial compliance which prejudices the rights of a party is reversible error.

In our view, the statutory jury selection procedures were substantially complied with in the case at bar.

7. Criminal Rule 24(d) provides:

*Peremptory Challenges.* After all challenges for cause are completed, the parties shall make or waive their peremptory challenges. First the plaintiff and then the defendant may exercise one or more peremptory challenges alternately until each party successively waives further peremptory challenges or all such challenges have been exercised. A party who waives peremptory challenge as to the jurors in the box does not thereby lose the challenge but may exercise it as to new jurors who may be called. A juror peremptorily challenged is excused without cause. If the offense is punishable by imprisonment for more than one year, the state is entitled to 6 peremptory challenges and the defendant or defendants jointly to 10 peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year, or by fine or both, each side is entitled to 3 peremptory challenges. If there