HB
146

STATE OF ALASKA
THE LEGISLATURE

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

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE REFERENCE LIBRARY

M y, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

H. JUD.	4-23-87	1:30p.m.
H. JUD.	4-16-87	1:30p.m.
H. JUD.	4-9-87	12:00p.m.
H. JUD.	3-3-87	1:30p.m.

(7)

HOUSE COMMITTEE REPORT

Date referred: 2/23/87 | R REFERRALS:

This is spelled incorrectly ↓

DATE: 4-23-87

The Judiciary considered HB 146

"An Act relating to the use of heresay evidence in grand jury proceedings; and amending Rule 6(r), Alaska Rules of Criminal Procedure."

RECOMMENDS:

[✓] replace with CS HB 146 (Jud) — [ ] the same title — [✓] a new title

[ ] attached amendment(s)

- [✓] do pass
- [ ] do not pass
- [ ] no recommendation
- [ ] individual recommendations
- [ ] additional referral to the ______ Committee

ADOPTS: [ ] ______ letter of intent

ATTACHES NEW FISCAL NOTE(s):

- [ ] fiscal impact
- [ ] zero fiscal note
- [ ] zero with analysis
- [ ] same as previous fiscal note published ______
- [ ] same as previous zero fiscal note published ______

SIGNING DO PASS:

[signatures]

SIGNING OTHER RECOMMENDATIONS:

Chairman's signature

5-0591X
Ford
4/23/87

Original sponsors: Swackhammer, Hanley, Donley and Rieger

1 IN THE HOUSE BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 146 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the use of telephonic testimony
7 in grand jury proceedings; and amending Rule 6,
8 Alaska Rules of Criminal Procedure."

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

10 * Section 1. Rule 6 of the Alaska Rules of Criminal Procedure is
11 amended by adding a new subsection to read:

12 (u) Upon motion of the prosecuting attorney, the court may
13 permit a grand jury witness to testify telephonically if the motion is
14 supported by an affidavit from the prosecuting attorney [indicating] stating
15 that (1) the evidence to be elicited from the witness contains matters
16 that at the time of the convening of the grand jury appear to be
17 largely uncontested or cumulative and substantial cost savings will
18 result from the telephonic testimony of the witness due to the loca-
19 tion of the witness, the cost of transporting the witness to the
20 nearest grand jury, or the cost of food and lodging for the witness;
21 or (2) there is compelling justification for excusing the witness from
22 appearing in person before the grand jury. If the motion to allow
23 telephonic testimony is granted, the witness shall testify from a
24 judge's or magistrate's courtroom or office if one is available. If
25 the witness is in an area that does not have a judge or magistrate,
26 then the witness may testify from the office or location of a notary
27 public or other public official. At the beginning of the witness'
28 testimony, the witness shall state the witness' identity and take the
29 oath prescribed in (e) of this rule. The oath shall be administered

1 by the grand jury foreman. The witness' testimony shall be given in
2 private, in accordance with (k) of this rule, and the witness shall
3 affirm this fact at the beginning and conclusion of the testimony.
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5-0591X
Ford
4/22/87

Original sponsors: Swackhammer, Hanley,
Donley and Rieger

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3 IN THE LEGISLATURE OF THE STATE OF ALASKA

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19 tion of the witness, the cost of transporting the witness to the
20 nearest grand jury, or the cost of food and lodging for the witness;
21 or (2) there are exigent circumstances that justify excusing the
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27 of a notary public or other public official. At the beginning of the
28 witness' testimony, the witness shall state the witness' identity and
29 take the oath prescribed in (e) of this rule. The oath shall be

administered by the grand jury foreman. The witness' testimony shall be given in private, in accordance with (k) of this rule, and the witness shall affirm this fact at the beginning and conclusion of the testimony.

5-0591X
Ford
4/15/87

Original sponsors: Swackhammer, Hanley,
Donley and Rieger

1 IN THE HOUSE BY THE JUDICIARY COMMITTEE

2 CS FOR HOUSE BILL NO. 146 (Judiciary)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - FIRST SESSION

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13 permit a grand jury witness to testify telephonically if the motion is
14 supported by an affidavit from the prosecuting attorney indicating
15 that (1) substantial cost savings will result from the telephonic
16 testimony of the witness due to the location of the witness, the cost
17 of transporting the witness to the nearest grand jury, or the cost of
18 food and lodging for the witness; and (2) the evidence to be elicited
19 from the witness contains matters that at the time of the convening of
20 the grand jury appear to be largely uncontested or cumulative. If the
21 motion to allow telephonic testimony is granted, the witness shall
22 testify from a judge's or magistrate's courtroom or office if one is
23 available. If the witness resides in an area that does not have a
24 judge or magistrate, then the witness shall testify at the office or
25 location of a notary public or other public official. At the
26 beginning of the witness' testimony, the witness shall state the
27 witness' identity and take the oath prescribed in (e) of this rule.
28 The oath shall be administered by a judge, magistrate, or clerk of
29 court, if available, or a notary public or public official if a judge,

1 magistrate, or clerk of court is not available. The witness' testi-
2 mony shall be given in private, in accordance with (k) of this rule,
3 and the witness shall affirm this fact at the beginning and conclusion
4 of the testimony.

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IN THE HOUSE

CS FOR HOUSE BILL NO. 146 (   )

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to the use of telephonic testimony in grand jury proceedings; and amending Rule 6, Alaska Rules of Criminal Procedure."

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

* Section 1. Rule 6 of the Alaska Rules of Criminal Procedure is amended by adding a new subsection to read: District Atty.

(u) In the discretion of the grand jury, the testimony of a witness may be presented telephonically. At the beginning of the witness' testimony, the witness shall state the witness' identity and indicate that the testimony is being given in private. — State under oath

Dana Fabe:

WITNESS:
① - demeanor
- drugs
- alcohol

② Authenticity → notary public

③ Privacy of witness

Physical setting: Paul Grant
Hearsay problem → read definition
Credibility →

Dana Fabe
Request Court - Criteria
① Substantial cost savings.
1) number of witness
2) cost of plane fair
3) per diem

② Testimony is cumulative or uncontested
expert testimony

③ But - if one eye witness is (credibility issue.)

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version : CSHB 146
Publish Date :

REQUEST:

Revision Date: April 3, 1987
Title : "An Act relating to the use of telephonic testimony . . ."
Sponsor : Repr. Swackhammer
Requestor : Repr. Swackhammer

Agency Affected : Department of Law
BRU : Prosecution

Components : All

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
GENERAL FUND		-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
FULL-TIME		-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Please see attached analysis.

Richard I. Pegues

Prepared by : Richard I. Pegues, Director
Division : Administrative Services
Phone : 465-3672
Date : April 3, 1987

Richard I. Pegues /FOR/

Approved by Commissioner : Grace Berg Schaible , Atty Gen.
Date : April 3, 1987
Agency : Department of Law

Distribution (by preparer) :
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. CSHB 146

The committee substitute for HB 146 would amend Rule 6 of the Alaska Rules of Criminal Procedure by permitting the telephonic testimony of a witness before the grand jury, at the discretion of the grand jury.

It is difficult to predict savings that would accrue as a result of this rule change, because telephonic testimony would be at the discretion of the grand jury and not the prosecutor. It certainly appears, however, that some savings will take place. It also appears that telephonic testimony would be used more often in outlying, rural areas than in urban areas, simply because of the inconvenience and cost that travel to rural areas sometimes poses.

Moreover, this rule change could have a major, beneficial impact on the department's operations by allowing the department to accept cases for prosecution that are now being declined largely on the basis of a disproportionate cost to prosecute, when compared to the value of the case. For instance, embezzlement cases, and other crimes involving a significant monetary loss to victims, have had to be declined when the cost for just the grand jury proceeding has exceeded the loss by twice its value. Telephonic testimony at a grand jury could substantially reduce our costs making it possible to accept some of these cases for prosecution.

As stated previously, it is very difficult to predict savings as a result of adoption of this bill. And perhaps there will be none if it results in more cases being accepted for prosecution, as we believe it will. In Fiscal Year 1986 the department spent about $180,000 for grand jury proceedings for witness fees, and witness travel and subsistence. To the extent that telephonic testimony has the potential of reducing these costs by one-quarter to one-third, an annual savings of between $45,000 and $60,000 may occur. However, the prosecution budget for non-personal service expenditures, including grand jury costs, will have been reduced by more than $500,000 between FY86 and FY88. For this reason, we are not showing a fiscal note savings.

5-0591Xa
Ford

A M E N D M E N T

Offered in the HOUSE   By Gruenberg

TO: CSHB 146(Jud)

Page 1, line 11:

Delete "a new subsection"

Insert "new subsections"

Page 2, after line 4:

Insert a new subsection to read:

"(v) In addition to telephonic testimony allowed under (u) of this rule, a grand jury witness may testify telephonically if compelling justification exists for allowing the testimony, the witness gives the witness' identity, and the testimony is given in private in accordance with (k) of this rule."

4/16/87

MEMORANDUM
4/27/87
TO: Rep. John Sund
FROM: J. Hartle, PA
RE: HB 146

29. HB 146 (Swackhammer) An Act relating to the use of hearsay evidence in grand jury proceedings; and amending Rule 6(r), Alaska Rules of Criminal Procedure

Judiciary only referral

Heard 4/9, 4/23 Reported out - Unan Do Pass

Testified:
1) Swack, Prime sponsor
2) Gayle Horetski, Prosecution section, Dept of Law
3) Rural police chiefs all support
  a) Pat Shealy, Valdez
  b) Pete Davis, Unalaska
  c) Floyd Steele, Naknek
  d) Glenn Herbst, Dillingham
4) Dana Fabe, Public Defender:
  a) Supports concept of the bill, agrees that we should not leave bush crimes unprosecuted because of the costs involved. Concerned that the idea is to save transportation costs, not to make indictment easier.

Judiciary CS:
1) New title: An Act relating to the use of telephonic testimony in grand jury proceedings; and amending Rule 6, Alaska Rules of Criminal Procedure.

2) A new section is added to Rule 6:
a) The Judge may permit telephonic testimony upon a motion by the prosecuting attorney, IF:
  1> Substantial cost savings will result; AND
  2> the testimony appears uncontested or cumulative at the time of the grand jury; OR
  3> exigent circumstances exist.

Testimony is to be taken in private, in a courtroom or magistrates office if available.

Comment: We're opening the window a crack, not putting in a driveway i.e. try this for this year, and if it doesn't save any money, or if there are abuses, change it next year. We have to move carefully here because in the Grand Jury process there is no defense presense at all - no defendant, no lawyer.

Issue: Gayle Horetski has expressed concern that the findings by the judge will be challengable 'on the back end' i.e. in a defense motion to dismiss charges at the omnibus hearing. This is true, and it will take case law to establish the guidelines as to what constitutes "substantial cost savings," and "appears uncontested or cumulative at the time of the Grand Jury." i.e. the legislature lays out a policy and the courts figure out the details as it applies to individual

cases - per constitutional design.

Issue: The Prosecution Section of the Dept. of Law may still have some concerns - may want a wider window - but they were specifically, officially, and firmly requested to comment on the bill in writing and they never did so, nor did they come to the final hearing.

Issue: "exigent circumstances" versus "compelling justification" - Dept of Law really wants to see the former. My guess is that because the Court of Appeals has already ruled that "compelling justification" cannot include cost. I am a little concerned that the D.A. could try to use this as an end run around the first section. It might be good if you could say on the floor record that any cost questions are taken care of in (1) and that exigent circumstances are for snowstorms, earthquakes, deaths, etc. Swack would NOT support any change here, however. And, this might open the bill up to be reconsidered by Fritz who could then come in with the barn door amendment Tuesday. The standard is essentially the same, except the Department of Law wants to take a new term to court.

* Section 1. Rule 6(r) of the Alaska Rules of Criminal Procedure is amended to read:

(r) ADMISSIBILITY OF EVIDENCE. Evidence which would be legally admissible at trial shall be admissible before the grand jury. Witnesses who reside, or at the time of the grand jury presentation are at a location, ~~which is~~ that is not connected by a road system or more than 100 miles by road from the site where the grand jury is convened may testify and be examined by telephone. In addition, in appropriate cases [, HOWEVER,] witnesses may be presented to summarize admissible evidence if the admissible evidence will be available at trial. The grand jury may also receive and consider hearsay summaries of scientific or other expert evidence that will be available at trial, and other relevant hearsay evidence if there is compelling justification for its introduction. If the prosecution relies on hearsay evidence, the grand jury shall be informed that it has the right to require a witness whose testimony is presented in the form of hearsay to appear and be examined. [HEARSAY EVIDENCE SHALL NOT BE PRESENTED TO THE GRAND JURY ABSENT COMPELLING JUSTIFICATION FOR ITS INTRODUCTION. IF HEARSAY EVIDENCE IS PRESENTED TO THE GRAND JURY, THE REASONS FOR ITS USE SHALL BE STATED ON THE RECORD.]

Introduced: 2/23/87
Referred: Judiciary

5-0591A

1 IN THE HOUSE BY SWACKHAMMER AND HANLEY

2 HOUSE BILL NO. 146

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 FIFTEENTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act relating to the use of hearsay evidence in
7 grand jury proceedings; and amending Rule 6(r),
8 Alaska Rules of Criminal Procedure."

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

10 * Section 1. Rule 6(r) of the Alaska Rules of Criminal Procedure is
11 amended to read:

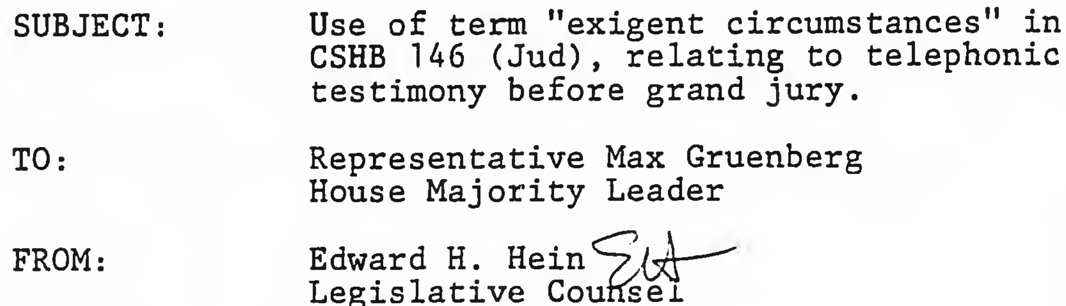
12 (r) ADMISSIBILITY OF EVIDENCE. Evidence which would be legally
13 admissible at trial shall be admissible before the grand jury. In
14 addition, the following evidence is admissible and may be relied upon
15 by the grand jury to the same extent as other evidence: (1) hearsay
16 summaries of scientific or other expert evidence that will be avail-
17 able at trial; (2) evidence of the contents of official records or
18 business records offered through the affidavit of the custodian of the
19 records; (3) other relevant hearsay evidence, whether or not it would
20 be admissible at trial. If the prosecution relies on hearsay evi-
21 dence, the grand jury shall be informed that it has the right to
22 require a witness whose testimony is presented in the form of hearsay
23 to appear and be examined [IN APPROPRIATE CASES, HOWEVER, WITNESSES
24 MAY BE PRESENTED TO SUMMARIZE ADMISSIBLE EVIDENCE IF THE ADMISSIBLE
25 EVIDENCE WILL BE AVAILABLE AT TRIAL. HEARSAY EVIDENCE SHALL NOT BE
26 PRESENTED TO THE GRAND JURY ABSENT COMPELLING JUSTIFICATION FOR ITS
27 INTRODUCTION. IF HEARSAY EVIDENCE IS PRESENTED TO THE GRAND JURY, THE
28 REASONS FOR ITS USE SHALL BE STATED ON THE RECORD].

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M   April 27, 1987



SUBJECT: Use of term "exigent circumstances" in CSHB 146 (Jud), relating to telephonic testimony before grand jury.

TO: Representative Max Gruenberg
House Majority Leader

FROM: Edward H. Hein
Legislative Counsel

You have asked whether there is a difference in the meanings of "exigent circumstances" and "compelling justification" as used in a draft version and the final version of CSHB 146 (Judiciary).

The term "exigent circumstances" appears in the context of warrantless searches and seizures and refers to cases of urgency or emergency in which time is of the essence. In such cases, a warrantless search and seizure is justified if the delay caused by obtaining a warrant from a magistrate would create an immediate danger to life or of serious injury, or an immediate threat of removal or destruction of evidence, or escape of the accused. State v. Clark, 654 P.2d 355 (Hawaii 198); People v. V nAuker, 314 N.W.2d 657 (Mich. App. 198); Words and Phrases.

The term "compelling justification" appears in Rule 6(r) of the Alaska Rules of Criminal Procedure. That rule states, in pertinent part, "Hearsay evidence shall not be presented to the grand jury absent compelling justification for its introduction." In State v. Gieffels, 554 P.2d 460, 464 - 465 (Alaska 1976), the Alaska Supreme Court said "For purposes of interpreting Criminal Rule 6(r) we equate compelling with necessity." The court quoted with approval language from the commentary to draft ABA Standard 3.6(a) relating to the prosecution function (1971), indicating that compelling justification would include cases in which an absent witness gave a written statement but was not not available at the time of the grand jury and circumstances justified prompt

grand jury action. In Gieffels the court found that in many instances it may be necessary to summarize the testimony of out- of-state witnesses, but the mere expense of transporting them to the grand jury is not a compelling justification. 554 P.2d at 465.

I believe it is accurate and fair to say that if exigent circumstances are present there is compelling justification, but that there may be compelling justification without exigent circumstances. Compelling justification is a broader term than exigent circumstances.

From a drafting standpoint, if the idea of necessity is intended, "compelling justification" appears to be the more appropriate term. If the idea of necessity because of urgency or danger is intended, then the more restrictive term "exigent circumstances" should be used. If, despite this distinction between the terms, you have no preference about which one to use, you may wish to consider that "compelling justification" is a term that has been in use by and interpreted by Alaska courts in the context of Criminal Rule 6 since 1972. Thus, the court's interpretation of "compelling justification" here would be more predictable, perhaps, than if you were to use "exigent circumstances," the meaning of which would have to be derived by analogy to the search and seizure context.

If I may be of further assistance in this matter, please advise.

EHH:lmb
M11/075

STATE OF ALASKA

STEVE COWPER, GOVERNOR

900 W. 5TH AVENUE
SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 279-7541

M E M O

TO: Representative John Sund
Chairman
House Judiciary Committee

DATE: April 23, 1987

FROM: Dana Fabe
Public Defender

RE: CS for HB 146 - Telephonic testimony in grand jury proceedings

I have reviewed two proposed committee substitutes for HB 146. I fully support the underlying goal of this bill which is to achieve cost savings in bush cases which are presented to the grand jury. I concur with the testimony of the various rural police chiefs that felonies which would be prosecuted in Anchorage are sometimes not prosecuted in such locations as Dillingham or Unalaska due to the cost of flying multiple witnesses from a rural location to the nearest urban grand jury site.

Since saving money in a time of declining revenues is the purpose of this bill, in my opinion, telephonic testimony before the grand jury should be limited to those cases where substantial cost savings will result. One of the proposed committee substitutes would allow telephonic testimony either when substantial savings would occur or when the witness' testimony would be uncontested or cumulative. If this were adopted, a large proportion of testimony in urban grand juries would be taken telephonically, despite no substantial cost savings.

Telephonic testimony has its drawbacks. Often, it is difficult to concentrate on a witness who is testifying telephonically. Depending on the witness' experience in testifying, he or she might not talk clearly into a microphone, causing difficulty in hearing the testimony. I would suggest that if no cost savings result from the use of telephonic testimony, then live witnesses should be presented to the grand jury to ensure that communication between the witness and the grand jurors is clear and understandable. Thus, I am in agreement with the proposed CS which would require both substantial cost savings and a limitation to evidence which is cumulative or largely uncontested.

I certainly have no problem with the addition of an "exigent circumstances" exception which would justify using telephonic testimony before the grand jury in emergencies. In fact, I believe that this exception already exists in Criminal Rule 6(r) which allows hearsay testimony to be presented to the grand jury where compelling justification exists.

Again, thank you for allowing me to have input on this matter.

DF:sh

STATE OF ALASKA

STEVE COWPER, GOVERNOR

PUBLIC DEFENDER AGENCY

900 W. 5TH AVENUE
SUITE 200
ANCHORAGE, ALASKA 99501
PHONE: (907) 279-7541

April 10, 1987

Representative John Sund, Chairman
House Judiciary Committee
P.O. Box V
Juneau, Alaska 99811

RE: CS for House Bill No. 146

Dear Representative Sund:

Thank you for allowing me to testify on the CS for HB 146 regarding telephonic testimony in grand jury proceedings. At the request of John Hartle, I have drafted some proposed language for the bill which would address some of the concerns which I expressed during my testimony. I think Representative Swackhammer's goal of reducing the cost of presentation of rural cases to the grand jury is an excellent one. Furthermore, allowing telephonic presentation of grand jury testimony where cost savings would result will help ensure that felony cases in rural locations are prosecuted to the same extent as they are in urban areas.

My chief concern is that the broad language of the current proposal would permit district attorneys to present telephonic testimony of witnesses even when no substantial cost savings would result. Furthermore, witnesses whose credibility and demeanor were a crucial factor in evaluating a case would not be available for live testimony before the grand jury. As a result, I would propose the following language for the bill:

Section 1, Rule 6 of the Alaska Rules of Criminal Procedure is amended by adding a new subsection to read:

(u) Telephonic Testimony.

(1) Upon application of the prosecuting attorney, the court by order may permit any grand jury witness to testify telephonically. The court in its discretion may issue such an order if an affidavit of the prosecuting attorney demonstrates that:

(i) Substantial cost savings will result from the order of telephonic testimony of one or more witnesses. In determining whether substantial cost savings would result from the telephonic testimony, the court may consider such factors as the location of the witness, the cost of transportation of the witness to the location of the nearest grand jury, and the cost of food and lodging

for the witness should the trip require an overnight stay;

(ii) The evidence to be elicited from the witness contains matters which at the time of the grand jury appear to be largely uncontested or cumulative; and

(iii) The location and circumstances under which the proposed testimony is to be given meet the requirements of section (u)(2) of this rule.

(2) If telephonic testimony is ordered for a grand jury witness, that witness shall testify from a judge or magistrate's courtroom or office if one is available. If the witness resides in an area which has no judge or magistrate, then the witness shall testify at the office or location of a notary public or other public official.

(3) At the beginning of the witness' testimony, the witness shall state his or her identity and take the oath prescribed in section (e) of this rule, administered by a judge, magistrate or clerk of court if available or a notary public or public official if no judge or magistrate is available. The witness' testimony shall be given in private, in accordance with section (k) of this rule, and the witness shall so certify at the beginning and conclusion of the testimony.

I believe that the wording of this proposal is broad enough to encompass virtually all of the situations described by the rural police departments and legislators at the hearing on this bill. For example, expert witnesses who have prepared reports would be permitted to testify telephonically to avoid the cost of transportation; their testimony would always be cumulative since their reports are already admissible alone under Gibson v. State, 719 P2d 687 (Alaska App. 1986). In a seven witness burglary out of Unalaska involving three police officers who gathered fingerprint and other physical evidence, most, if not all, of the witnesses would be able to testify telephonically since their testimony would be unlikely to be contested and would often be cumulative. I have added language that the matter appeared to be uncontested at the time of the grand jury to avoid the concerns Ms. Horetsky expressed regarding issues which appear to be uncontested at the time of the grand jury but later evidence unpredicted significance.

My major concern is that substantial cost savings be required prior to allowing witnesses to appear telephonically. This will prevent the possibility of abuse of this statute where an Anchorage D.A. wishes to keep a local witness away from the grand jury based on the witness' appearance or demeanor. It is important that substantial savings result, since the cost of gas from Eagle River to Anchorage could qualify as some cost saving. Furthermore, requiring witnesses who have testimony crucial to the case to appear in person will allow grand jurors to judge their demeanor and credibility. This will help to ensure that cases which are unlikely to prevail at trial based on credibility issues will not result in grand jury indictment, resulting in tremendous costs to the system prior to a subsequent dismissal of charges or trial jury acquital.

File bill
S

alaska judicial council

1031 W. Fourth Avenue, Suite 301, Anchorage, Alaska 99501 (907) 279-2526

EXECUTIVE DIRECTOR
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Barbara L. Schuhmann

CHAIRMAN, EX OFFICIO
Warren W. Matthews
Chief Justice
Supreme Court

November 5, 1987

Honorable C. E. Swackhammer
Alaska State Legislature
House of Representatives
312 Tyee Street
Soldotna, Alaska 99669

RE: CSHB146

Dear Representative Swackhammer:

This letter will acknowledge yours of October 26, 1987 requesting my comments and suggestions on CSHB146.

Preliminarily, I would observe that Alaska is unique in its strict requirement that indictment not be based upon hearsay except in very limited circumstances.

Many states have done away with the requirement of indictment by grand jury allowing, in most instances, for the filing of an information by the prosecution with or without agreement of the defendant.

Closely related to the "protection" allegedly afforded by the grand jury process is another procedure or process namely, the preliminary hearing. In Alaska the preliminary hearing as a probable cause or discovery device is limited in its use because indictment has already occurred or the offender has been released from confinement. Defendants for the most part rely upon discovery under Criminal Rule 16 or upon less formal procedures established in local D.A. offices. Generally, those states which limit use of indictment by grand jury make a preliminary hearing procedure more available to defendants.

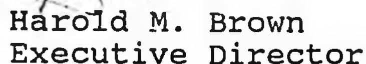
As a practical matter most defense attorneys will argue and prosecutors will admit that grand juries perform according to the script prepared by the prosecutor, and it is advanced that the grand jury as a "process" provides little in the way of real protection to the citizen from the abuse of power by the state. It does provide a record that a judge may review to test the sufficiency of the evidence to support the indictment.

There are several factors affecting the use of the grand jury that are unique to Alaska. Because of this states vast size, the expense of transportation and the limited criminal justice infrastructure, presentation of cases to the grand jury can be an expensive and extraordinarily time consuming exercise. Given the earlier observation that grand jurors tend to follow the script prepared by the prosecutor and given also the decline in state revenues it would seem appropriate and reasonable to provide for the use of hearsay evidence under circumstances calculated to limit the possibility of improvident indictment.

Having said all this, I do not believe that CSHB146 in its current form can accomplish the intended result. The meaning of the phrase "...largely uncontested..." is unclear and in my opinion unworkable. I think that one must assume in the absence of specific approval by the defendant of the use of telephonic testimony that all evidence is contested.

I would appreciate it if your staff could send me a copy of the proposed legislation prior to amendment. In the meantime I will be thinking about a standard that could be employed to accomplish the desired result i.e. decreasing the expense and inconvenience of current grand jury requirements without seriously affecting the rights of the defendant.

Sincerely,



Harold M. Brown
Executive Director

American Civil Liberties Union

Alaska Civil Liberties Union -Legislative Committee-217 Second St. #204-Juneau, Alaska 99801

March 24, 1987

Rep. John Sund
Chairman, House Judiciary Committee
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Dear Representative Sund:

I am a member of the Board of Directors of the Alaska Civil Liberties Union, and Chairman of the Legislative Committee of that organization. I would like to go on record in opposition to HB 146, which would permit persons to be indicted before the Grand Jury on the basis solely of hearsay evidence.

While the ACLU as an organization has not had the opportunity to review the specific language of the bill, in general the use of hearsay evidence for any purpose is to be avoided under ACLU policies. This is true because hearsay is the most unreliable source of evidence, and is also the most easily fabricated. There is no opportunity to observe the demeanor of the person who made the hearsay statement, and thus no way to evaluate the credibility of the person by using those subtle but effective non-verbal cues that tell us whether a person is lying or not.

The bill has a number of provisions that are just bad policy, and which raise potentially serious constitutional issues. For example, Subsection (r) (3) would permit the use of coerced confessions, co-defendant statements, and other highly unreliable and illegally obtained evidence. Permitting the state to use such evidence to obtain indictments will encourage police misconduct and sloppy or incomplete investigation. If an indictment can be obtained without direct evidence, police will be inclined to do their investigation after indictment, rather than before. All questions of good or bad intentions aside, it is only natural for overworked police officers to take the easy way out, which this bill offers.

The bill provides that the prosecution must advise the grand jury that it can require the personal attendance of the hearsay declarant. However, that is a promise that the prosecutor cannot always keep. For example, out of state witnesses cannot be compelled to attend, and co-defendant statements may be unavailable due to Fifth Amendment protections. This sets up a situation in which the prosecutor can use testimony that will <u>never</u> be tested in front of the trial jury and which the prosecutor himself may never hear or evaluate first hand. I believe this raises serious confrontation clause issues, and that it also

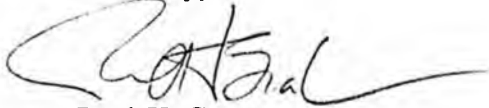
violates the prosecutor's obligation to act as an independent check on the power and activities of the police and to exercise discretion in the bringing of charges.

I understand the thrust of the bill to be the decrease of costs associated with grand jury proceedings. However, I submit that the bill will prove to be a false economy. Because of the constitutional issues raised by the law, there will be a marked increase in litigation over the grand jury process. Numerous indictments obtained using hearsay may be thrown out, requiring reindictment at greater expense.

Finally, present law allows the use of hearsay in those compelling circumstances which might arguably justify using unreliable evidence. The prosecutor may use hearsay in cases of need, after presenting the justification on the record of the proceeding. This protects legitimate law enforcement goals, and at the same time allows the reviewing court to independently evaluate the claim of necessity. Wider latitude is simply not needed by the state.

I urge the defeat of HB 146; it is a bad idea.

Sincerely,



Paul H. Grant
ACLU Legislative Committee

cc: Don Clocksin
Marian Butcher

APR 15 1987

American Civil Liberties Union

Alaska Civil Liberties Union -Legislative Committee-217 Second St. #204-Juneau, Alaska 99801

April 10, 1987

Rep. John Sund
Chairman, House Judiciary Committee
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Re: CS for HB 146

Dear Representative Sund:

Thank you for the opportunity to testify about CS for HB 146. Representative Taylor asked me to provide the committee with draft language to solve the problem of maintaining security and confidentiality of grand jury proceedings during telephonic testimony of witnesses. After the hearing, I discussed the bill with Dana Fabe of the Public Defender Agency; she read me her draft language which, in my view, accomodates the state's interest in reducing the costs of Grand Jury proceedings, while at the same time insuring that telephonic testimony is taken in a dignified and private manner.

Telephonic testimony should only be permitted if it actually accomplishes the goal of achieving costs savings; it should not be allowed at the expense of the protections already provided to the subjects of Grand Jury investigations by court rule, statute, and the constitution. Accordingly, we support the concept that the court should review and approve requests to take telephonic testimony as a means to insure that the process is not abused. The affidavit procedure established in the Public Defender's proposal is a minimal burden on the state, and at the same time insures that the cost saving goals sought by the bill's sponsor are accomplished.

While ACLU does not encourage the committee to move this bill, we recognize the fiscal realities of the day. If the committe decides to act in this area, we believe that you should adopt the guidelines proposed by the Public Defender.

Sincerely,

Paul H. Grant
ACLU Legislative Committee

cc: Don Clocksin
Representative Robin Taylor
Dana Fabe

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

Bill Version: HB 146
Publish Date: 2/23/87

REQUEST:

Revision Date:
Title: "An Act relating to hearsay evidence..."
Sponsor: Swackhammer & Hanley
Requestor: House Judiciary

Agency Affected: Administration
BRU: Office of Public Advocacy

Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES		0	0	0	0	0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		0	0	0	0	0
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
GENERAL FUND		0	0	0	0	0
FEDERAL FUNDS						
OTHER						
TOTAL		0	0	0	0	0

POSITIONS:

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
FULL-TIME		0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Brant McGee, Public Advocate
Phone: 274-1684
Division: Office of Public Advocacy
Date: 3/13/87

Approved by Commissioner: Garrey Peska
Date: 3/12/87
Agency: Department of Administration

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

POSITION PAPER

HB 146

The Alaska Public Defender Agency and Office of Public Advocacy are totally reactive agencies which provide representation to indigent persons when appointed by the court. These agencies do not make policy nor do they initiate litigation. Only proposed legislation with fiscal or program ramifications for these agencies can be said to have a direct agency impact. Thus the Public Defender Agency and Office of Public Advocacy will submit position papers for legislation which will affect these agencies fiscally or programatically or will require these agencies to litigate constitutional issues raised by the legislation.

Fiscal impact: None.
Program impact: None.
Constitutional impact: See Analysis Below.

This bill would significantly change current law by allowing the presentation of hearsay evidence before Alaskan grand jury and further allow hearsay evidence to be presented regardless of whether it would be admissible at trial.

This bill will allow but a single witness, usually a police officer, to present all the evidence before the grand jury on a given case. A single witness could testify to all witness statements as reflected by police reports. The grand jury, unless they made a special request, would not have the opportunity to observe the demeanor and judge the credibility of the witnesses to a particular alleged offense.

The bill further would allow hearsay evidence that would not be admissible at trial. By eliminating the traditional restrictions on the admissibility of hearsay evidence, the bill will allow the grand jury to hear rumor, inuendo, and speculation and to base its decision on whether to indict an individual for a felony on evidence that the trial jury will never hear.

The Alaska Public Defender Agency and the Office of Public Advocacy oppose passage of the bill because it clearly undermines the protection afforded to citizens by Art. 1, §8 of the Alaska Constitution which mandates that a grand jury must review the evidence before a citizen is charged with a serious crime. The bill will render almost meaningless the role of the grand jury as an institution designed to ensure that the government has sufficient evidence before it charges citizens with serious crimes.

The bill presents formidable constitutional issues which would be exhaustively litigated in the appellate courts. If the state immediately implemented this legislation, the validity of indictments and subsequent trials would remain in question until the constitutional issues was finally determined by the Alaska Supreme Court. Immediate implementation of the bill thus would place hundreds of felony convictions in jeopardy of being overturned if this legislation was found to be unconstitutional.

Brant McGee Public Advocate	3/13/87 Date
Dana Fabe Public Defender	3/13/87 Date
Commissioner Garrey Peska Department of Administration	3/18/87 Date

House Bill 146 is an act which would allow the use of hearsay evidence before a grand jury. This is accomplished by amending Rule 6(r) of the Alaska Rules of Criminal Procedure. Hearsay summaries of expert or scientific evidence would be allowed as would official records or business records offered through an affidavit by the official custodian of the records. Other relevant hearsay evidence would be admissible as well. The grand jury would still have the right to require a witness whose testimony is presented as hearsay.

INTRODUCTION OF BILLS, (House)

Use of Hearsay Evidence (grand jury)

HOUSE BILL NO. 146, by Reps. Swackhammer and Hanley. Would amend Rule 6(r) of the Alaska Rules of Criminal Procedure to allow certain types of evidence to be admissable before a grand jury. The rule, as amended by this bill, would read: "Admissibility of Evidence. Evidence which would be legally admissible at trial shall be admissible before the grand jury. In addition, the following evidence is admissible and may be relied upon by the grand jury to the same extent as other evidence: (1) hearsay summaries of scientific or other expert evidence that will be available at trial; (2) evidence of the contents of official records or business records offered through the affidavit of the custodian of the records; (3) other relevant hearsay evidence, whether or not it would be admissible at trial. If the prosecution relies on hearsay evidence, the grand jury shall be informed that it has the right to require a witness whose testimony is presented in the form of hearsay to appear and be examined."

Rule 6(r) now reads: "Admissibility of Evidence. Evidence which would be legally admissible at trial shall be admissible before the grand jury. In appropriate cases, however, witnesses may be presented to summarize admissible evidence if the admissible evidence will be available at trial. Hearsay evidence shall not be presented to the grand jury absent compelling justification for its introduction. If hearsay evidence is presented to the grand jury, the reasons for its use shall be stated on the record."

Does not provide an effective date (bill becomes law 90 days after being signed by the governor).

On February 25 Rep. Donley added his name as co-sponsor.

Introduced February 23 and referred to Judiciary.

Five states disallow hearsay at the grand jury level, one of the states is Alaska. A detailed list of each state's approach to the use of grand jury and hearsay evidence is included in this folder. It appears only Alaska requires a grand jury indictment unless waived by the defendant and at the same time disallowing hearsay unless the hearsay comes within an allowed exception. Those exceptions are the same that are applicable to trials. In a 1974 ruling, State vs. Johnson, the Alaska Supreme Court ruled that a hearsay declarant's absence from court, because of a dying relative, was compelling justification for admission of the absent person's statement. On the other hand, the court also ruled that "the mere expense of transportation for the absent witness" is not compelling justification to allow that person's statement. This ruling was determined in the State vs. Gieffels, 1976. This was reaffirmed in Metler vs. the State, "neither the cost of compensating an expert witness for his time nor the mere expense of transportation are sufficient reasons for the admission of hearsay evidence in a grand jury proceeding." The United States Supreme Court, however, upheld the consitutionality of admitting hearsay evidence at grand jury proceedings in Costello vs. U.S., 1965.

The Alaska Association Chiefs of Police support the use of hearsay testimony in grand jury hearings. In a 1985 letter, the Association stated their reasons for supporting the use of hearsay testimony:

> Currently some Bush felony cases are not prosecuted due to the prohibitive costs of gathering all of the required witnesses and the members of the grand jury together. Even in urban areas court time expenses for police witnesses appearing off duty can be substantial. In a time of rising costs and falling revenues this is an important consideration. Another concern obviously is the orderly administration of justice and the potential effect on the rights of those persons indicted.

The Chiefs Association also felt that by allowing hearsay testimony that increased efficiency and a positive effect on the cost of the justice system would occur.

In an Anchorage Times editorial, a former Alaska Attorney General wrote:

> Allowing a grand jury to indict on hearsay does not weaken a defendant's right to confront and cross examine his or her accusers at trial. It merely streamlines the investigative process, making it more efficient from both a time and monetary standpoint. It also makes the process less burdensome to victims and innocent bystanders.

It has been said that Alaska has the most restrictive rules surrounding presentation of evidence to grand juries of any state in the nation. For example, in a burglary case, witnesses A, B and C as well as the officer would have to brought in to testify. It could cost $7000 to bring witnesses from Unalaska to Anchorage to testify in a $2500 burglary case.

If hearsay evidence were allowed in front of a grand jury, the Department of Law estimates approximately 75% of the witnesses now required to attend these proceedings would not be needed until the trial. As a result, the department would save the travel, per diem, witness fees, expert witness fees and professional services expenses that are now incurred. According to Tom Judson of the department's Administrative Services Division, approximately one-third of criminal cases costs are spent on grand jury hearings. The following lists projected costs for grand jury hearings:

	FY84	FY85	FY86
WITNESS TRAVEL:	$109,469	$143,682	$121,022
WITNESS PER DIEM:	32,949	40,840	41,665
WITNESS FEES:	12,547	16,609	17,463
EXPERT WITNESS:	23,021	52,900	21,128
TOTALS:	$177,986	$254,031	$201,278

The FY86 totals are an estimate. The expenses have not been compiled at the time of writing.

Victor Krumm, former Anchorage District Attorney, compiled figures for FY85 which shows the witness travel and per diem that each criminal division office incurred. Those totals coincide with the data provided by Tom Judson. (These figures are found in the support papers supplied in this folder.) Using Judson's calculations, if 75% of the witnesses could be excused until trial, the Department's savings would be approximately $150,960 for FY86.

It should also be noted that witness fees totals will probably increase due to publicity that has made more people aware that they are eligible for a witness fee. The current witness fee structure is $12.50 for less than three hours, $25 for more than three hours and a per diem, depending on the location, for an out of town witness that has to remain overnight.

A financial value cannot be placed on those cases that are not prosecuted because the expense is too high. Society would receive benefits of an improved criminal justice system if the open and shut cases were prosecuted instead of being dismissed due to the high cost. If the hearsay rule was expanded to include grand jury proceedings, personal service costs would also be saved. Cases would take less time since fewer witnesses would be called upon to testify, thereby saving costs incurred by the grand jury process which includes judges, grand jurors and court administrators. The money saved would be used by the Department to accept more cases for prosecution than what have been accepted in the past.

Grand jury hearings are not the same as a trial and should not be subject to the same rules. To treat it as a mini-trial is duplicative, burdensome and expensive.

STATE OF ALASKA 1987 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:

Bill Version : HB 146
Publish Date :

Revision Date:
Title : "An Act relating to hearsay evidence in grand jury proceedings..."
Sponsor : Representative Swackhammer
Requestor : Representative Swackhammer

Agency Affected : Department of Law
BRU : Prosecution
Components : All

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

	FY 87	FY 88	FY 89	FY 90	FY 91	FY 92
FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS : (Attach a separate page if necessary)

Please see attached analysis.

Richard I. Pegues

Prepared by : Richard I. Pegues, Director
Division : Administrative Services
Phone : 465-3672
Date : February 27, 1987

Richard I. Pegues /For/
Approved by Commissioner : Grace Berg Schaible, Atty. Gen.
Date : February 27, 1987
Agency : Department of Law

Distribution (by preparer):
- Legislative Finance
- Legislative Sponsor
- Requestor
- Office of Management and Budget
- Impacted Agency(ies)
- Senate Secretary

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 146

This bill amends Rule 6(r) of the Alaska Rules of Criminal Procedure by permitting the use of hearsay evidence in grand jury proceedings, if it is relevant, whether or not it would be admissible at trial. The current rule provides that hearsay evidence shall not be presented to a grand jury absent compelling justification. This change in the use of hearsay evidence, which is modeled after the federal rule, would substantially reduce the department's costs for conducting grand jury proceedings by reducing the number of witnesses who must physically appear and testify at such proceedings.

The department has estimated that about one-third of $180,000 that it spends annually in grand jury witness expenses, or $60,000, would be saved if this bill is approved. Likewise, a similar savings in staff resources would also occur, although we have no data available breaking out staff time by trial or grand jury activity. However, any savings that occurs as a result of this bill will be offset many times over by reductions in the department's budget that have already taken place in FY 87, and reductions that will take place in FY 88.

The criminal division's non-personal services funding will have been reduced by $737,900 from FY 86 to FY 88. About one-half of this amount represents reductions in local district attorney office accounts, and from which witness expenses are paid. The staff of the Criminal Division will have been reduced from 164 full-time and 2 part-time positions to 107 full-time positions, over the same period of time. For these reasons the department is not showing a fiscal note savings.

Anchorage Chamber of Commerce
Crime Commission

February 25, 1987

Representative C. E. Swackhammer
Alaska House of Representatives
Pouch V
Juneau, Alaska 99811

RE: HOUSE BILL 146
Hearsay Evidence in Grand Jury Proceedings

Dear Representative Swackhammer:

Tom Wright of your office has requested the Anchorage Crime Commission to express a position on the referenced legislation. The Anchorage Crime Commission supports this particular bill and and our reasons for doing so are outlined below.

This particular issue has been a priority item of the 1986-87 as well as the 1985 Anchorage Crime Commission.

A survey conducted by the 1986 Anchorage Crime Commission reflected expenses incurred throughout the State by the judicial system under the present procedure. The costs incurred in 1985 for combined travel and per diem for grand jury witnesses exceeded $177,000. Therefore, it is the consensus of the 1986-87 Crime Commission that, in light of reduced state revenue and budgetary constraints, this legislation could be cost effective.

Not only would passage of this bill provide the State with an element of the judicial system

A Committee of the
Anchorage Chamber
of Commerce

415 F Street
Anchorage AK 99501
(907) 272-2401

aligned with other state and federal laws but, also an effective cost conscious procedure benefitting the citizens of the State of Alaska.

Sincerely,

Harold C. Heinze

Harold C. Heinze
Chairman

bh

MEMORANDUM State of Alaska

TO: All Criminal Division Offices

DATE: February 24, 1986

FILE NO:

TELEPHONE NO: 277-8622

FROM: Victor C. Krumm
District Attorney
Anchorage

SUBJECT: Grand Jury Expenses

The Anchorage Crime Commission may consider recommending presentation of hearsay evidence before the grand jury if expense or distance is a significant consideration.

Each criminal division office is asked to telecopy grand jury travel and perdiem for calendar year 1985.

	Travel	Per Diem
Barrow	11,359	9,180
Fairbanks	10,500 ?	4,500 ?
Kotzebue	9,700	3,450
Nome	12,250	5,800
Bethel	11,639	8,168
Kodiak	5623	2,707
Anchorage	24,538	6,451
Kenai	6181	2,514
Juneau	6,577	2,069
Sitka	1632	1320
Ketchikan	13,724	4030
Dillingham	7,777	2,241
Palmer	2,973	124
	$124,523	$52,554

Jackie 8106
7100

Please write down the pertinent amounts on this sheet and telecopy it to Vic Krumm, Anchorage DAO. Thanks.

VCK:bgh

Memo to Dean Guaneli
CPO, Jun
From Vic Krumm
DAO, Anch

3/10/86

The figures reflected above are probably light. Even so, it is obvious that a statute permitting hearsay for reasons of expense would save the Dept $175,000 OR nearly the equivalent of Sitka's budget. You should show this to H.S.

Vic

02-001A (Rev. 10/79)

ANCHORAGE POLICE DEPARTMENT

4501 SOUTH BRAGAW STREET • ANCHORAGE, ALASKA 99507-1599
TELEPHONE (907) 786-8500

TONY KNOWLES
MAYOR

RONALD L. OTTE
CHIEF

March 13, 1987

Representative C. E. Swackhammer
Alaska State Legislature
Pouch V (MS 3100)
Juneau, Alaska 99811

Dear Representative Swackhammer,

We have completed a review of House Bill Number 146 introduced by yourself and Representative Hanley. We have in concept supported this type of legislation for the last couple of sessions of the legislature. We believe it makes sense from a public policy perspective and particularly from a law enforcement perspective. We believe that some cases in the State of Alaska, given its far flung locations, may not be prosecuted because of the cost involved in having all of the witnesses gather for Grand Jury. Although here in Anchorage we do not face the same problems and jurisdictions that the Bush may relative to transporting witnesses to Grand Juries, we do incur substantial expense when numerous officers involved in the same incident must appear for Grand Jury in their off duty hours. We believe that the tax paying public is well served by not incurring the expense of additional officers appearing to basically relate aspects of the same incident.

The proposed legislation as I read it would allow the Grand Jury, if they had questions that the witness in front of them was not providing the answer to, to call a particular witness and examine that witness relative to their questions. We do not see any diminishment in the rights of the defendant in these types of proceedings, therefore as stated previously, support the passage of this legislation at this time.

If we can be of any further assistance in this matter, please do not hesitate to call on us.

Sincerely,

Del Smith

Del Smith
Deputy Chief of Operations

DS:dl

HB 146 (Swackhammer) <u>relating to the use of hearsay evidence in grand juries</u>

APOA supports the use of hearsay evidence in grand juries. Among the several positive aspects of this bill is the fact that children who have been victims of sexual abuse will be able to have their testimony videotaped and will therefore not have to endure the trauma of repeating their testimony several times.

The bill also has the potential to substantially reduce expense to the state. For example, the bill would enable one police officer to travel to Anchorage for Grand Jury from another city to testify in behalf of all the officers investigating a particular crime, whereas without this bill, the state would have to pay travel and expenses for each of the officers to testify. In addition, if one officer could testify for all, the community would not have all, or most of, its officers gone at one time. Additional costs would be saved if, for example, a videotape could portray the scientific analyses performed at the state's Crime Lab, along with testimony of expert witnesses from the laboratory, and the tape then be used during Grand Jury. Presently laboratory scientists fly all over the state to testify at Grand Jury proceedings. The cost of travel and expenses would be saved and the productivity now lost when laboratory personnel are traveling would be saved in the future.

The cost savings to the state, particularly during the present period of economic decline, argue forcefully for the bill.

Palmer Police Department

423 SOUTH VALLEY WAY
PALMER, ALASKA 99645

PHONE: (907) 745-4811

JOHN L. McKIBBEN
CHIEF OF POLICE

March 2, 1987

Representative C. E. Swackhammer
Box V (Mail Stop 3100)
Juneau, Ak 99811

Attn: Tom Wright

Dear Swack,

I would like to go on record as supporting a change in current law which would allow some hearsay evidence to be used in court.

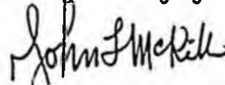
My two areas of concern are in juvenile abuse cases and in Grand Jury.

I feel that juveniles should be given more protection than they now receive.

My objection to our present Grand Jury system is the cost. I sometimes end up with five or six officers testifying at Grand Jury, when only the investigating officer really needs to be there.

Thank you for your consideration in these matters.

Very truly yours,



John L. McKibben
Chief of Police

JLM/pb

NORTH SLOPE BOROUGH
DEPARTMENT OF PUBLIC SAFETY
P.O. BOX 420 BARROW, AK 99723
(907) 852-6111

Edgar E. Martin
Director

February 24, 1987

Representative Charles Swackhammer
Pouch V
Juneau, AK 99811
(Mail Stop 3100)

Dear Representative Swackhammer:

This letter is in response to a recent letter I received from President Shely, Alaska Association of Chiefs of Police, in which he solicited support for your intention to introduce a bill which would allow for expanded use of hearsay testimony in grand jury proceedings. As you are aware the use of hearsay testimony in such proceedings is currently allowed in the federal judicial system, and in most other states.

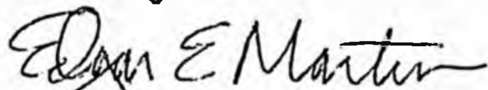
My understanding of the purpose of the grand jury proceeding is that it is to protect the citizen against being forced to stand trial and to defend himself against spurious charges, or charges which are without merit and are intended to harass the person charged. This protection can be afforded either through the grand jury or through the use of the preliminary hearing both of which require the state to produce a sufficient level of uncontested evidence to indicate that a crime has been committed and that there is sufficient reason to beleive that the person charged may have committed the crime, that the matter should proceed to trial.

I believe that the current practice of not allowing for hearsay testimony, places an unneeded burden and expense upon both the prosecuting and investigating agencies. This is particuliarily true in the rural areas of the state, where it is both expensive and disruptive to have to assemble all investigating officers twice, once for grand jury and again for trial. In the case of my agency, the North Slope Borough, this can be particuliarly onerous, as we have officers stationed up to 700 miles apart.

In addition in many instances it is necessary for us to send another officer out to the village to relieve the offficer who is required for grand jury. In the typical felony case, where several officers may have been involved, the expense and logistics become staggering.

I would strongly support your efforts to obtain legislation in this matter. The use of hearsay evidence in grand jury proceedings is currently the norm in most of the United States, and I believe is a much needed change to our current system in Alaska.

Sincerely:



Edgar E Martin
Director of Public Safety

CC: President Pat Shely
Alaska Association Chiefs of Police
PO Box 307
Valdez, AK 99686

CITY OF SEWARD

P.O. BOX 167
SEWARD, ALASKA 99664

- Main Office (907) 224-3331
- Police (907) 224-3338
- Harbor (907) 224-3341
- Telecopier (907) 224-3248

February 26, 1987

Representative Swackhammer
Pouch V
Juneau, Ak. 99811
(MS 3100)

Dear Representative Swackhammer:

I would like to take the opportunity to voice my support for HB 146. Since the removal of hearsay testimony from Grand Jury hearings, the entire indictment process has become cumbersome and much more costly.

Since the Grand Jury makes no determination of guilt or innocence, hearsay is a proper expedient which does nothing to undermine the rights of the accused. If I can help you promote this bill, Please feel free to contact me.

Sincerely,

Louis A. Bencardino
Chief of Police

CITY OF UNALASKA
P.O. BOX 89 112
UNALASKA, ALASKA 99685
(907) 581-1251
"Capital of the Aleutians"

DEPARTMENT OF PUBLIC SAFETY

February 25, 1987

Representative C. Swackhammer
P. O. Box V
Mail Stop 3100
Juneau, Alaska 99811

Attn: Tom Wright

Dear Representative Swackhammer:

I would like to express support for your efforts to allow hearsay evidence in Grand Jury hearings. Given the emphasis being placed on cost reductions and increased efficiency, admittance of hearsay testimony would be a giant step in the right direction.

The present requirements of the Grand Jury give it almost trial status and have created a cumbersome and expensive step in an already burdened system. The Grand Jury, though, is not a trial. It is a hearing in which the primary purpose is to determine if a crime has been committed. To do this, all that should really be necessary is the District Attorney to explain the statutory requirements and the police officer or investigator to present the facts of the case submitted to the D.A. This would include the statement (hearsay) of the victim and those of whatever witnesses were spoken to.

Were hearsay testimony to be allowed, it would initiate a faster, more efficient process that would ease the burden on the District Attorney's office. The enhanced process would also significantly improve the system's effectiveness in rural areas if officer's testimony could be given telephonically. The combination of these features would, in addition, save the system thousands of dollars.

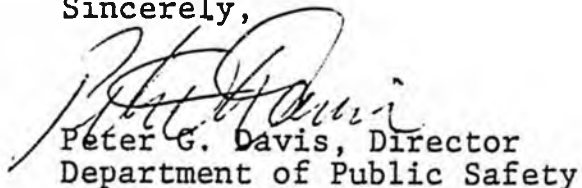
Present procedures for Grand Jury hearings followed by the District Attorney call for the victim, witnesses, officers and the D.A. to appear. As all hearings for Unalaska cases are held in Anchorage,

one case from here costs the state over $1,000 per person. Multiply that by the number of felony cases and one gets a healthy figure. Telephonic testimony by officers in rural areas could, as one can see, constitute a considerable savings.

The bill proposed by your office would go a long way toward resolving a problem of equality of justice experienced in the bush. I have enclosed a copy of an article I prepared for our local media and sent to Senator Zharoff on this problem.

Thank you for your interest. We encourage and applaud your efforts.

Sincerely,



Peter G. Davis, Director
Department of Public Safety

PGD:plb

BUSH JUSTICE

We are now entering a new year. A year that unfortunately, may be one of the more difficult that many State administrators, municipalities and citizens have had to deal with in a long, long time. As is well known, the fiscal restrictions imposed by reduced revenues have forced reductions in many essential services. Given the circumstances, such reductions can be accepted, as I'm sure capable administrators and consciencious employees will try to do more with less. What cannot be accepted is unequal receipt of these essential services due to population size or geographic location.

Even before the crunch, never, in my 24 years in law enforcement, have I seen such apparent disregard for the equal administration of justice; less concern for the victims of crime and social injustices; and apathy about the maintenance of the social fabric, than displayed by the Alaskan justice system in the remote areas. Needless to say, the system works as well as can be expected in the golden triangle and its fringes (i.e., Juneau, Anchorage and Fairbanks) but once one gets outside of easy access to the system the chances of getting a fair shake decrease in porportion to the distance.

Here in Unalaska we have a municipal Public Safety organization to enforce the laws that help maintain social stability in the community. But this is just the first step into the justice system. It is the second step that falters.

We, as a people, proudly state that we are "a nation of law, not of men. I think, though, I would be safe in saying that a victim of a crime in a remote community could dispute that. Such a victim, if one knew how the system worked, would surely amend that proud phrase to read that we are really a nation of dollars!

What I mean to say by all this is that the people of rural, bush or remote Alaskan communities and municipalities are being short-changed by a justice system that apparently puts the expense of adjudicating a criminal suspect before concern for a victim or the impact that the lack of effective prosecution has on smaller communities.

It sometimes surprises me that more citizens are not aware of this problem and that there has not been a popular movement for change. A couple of reasons may be that unless one becomes a victim of a crime, one tends to be unaware of the impact such an incident has on another - even a friend - with the possible exception of whatever police action was taken. Police action is the second reason mentioned. Many people believe that once a suspect is identified or arrested the case is over with. That, unfortunately, is when the problem I have been decrying begins.

It appears, and I believe others in remote law enforcement organizations will agree, that there are some rules-of-thumb that the District Attorney's office uses for prosecution of certain types of cases. Rules that are not generally applied in the population centers. A general rules seems to be that all but the most serious felonies should be reduced to misdeanors. Such felonies as property damage in excess of $500, thefts of property or services exceeding $500, forgeries, worthless check writing, assaults, burglaries, drug possession and even some weapons violations are quite regularly reduced or, in some cases, plea bargained away to virtually nothing. The rationale behind this is to reduce expenses to the system. In felony cases the statutes require a Grand Jury hearing. Grand Juries sit only in the population centers. Therefore, in order to prosecute a felony suspect, all parties, suspect, defendant, officers and witnesses, would have to be transported to Anchorage and return. From Unalaska that could run into several thousands of dollars. Some review of cases must be made in light of these expenses, but consideration for the dollars saved must be weighed against the long-term impact of weak prosecution on communities. If the system cannot improve on this we must look to change the requirements of the system.

Misdemeanor cases are dealt with in a manner similar to felonies. This is especially so in cases where the offense was serious enough to warra[illegible] jail time. Many small communities have either no facilities or small ones limited by space, personnel or contract, to very minimal sentences Again, efforts seem to be made to keep sentences minimal. This, to reduce the expense of having to transport longer-termed sentences to a central facility.

All this is, of course, very frustrating to those of us in law enforcement. Worse, though, is that it is a dis-service to the victims and to the community. Victims are often left wondering what justice is all about and the community remains exposed to a criminal, or potential criminal, who has just had the notion reinforced that he can do just about as he pleases. Law enforcement personnel too are given cause to wonder at the perspective and rationale of the system of which they are the first step. For, after the judges and attornies have packed up and left, they remain to try to explain to a questioning citizen why so-and-so was let go; or what happened to the guy who ripped off the money? A doubt then is placed in the minds of residents about the effectiveness of local enforcement.

When one takes the total impact on the local social structure of the victims' sense of a lack of effective justice, the reinforcement of perceived immunity by defendants, the citizens questioning of results and the frustration of enforcement personnel, one can almost hear the rending and tearing of that fabric of law which binds a community of people in any society.

I do not intend this to be an open condemnation of any individual or office. The Office of the District Attorney has so very much to do with so very little, given the enormous geographic area of responsibility. Individual attornies often put out a great deal of effort to do what they can within the framework of responsibilities, fiscal restraints and rules-of-thumb. In addition, many of the same problems faced by the District Attorney are reflected and magnified in the Public Defender's office. What I am attempting to do is to stimulate awareness of discrepancies in the system that place a greater burden on the service provider and presents an unequal and unfair distribution of justice to Alaska citizens, just because they are away from the system center.

Neither do I wish to critize without offering at least a possible, partial solution. Since the greatest stumbling block is with expenses relative to required Grand Jury hearings, why not amend the law? As mentioned, the present law requires the attorney, arresting officer, victim and witnesses be present. This is not only expensive but redundant. The purpose of a Grand Jury is to determine only that a crime has occurred. It is not a trial. The real need for all those participants is doubtful. The law could - and should - be amended to require only the District Attorney and the investigating officer to present the facts of the incident. Many, if not most, other states function well in this manner. Were the law to be so amended, it would be but a simple and logical step to allow telephonic testimony from officers in the remote communities. In this manner, many of the inequities pointed out could be overcome.

Whatever the eventual solution, something needs to be done. It may, however, take the concern and voices of many to get it started.

Peter G. Davis
Director,
Unalaska Department of Public Safety

The following is a short summary of the data I collected regarding the use of grand juries for initiating criminal charges in the United States. A detailed list of each state's approach to the use of the grand jury is attached.

One state, Connecticut, has abolished the grand jury for reviewing evidence in criminal cases.1/ Several other states use the grand jury only rarely. These states include California, Kansas, Michigan, Nebraska, Vermont, Washington, and Wisconsin. There are various reasons for this. The California Supreme Court has held that a defendant has a right to a preliminary hearing, even after an indictment, on equal protection grounds; since that decision the grand jury is rarely used except in complicated fraud cases. In Wisconsin, a preliminary hearing is also required in all cases, including those which are charged by the grand jury. Thus there is little reason for the prosecutor to convene a grand jury. In Washington, cases may proceed by indictment or information, at the discretion of the prosecution; the prosecution there finds it most expedient to avoid grand juries.

Several states' constitutions require capital cases to be submitted to the grand jury, while other felonies may be instituted by information or indictment. These states include Florida, Georgia, Louisiana, Massachusetts, North Carolina, Ohio, Rhode Island, and West Virginia. Whether the defendant has a right to an indictment in other felonies, or whether the prosecution may choose the means, varies by state.

In some states the use of a grand jury varies by city or county. In Pennsylvania a few counties still use the grand jury regularly, while the majority of cases proceed with information and preliminary hearing. In large cities in Indiana the grand jury meets regularly. In small communities a grand jury is rarely convened.

1/ Connecticut still has a one person investigative grand jury.

Many states continue to use grand juries in the great majority of cases. In New York, all felonies are submitted to the grand jury except those where there is a negotiated plea. In Texas all felonies are submitted to grand jury. In Ohio and several southern states, the majority of cases are submitted to the grand jury.

You also requested information about the use of hearsay at the grand jury in other jurisdictions. In the majority of states, hearsay may be presented to the grand jury. In 44 jurisdictions some hearsay is allowed. In many states an indictment may be based solely on hearsay.2/ In others some forms of hearsay are allowed, and these are set forth by statute or rule.3/

The authority for use of hearsay varies widely. In some jurisdictions there is statutory authorization for use of hearsay.4/ In others, court rules set forth authorization.5/ In many states hearsay use is the common practice, and often there is no way for a defendant to know whether it was used, or to raise the issue.6/ In the majority of states, case law provides authority for use of hearsay at the grand jury.7/

Alaska has some company in its rule disallowing hearsay at the grand jury. Idaho, Nevada, Oklahoma, and South Dakota have rules or statutes providing that the rules of evidence apply at the grand jury. All four of these states allow the prosecution to choose whether to proceed by indictment or information. Alaska appears to be alone in requiring a grand jury indictment unless waived by the defendant, and at the same time disallowing most hearsay.

ADC/gb-07

2/ E.g. Alabama, Illinois, Massachusetts.

3/ E.g. Minnesota, Montana, Oregon.

4/ E.g. Montana, Oregon.

5/ E.g. Minnesota, Utah, Delaware.

6/ E.g. Indiana, Missouri, West Virginia, Mississippi.

7/ E.g. Arizona, Alabama, Illinois, Maine, Massachusetts, New Jersey, Tennessee, Texas.

Arizona: Indictment or information at discretion of prosecution Crim. R. 13.1 et seq.;
Hearsay allowed. Franzi v. Superior Court, 679 P.2d 1043 (1984).

Alabama: Generally grand jury indicts; occasionally information used;
Hearsay allowed. State ex rel Baxley v. Strawbridge, 296 So.2d 779 (1974).

Arkansas: Indictment or information at discretion of prosecution; grand juries rarely convened;
Hearsay - Commonly used.

California: Preliminary hearing required in all cases; grand juries rarely used;
Hearsay allowed.

Colorado: Indictment or information at discretion of prosecution; grand juries rarely convened;
Hearsay allowed.

Connecticut: Grand jury abolished.

Delaware: Indictment or information at discretion of prosecution;
Hearsay allowed. Crim. Rules 5 & 6.

Florida: Capital cases - indictment required; other felonies - Information mainly used;
Hearsay allowed.

Georgia: Indictment required in capital cases; defendant has right to indictment in all cases, but may waive;
Hearsay: Police officer may testify to hearsay.

Hawaii: Indictment or information if defendant waives indictment;
Hearsay may be used if direct evidence unavailable or it is demonstrably inconvenient to present direct evidence.

Idaho: Indictment or information at discretion of prosecution;
Hearsay not allowed. Crim. R. 6(f).

Illinois: Indictment required for felonies unless waived by defendant;
Hearsay allowed. People v. Willie, 388 N.E. 2d 107 (1979).

Indiana: Indictment or information at discretion of prosecution; in large cities the grand jury meets regularly;
Hearsay allowed (no way to object).

Iowa: Indictment or information at prosecutor's discretion; grand jury - seldom used;
Hearsay allowed.

Kansas: Grand jury rare; probable cause established by affidavit attached to charging document;
Hearsay presumably allowed.

Kentucky: All felonies indicted unless waived by defendant: (Crim. R. 6.02)
Hearsay allowed. Crim R. 5.10.

Louisiana: Capital cases must be indicted; other felonies use indictments or information at discretion of prosecution;
Hearsay allowed. Code §442 - Indictment may not be overturned for illegal evidence.

Maine: Indictment required unless waived by defendant;
Hearsay allowed. (Rules of Evidence do not apply).

Maryland: Indictment or information at discretion of prosecution;
Hearsay allowed.

Massachusetts: Indictment required for capital cases; other felonies use indictment unless defendant waives;
Hearsay allowed. Com. v. Gibson, 333 N.E.2d 400 (1975).

Michigan: Indictment or information at discretion of prosecution; grand jury rare;
Hearsay allowed.

Minnesota: Indictment required in life imprisonment cases; other felonies at prosecutions' discretion;
Hearsay limited. Rule 18.06.

Mississippi: Indictment required unless waived by defendant;
Hearsay allowed.

Missouri: Indictment or information at discretion of prosecution - use varies widely by county;
Hearsay allowed.

Montana: Indictment or information at discretion of prosecution;
Hearsay limited. § 46-11-314.

Nebraska: Indictment or information at discretion of prosecution; grand jury rare;
Hearsay allowed.

Nevada: Indictment or information at discretion of prosecution;
Hearsay not allowed. NRS 172.135(2).

New Hampshire: Indictment required unless waived by defendant;
Hearsay allowed. State v. Blake, 305 A.2d 300 (1973).

New Jersey: Indictment required unless waived by defendant;
Hearsay allowed. State v. Price, 260 A.2d 877 (1970).

New Mexico: Indictment or information at discretion of state
Hearsay allowed. Maldonado v. State, 604 P.2d 363. (1979).

New York: All felonies indicted unless there is negotiated plea;
Hearsay limited. Crim. Pro. Code § 190.30.

No. Carolina: Indictment required in capital cases and if defendant not represented; in other felonies defendant may waive;
Hearsay allowed; Grand jury hearing is not transcribed, no DA goes to grand jury - anything goes.

No. Dakota: 99% cases by Information; prosecution may choose grand jury;
Hearsay allowed.

Ohio: Indictment required in capital cases and where defendant not represented; other felonies - defendant may waive - 80% felonies are indicted;
Hearsay allowed, and some indictments are based soley on hearsay.

Oklahoma: Indictment or information at discretion of prosecution;
Hearsay inadmissable except as allowed by general rules of evidence.

Oregon: Indictment required unless waived by defendant;
Hearsay: limited use - (1) reports of experts, (2) affidavits of witness - if good cause shown to court that witness cannot appear.

Pennsylvania: Use of grand jury depends on county; most counties use information;
Hearsay allowed.

Rhode Island: Indictment required in capital cases; life imprisonment - indictment required unless defendant, state, and court waive; other felonies at discretion of prosecution;
Hearsay allowed.

So. Carolina: Indictment required unless defendant waives and pleads guilty;
Hearsay allowed (anything goes).

So. Dakota: Indictment or information at discretion of prosecution;
Rules of Evidence apply at grand jury.

Tennessee: Indictment for felonies and misdemeanors;
Hearsay allowed. State v. Gonzales, 638 S.W.2d 841 (1982).

Texas: All felonies indicted;
Hearsay allowed. Carr v. State, 600 S.W.2d 816.

Utah: Indictment or information at prosecution's discretion; grand jury rare;
Hearsay allowed.

Vermont: Indictment or information at option of prosecution; grand jury rarely convened;
Hearsay allowed.

Virginia: Indictment required unless waived by defendant (§12-2-200);
Hearsay allowed - generally only hearsay heard by grand jury.

W. Virginia: Capital cases must be indicted; others go to grand jury unless defendant waives (and usually only for plea);
Hearsay allowed.

Washington: Indictment or information at discretion of prosecution; grand jury rare;
Hearsay allowed.

Wisconsin: Preliminary hearings required in all cases - no longer use grand jury, except in "John Doe" proceedings;
Hearsay allowed.

Wyoming: Discretion of prosecution as to indictment or information; grand jury rarely used;
Hearsay allowed.

(r) Admissibility of Evidence. Evidence which would be legally admissible at trial shall be admissible before the grand jury. In appropriate cases, however, witnesses may be presented to summarize admissible evidence if the admissible evidence will be available at trial. Hearsay evidence shall not be presented to the grand jury absent compelling justification for its introduction. If hearsay evidence is presented to the grand jury, the reasons for its use shall be stated on the record.

(s) Discharge and Excuse. A grand jury shall serve until discharged by the presiding superior court judge of the judicial district but no grand jury may serve more than 5 months, unless for good cause such period is extended. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court. At any time for cause shown the presiding judge may excuse a juror either temporarily or permanently, and in the latter event said judge may impanel another person in place of the juror excused.

(t) Delegation of Duties. Whenever a superior court is sitting other than where the presiding judge is sitting, the presiding judge may delegate his duties under this rule to another superior court judge. (Amended by Supreme Court Order 136 dated August 27, 1971; by Supreme Court Order 136A dated September 13, 1971; by Amendment No. 1 to Supreme Court Order 136 dated October 17, 1972; by Supreme Court Order 146 effective October 31, 1971; by Amendment No. 1 to Supreme Court Order 146 effective October 31, 1971; by Supreme Court Order 157 effective February 15, 1973; by Supreme Court Order 216 effective October 1, 1975; by Supreme Court Order 261 effective December 30, 1976; by Supreme Court Order 539 effective October 1, 1982; by Supreme Court Order 706 effective May 21, 1986; and by Supreme Court Order 711 effective September 15, 1986)

(c) CROSS REFERENCE: Crim. Form 12
(d) CROSS REFERENCES: Crim. Forms 11, 12
(h) CROSS REFERENCES: AS 12.40.030; AS 12.40.040; AS 12.40.050; AS 12.40.060
(i) CROSS REFERENCE: AS 12.40.070
(l) CROSS REFERENCE: AS 12.40.090
(o) CROSS REFERENCE: Crim. Form 13

(n) Similar to Fed. R. Crim. P. 6(f)

1 Wright, Federal Practice and Procedure § 110 (1969)

42 C.J.S. Indictments and Informations §§ 24, 28 (1944)

41 Am. Jur. 2d Indictments and Informations §§ 21–22 (1968)

(q) and (r) 42 C.J.S. Indictments and Informations § 209 (1944)

41 Am. Jur. 2d Indictments and Informations §§ 232–241 (1968)

(s) Similar to Fed. R. Crim. P. 6(g)

1 Wright, Federal Practice and Procedure § 112 (1969)

38 C.J.S. Grand Juries §§ 31–32 (1943)

38 Am. Jur. 2d Grand Jury § 10 (1968)

Cases

I. Grand Jury Proceedings
- A. In General
- B. Selecting and Convening Grand Jury
- C. Sufficiency of Evidence
- D. Hearsay Testimony
- E. Record of Proceedings

I. Grand Jury Proceedings

A. In General

Indictment was not subject to dismissal where record showed that after deducting the one juror not qualified to serve as grand juror, a majority of the grand jurors had concurred in finding the indictment. Crawford v. State, Op. No. 312, 408 P2d 1002 (Alaska 1965).

An indictment is not defective where a grand jury foreman serves for a few months, is temporarily excused, and then resumes service a few months later. Miller v. State, Op. No. 589, 462 P2d 421 (Alaska 1969).

District attorney's statements to grand jury did not constitute an improper attempt to influence grand jury. Coleman v. State, Op. No. 1288, 553 P2d 40 (Alaska 1976).

This rule does not prohibit admission before grand jury of evidence of defendant's silence after arrest. Coleman v. State, Op. No. 1288, 553 P2d 40 (Alaska 1976).

Indictment need not state every element of crime since records of grand jury proceedings are available to defendant. Peterson v. State, Op. No. 1411, 562 P2d 1350 (Alaska 1977).

Grand jury's determination that it would not hear defendant did not invalidate the indictment. Webb v. State, Op. No. 1638, 580 P2d 295 (Alaska 1978).

This rule imposes on the prosecutor a duty to disclose exculpatory evidence to the grand jury. Frink v. State, Op. No. 1870, 597 P2d 154 (Alaska 1979).

A peace officer testifying before a grand jury may present autopsy report of doctor and ballistics report of lab technician, and may answer questions about such reports, but the officer may not offer far-ranging opinions about how she thinks an expert would answer hypothetical questions. Frink v. State, Op. No. 1870, 597 P2d 154 (Alaska 1979).

A peace officer may not testify before a grand jury concerning the contents of an autopsy or lab report unless the reports are presented to the grand jury. Frink v. State, Op. No. 1870, 597 P2d 754 (Alaska 1979).

Prosecutor did not breach the duty imposed by this rule by not informing

Where a hearsay admission of the defendant's companion in crime is properly admitted before a grand jury, and the statement is corroborated by other evidence, the evidence is sufficient to support an indictment. Galauska v. State, Op. No. 1094, 527 P2d 459 (Alaska 1974).

The mere expense of transportation of out of state witnesses is not a compelling reason for the use of hearsay under this rule. State v. Gieffels, Op. No. 1309, 554 P2d 460 (Alaska 1976).

Where hearsay testimony before grand jury was either peripheral or cumulative to direct testimony, it did not invalidate the indictment. Webb v. State, Op. No. 1638, 580 P2d 295 (Alaska 1978).

Neither the cost of compensating an expert witness for his time nor the mere expense of transportation are sufficient reasons for the admission of hearsay evidence in a grand jury proceeding. Metler v. State, Op. No. 1678, 581 P2d 669 (Alaska).

Admission made by a defendant is admissible against him but not against co-defendant and should not be presented to grand jury as such, absent compelling justification. State v. Taylor, Op. No. 1457, 566 P2d 1016 (Alaska 1977).

The use of inadmissible hearsay evidence before a grand jury will not vitiate the indictment if other evidence was presented which justified the indictment. Gieffels v. State, Op. No. 1787, 590 P2d 55 (Alaska 1979); Giacomazzi v. State, Op. No. 2404, 633 P2d 218 (Alaska 1981).

Where there was sufficient admissible evidence presented to grand jury to justify a conviction if uncontradicted or unexplained, the admission of hearsay was not critical to the return of a true bill. Frink v. State, Op. No. 1870, 597 P2d 154 (Alaska 1979).

When hearsay evidence has been presented to a grand jury, character evidence concerning the hearsay declarant's credibility is permissible to the same extent to which it would be permissible at trial had the declarant's character been challenged. Putnam v. State, Op. No. 2251, 629 P2d 35 (Alaska 1981).

When testimony is offered merely to establish the fact that a statement was made and not to prove the truth of the matter stated, the hearsay rule does not apply. Putnam v. State, Op. No. 2251, 629 P2d 35 (Alaska 1980).

Mere fact that declarant was participating in a residential drug treatment program did not establish the compelling need necessary to admit his declaration as hearsay testimony before the grand jury. Lofquist v. State, Op. No. 203, 656 P2d 1222 (Alaska App. 1983).

Prosecutor did not err in not allowing police officer to respond to grand juror's question concerning the whereabouts of another possible suspect at the time of the incident in question on the basis that the response would be hearsay. Wilkie v. State, Op. No. 599, 715 P2d 1199 (Alaska App. 1986).

Failure to state on the record the reason for using hearsay evidence in the form of a written laboratory analysis rather than live testimony was not error. Gibson v. State, Op. No. 621, 719 P2d 687 (Alaska App. 1986).

Hearsay evidence in the form of a written laboratory analysis was admissible at grand jury proceeding. Gibson v. State, Op. No. 621, 719 P2d 687 (Alaska App. 1986).

Testimony of statements made by alleged child abuse victim was hearsay

Grand jury reform

By G. Kent Edwards

THE ALASKA LEGISLATURE is finally recognizing some of the benefits to be gained by allowing hearsay testimony to be considered by Alaskan grand juries. This realization is long overdue.

Hearsay is a statement as to what a witness has heard others say. It is a second-hand report given under oath, such as a police officer testifying about what the victim told the officer. Current state practice requires the victim to personally appear and testify before the grand jury.

It has taken the trauma of child molestation cases to underscore the problem with current practice. The emotional trauma suffered by youthful victims is something that most people can understand and sympathize with. The public generally sees little value in requiring young victims to recount to strangers on so many occasions their traumatic experience. Usually the victims must not only tell their parents, but also the investigating officers, then the prosecutor, next the grand jury and finally the jury itself at the trial. It is little wonder that parents are reluctant to let their children be subjected to such a never ending ordeal.

ACTUALLY, the same trauma and inconvenience is experienced by virtually all criminal victims, not just children. None of the victims or witnesses should be put to any greater inconvenience than necessary.

Grand jury proceedings are not the same as a trial and should not be subject to the same rules. To treat it as a mini-trial and restrict hearsay evidence makes the judicial system unnecessarily expensive and burdensome.

It has been pointed out by the state's chief prosecutor, Dan Hickey, that Alaska "has the most restrictive rules surrounding presentation of evidence to grand juries of any state in the nation."

Hickey has correctly described the Alaska procedure as "being excessive and incredibly expensive." As Hickey points out, under current practice of prohibiting hearsay "it would cost $7,000 just to bring witnesses from Unalaska to Anchorage to testify in a $2,500 burglary case."

Unfortunately, the legislature currently seems prone to restrict the situations in which such hearsay testimony can be used at the grand jury. Thus, it is now arguing over the age at which victims should be excused from personally testifying before the grand jury.

Instead of arguing over age, the legislature should be asking itself why Alaska is preventing hearsay testimony before the grand jury at all.

FEDERAL COURTS in Alaska have always allowed hearsay before the grand jury. Historically, this has also been the practice in the courts of all other states. The investigative officer testifies under oath what he was told by the victim and then answers all questions which those present may have about the witness and the events. If they so desire, members of the grand jury can call additional witnesses, including the victims. They retain that power.

Under the federal system, grand jury proceedings are geared to their real purpose; a cross-check of representatives of the public to determine whether sufficient evidence has been found from an investigation to warrant requiring the suspects of criminal activity to be placed on public trial for a crime.

Allowing a grand jury to indict on hearsay does not weaken a defendant's right to confront and cross examine his accusers at trial. It merely streamlines the investigative process, making it more efficient from both a time and monetary standpoint. It also makes the process less burdensome to victims and innocent bystanders.

Rather than limiting the situations in which hearsay can be used, Alaska's legislature should join the majority of other states and allow hearsay testimony before the grand jury in all criminal cases.

G. Kent Edwards was attorney general for the State of Alaska from 1968 to 1970. From 1971 to 1977 he was U.S. attorney for Alaska. Edwards is now in private practice.

Alaska Association Chiefs of Police

625 C Street • Anchorage, Alaska 99501

March 29, 1985

Representative Alyce A. Hanley
Pouch V
Interdepartmental Mail Stop 3100
Juneau, Alaska 99811

Dear Representative Hanley,

Our Association conducted its Annual Meeting on March 22, 1985 in Anchorage.

Extensive consideration was given by the group to pending legislation. Of the many Bills submitted this session we identified six (6) that we consider to be priority legislation and worthy of our Associations support.

The legislation we support is listed below along with a summation of our reasons for supporting the Bill.

(1) HB 178 Conspiracy

This legislation, if enacted, would enable law enforcement to initiate prosecution against persons planning to commit felony crimes. The ability to take action prior to the actual commission of the crime could well serve to protect property and save lives.

(2) HB 179 Hearsay

Currently some Bush felony cases are not prosecuted due to the prohibitive costs of gathering all of the required witnesses and the members of the Grand Jury together. Even in urban areas court time expenses for police witnesses appearing off duty can be substantial. In a time of rising costs and falling revenues this is an important consideration. Another concern obviously is the orderly administration of justice and the potential effect on the rights of those persons indicted.

We do not feel the right of the suspects would be abridged in any way by this legislation. Additionally, this procedure would increase the efficiency and have a positive effect on the cost of the justice system.

MEMORANDUM

State of Alaska

TO: Herbert D. Soll, Director
Criminal Prosecution

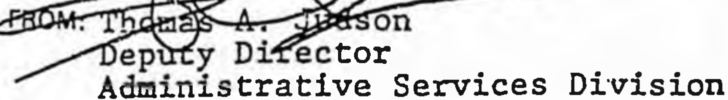
DATE: June 18, 1986

FILE NO.:

THRU:

TELEPHONE NO.: 465-3672

SUBJECT: Criminal Case Costs



FROM: Thomas A. Judson
Deputy Director
Administrative Services Division

In past years we have periodically provided the Criminal Division with information concerning costs related to criminal prosecution sorted by type and by component. Below is the latest information for FY 86 (which is a projection based on three-quarters of the year), FY 85 and FY 84.

	FY 84	FY 85	FY 86 Estimate
Witness Travel:	328,407	431,046	363,065
Witness Per Diem:	98,847	122,520	124,996
Witness Fees:	37,640	49,828	52,389
Depositions:	25,594	20,752	29,757
Expert Witness:	69,063	158,699	63,384
Medical Service:	13,504	14,557	12,301
Professional Services:	52,577	55,931	327,638
Year Total	625,632	853,333	973,530

Following figures represent the same total above distributed by component with percentage change between FY 85 and projected FY 86.

	FY 84	FY 85	Estimated FY 86	% Change
1st Judicial	95,365	188,698	155,696	[17.4]-
2nd Judicial	87,007	102,692	90,564	[11.8]-
3rd Judicial	306,282	343,911	514,477	49.5 +
4th Judicial	76,423	86,773	48,659	[43.9]-

pots. When the officers of the Fish and Game Department approached the pots on July 31 to conduct the search, Nathanson was not present, attending to his crab pots. There being no "person in control of the property or object to be searched," the officers were unable to give him the required notice. We think that it would frustrate the governmental purpose behind the regulation to require the officers to hold in abeyance the search in order to discern the whereabouts of the fisherman in control or to arrange with him in advance for a convenient time to conduct the search. To do so would not promote effective enforcement of the regulation that the doors of the crab pots be secured, fully open and bait and containers removed when the pots are stored in the water 72 hours in advance of the opening of the season.[14]

We find, then, that the failure to notify Nathanson was not a violation of statute under the facts of this case.[15]

The decision is affirmed.

STATE of Alaska, Appellant,

v.

Timothy Leroy GIEFFELS, Appellee.

No. 2846.

Supreme Court of Alaska.

Aug. 27, 1976.

After the Supreme Court, 552 P.2d 661, dismissed in part defendant's appeal from trial court's preliminary orders on ground of mootness, defendant, who was charged with first-degree murder and armed robbery, moved to dismiss indictment. The Superior Court, Third Judicial District, Anchorage, S. J. Buckalew, J., granted defendant's motion and State appealed. The Supreme Court, Erwin, J., held that mere expense of transportation for eight witnesses who were out of State when grand jury met did not make it necessary for police officer to testify before grand jury on behalf of absent witnesses and present evidence most damaging to defendant by means of hearsay.

Affirmed.

Boochever, C. J., concurred and filed opinion.

1. Criminal Law ⇐1024(2)

Supreme Court had jurisdiction over State's appeal from trial court's dismissal of indictment charging defendant with first-degree murder and armed robbery, in view of fact that defendant questioned legal sufficiency of evidentiary basis for the indictment. AS 22.05.010(a)

2. Grand Jury ⇐36

For purposes of interpreting criminal rule providing that hearsay evidence shall not be presented to grand jury "absent compelling justification for its introduction," word "compelling" may be equated with necessity. Rules of Criminal Procedure, rule 6(r).

See publication Words and Phrases for other judicial constructions and definitions.

14. *Cf. United States v. Biswell*, 406 U.S. 311, 316, 92 S.Ct. 1593, 1596, 32 L.Ed.2d 87, 92 (1972), involving a warrantless search in a federally regulated industry, where the court stated,

> . . . if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential.

The considerations leading us to conclude that no notice was required under the circumstances would not apply to the search of a vessel, building or other effects in which the owner would have a reasonable expectation of privacy.

15. We do not reach the question as to the appellant having impliedly consented to the search by accepting a license to operate crab gear in the registration area. See *People v. White*, 259 Cal.App.2d Supp. 936, 65 Cal. Rptr. 923 (1968).

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limitations discussed previously); the right to confront and cross-examine witnesses; and the right to have the entire hearing recorded for purposes of administrative appeal and potential further appeal to the superior court. McGinnis v. Stevens, Sup. Ct. Op. No. 1207 (File Nos. 2255, 2312), 543 P.2d 1221 (1975); McGinnis v. Stevens, Sup. Ct. Op. No. 1517 (File No. 3094), 570 P.2d 735 (1977).

The Alaska Constitution affords an inmate of Alaska's penal system no greater protection than the United States Constitution in the following respects: a disciplinary proceeding is not a criminal proceeding, thus the inmate has no automatic right of appeal to the courts of Alaska; the standard of proof, in disciplinary hearings, of violation of prison rules is not "beyond a reasonable doubt"; and, while the inmate is entitled to a fair and impartial hearing, it is not constitutionally impermissible for the hearing to be conducted by employees of the prison system. McGinnis v. Stevens, Sup. Ct. Op. No. 1207 (File Nos. 2255, 2312), 543 P.2d 1221 (1975); McGinnis v. Stevens, Sup. Ct. Op. No. 1517 (File No. 3094), 570 P.2d 735 (1977).

Prisoners who are subjected to minor disciplinary action by prison authorities are entitled to no more due process than a right to be heard by fair and impartial officials of the prison system whose disposition of the matter, coupled with the reasons for the decision, is made part of a complete record. McGinnis v. Stevens, Sup. Ct. Op. No. 1517 (File No. 3094), 570 P.2d 735 (1977).

There are limitations on the right of Alaska prisoners to call witnesses and to produce documentary evidence in their favor, and the right to confront and cross-examine witnesses. McGinnis v. Stevens, Sup. Ct. Op. No. 1517 (File No. 3094), 570 P.2d 735 (1977).

Disciplinary proceedings which threaten major deprivations of a prisoner's limited liberty and those which do not distinguished. — See McGinnis v. Stevens, Sup. Ct. Op. No. 1207 (File Nos. 2255, 2312), 543 P.2d 1221 (1975); McGinnis v. Stevens, Sup. Ct. Op. No. 1517 (File No. 3094), 570 P.2d 735 (1977).

The administrative appeals provided by the division of corrections regulations are not constitutionally defective. McGinnis v. Stevens, Sup. Ct. Op. No. 1207 (File Nos. 2255, 2312), 543 P.2d 1221 (1975); McGinnis v. Stevens, Sup. Ct. Op. No. 1517 (File No. 3094), 570 P.2d 735 (1977).

The test of a prisoner's right to receive treatment for health problems outlined in Bowring v. Godwin, 551 F.2d 44 (4th Cir. 1977), is an appropriate one and its criteria have been adopted in determining questions as to the right of a prisoner to receive psychological or psychiatric care under the provisions of AS 33.30.020 and 33.30.050. Rust v. State, Sup. Ct. Op. No. 1668 (File No. 3172), 582 P.2d 134 (1978).

Pursuant to the provisions of AS 33.30.020 and 33.30.050 a prisoner in the custody of the division of corrections has the right to receive psychological or psychiatric treatment if a physician or other health care provider, exercising ordinary skill and care at the time of observation, concludes with reasonable medical certainty that the prisoner's symptoms evidence a serious disease or injury, that such disease or injury is curable or may be substantially alleviated and that the potential for harm to the prisoner by reason of delay or denial of care could be substantial. Rust v. State, Sup. Ct. Op. No. 1668 (File No. 3172), 582 P.2d 134 (1978).

Section 8. Grand Jury. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the armed forces in time of war or public danger. Indictment may be waived by the accused. In that case the prosecution shall be by information. The grand jury shall consist of at least twelve citizens, a majority of whom concurring may return an indictment. The power of grand juries to investigate and make recommendations concerning the public welfare or safety shall never be suspended.

Cross reference. — See AS 12.40.050 and note thereto.

Language is identical with federal constitution. — The language of this section relating to the grand jury is identical with a like provision in the 5th amendment to the federal constitution. State v. Shelton, Sup. Ct. Op. No. 56 (File No. 591), 368 P.2d 817 (1962).

A vital function of the grand jury is the protection of the innocent against oppression and unjust prosecution. State v. Shelton, Sup. Ct. Op. No. 56 (File No. 591), 368 P.2d 817 (1962).

The purpose served by grand jury indictment is to give one accused of a serious offense the benefit of having private citizens judge whether there is probable cause to hold the accused for trial. Theoretically this acts as a check upon the district attorney's power to initiate criminal prosecutions, and insures the protection of the innocent against oppression and unjust prosecution. John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

The purpose served by grand jury indictment is to give one accused of a serious offense the benefit of having private citizens judge whether there is probable cause to hold the accused for trial. The grand jury protects the innocent from unjust prosecution by acting as a check on the prosecutor. Adams v. State, Sup. Ct. Op. No. 1864 (File No. 3067), 598 P.2d 503 (1979).

Children need not be indicted by grand jury. — Children who are charged with acts which would be chargeable only by grand jury indictment if committed by an adult, need not be indicted by a grand jury. John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

The right to grand jury indictment is not so fundamental that due process is offended by alternate methods for instituting children's proceedings where the child is charged with having violated a criminal statute. John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

Grand jury proceedings cannot be turned into a mini-trial. The grand jury is an accusatorial body operating without a judicial officer to pass on the admissibility of evidence, and as such is charged with a determination of the probability of guilt. Coleman v. State, Sup. Ct. Op. No. 1288 (File No. 2331), 553 P.2d 40 (1976).

Right to indictment by grand jury free of prosecutor-instigated prejudice. — Although no provision of the United States or Alaska constitutions specifically guarantees the right of an accused to be indicted by a grand jury free of prosecutor-instigated prejudice, a strong historical basis exists for holding that the grand jury should operate to control abuses by the government and protect the interests of the accused. Coleman v. State, Sup. Ct. Op. No. 1288 (File No. 2331), 553 P.2d 40 (1976).

Actions of prosecuting attorney did not improperly influence grand jury. — See Coleman v. State, Sup. Ct. Op. No. 1288 (File No. 2331), 553 P.2d 40 (1976).

A trial cannot validate an otherwise invalid indictment. Adams v. State, Sup. Ct. Op. No. 1864 (File No. 3067), 598 P.2d 503 (1979).

Although the state presented sufficient evidence at trial to sustain a conviction of mayhem, because the trial followed an invalid indictment, the supreme court reversed the conviction. Adams v. State, Sup. Ct. Op. No. 1864 (File No. 3067), 598 P.2d 503 (1979).

Failure of the prosecutor to present to the grand jury a witness's description of the occupant of a car he had observed on the morning of the murder did not violate the duty imposed by Cr. R. 6(q) to disclose exculpatory evidence to the grand jury and, therefore, would not have violated any constitutionally imposed duty of disclosure. Frink v. State, Sup. Ct. Op. No. 1870 (File No. 3100), 597 P.2d 154 (1979).

Nonreversible error. — Where an unintentional misstatement before the grand jury goes to a nonmaterial fact that would not substantially affect the grand jury's conclusion, it would not be reversible error. Keith v. State, Sup. Ct. Op. No. 2099 (File No. 4003), 612 P.2d 977 (1980).

Section 9. Jeopardy and Self-Incrimination. No person shall be put in jeopardy twice for the same offense. No person shall be compelled in any criminal proceeding to be a witness against himself.

I. General Consideration.
II. Jeopardy.
III. Self-Incrimination.

defendant was afforded the right to counsel in the prior case; an uncounseled conviction is simply too unreliable to be depended on for purposes of imposing a sentence of incarceration, whether that sentence is imposed directly or collaterally. Pananen v. State, Ct. App. Op. No. 551 (File Nos. A-943, A-948), 711 P.2d 528 (1985).

Twenty-year minimum sentence for first-degree murder does not constitute cruel and unusual punishment in violation of § 12, art. I, of the state constitution, and U.S. Const., amend. 8, nor does it deprive her of substantive due process and the equal protection of the laws in violation of U.S. Const., amend. 14 and of the comparable provisions in the Alaska Constitution. Martin v. State, Ct. App. Op. No. 261 (File No. 6665), 664 P.2d 612 (1983), cert. denied, 465 U.S. 1007, 104 S. Ct. 1001, 79 L. Ed. 2d 234 (1984).

Sentence held constitutional. — Where the trial court originally enhanced defendant's sentence based on an aggravating factor which was held on appeal not to apply; on remand the trial court referred the case to the three-judge panel which then imposed a sentence which was less than defendant's original sentence; and the three-judge panel's sentence was based upon basically the same factors which the trial court had used to enhance defendant's original sentence, although the sentence was greater than the presumptive term applicable to his offense, defendant's sentence did not violate the prohibition against double jeopardy, did not violate his due process rights, and was not a product of prosecutorial or judicial vindictiveness. Kuvaas v. State, Ct. App. Op. No. 615 (File No. A-1244), 717 P.2d 855 (1986).

Denial of motion for new trial upheld. — The trial court was within its discretion denying defendant's motion for a new trial based on newly discovered evidence where new testimony would not produce an acquittal at a new trial, in part, because of the witness' observable lack of credibility while testifying. Stiegele v. State, Ct. App. Op. No. 580 (File No. A-694), 714 P.2d 356 (1986).

Right to counsel in post-conviction proceeding. — See notes to Alaska Const. art. I, § 11, analysis line VII, under this catchline.

As well as revocation of probation. There is no difference between parole and probation revocations as regards due process requirements. Avery v. State, Sup. Ct. Op. No. 2175 (File No. 4440), 616 P.2d 872 (1980).

Right to impartial fact finder in parole revocation proceedings. — Due process includes the right to an impartial fact finder in parole revocation proceedings. Newell v. State, Sup. Ct. Op. No. 2241 (File No. 4453), 620 P.2d 650 (1980).

When a person sitting in on deliberations in a parole revocation hearing was the person who initially recommended revocation and whose reports and testimony form the bulk of the evidence supporting revocation, such a person was part of the prosecution, and their presence violated the parolee's due process rights to an impartial fact finder. Newell v. State, Sup. Ct. Op. No. 2241 (File No. 4453), 620 P.2d 650 (1980).

Standard applied in parole revocation hearing. — It was not error for a parole board to apply the preponderance of the evidence standard in a parole revocation hearing. Avery v. State, Sup. Ct. Op. No. 2175 (File No. 4440), 616 P.2d 872 (1980).

Section 8. Grand Jury.

NOTES TO DECISIONS

Review of misdemeanor charges. — The constitution does not require grand jury review of misdemeanor charges, no matter how many are joined together. Sluse v. State, Ct. App. Op. No. 582 (File No. A-885), 714 P.2d 368 (1986).

Right to indictment by grand jury, etc.

When presenting a case to a grand jury the prosecutor should not make statements or arguments which would influence the grand jury in a manner would be impermissible at trial. Putnam v. State, Sup. Ct. Op. No. 2251 (File No. 3475), 629 P.2d 35 (1980).

But prosecutor not generally answerable for utterances of witnesses. — Absent some evidence that the prosecutor knew or should have known that the response to his question would contain improper evidence, he is not held answerable for the utterances of the witness. This

does not mean to imply that a prosecutor need not be concerned with the answers which his questions might elicit. He remains under a duty to present to the grand jury only that evidence which he believes would be admissible at trial. Putnam v. State, Sup. Ct. Op. No. 2251 (File No. 3475), 629 P.2d 35 (1980).

Hearsay evidence. — In order to support a grand jury indictment, the hearsay evidence must present a sufficiently detailed account of the defendant's activity and the hearsay declarant must be sufficiently reliable. Putnam v. State, Sup. Ct. Op. No. 2251 (File No. 3475), 629 P.2d 35 (1980).

To overturn an indictment because of grand jury prejudice, a defendant should make a factual showing of prejudice. Hohman v. State, Ct. App. Op. No. 290 (File No. 6779), 669 P.2d 1316 (1983).

Applied in Morgan v. State, Ct. App. Op. No. 320 (File No. 6991), 673 P.2d 897 (1983).

Quoted in Triangle, Inc. v. State, Sup. Ct. Op. No. 2405 (File No. 4811), 632 P.2d 965 (1981); Gaona v. State, Ct. App. Op. No. 31 (File No. 4752), 630 P.2d 534 (1981).

Cited in Dyer v. State, Ct. App. Op. No. 268 (File No. 6133), 666 P.2d 438 (1983).

Section 9. Jeopardy and Self-Incrimination.

NOTES TO DECISIONS

I. GENERAL CONSIDERATION.

Applied in [illegible] v. State, Ct. App. Op. No. [illegible] (File No. [illegible]), 647 P.2d 1113 (1982); [illegible] v. State, Ct. App. Op. No. 322 (File No. [illegible]), 674 P.2d 825 (1983).

Quoted in [illegible] v. State, Sup. Ct. Op. No. [illegible] (File No. [illegible]), 617 P.2d 759 (19[illegible]).

Cited in [illegible] v. State, Ct. App. Op. No. 161 (File No. 6203), 653 P.2d 661 (1982); Kott v. State, Sup. Ct. Op. No. 2774 (File No. 5570), 678 P.2d 386 (1984).

II. JEOPARDY.

Protection afforded. — The double jeopardy clause protects against a second prosecution for the same offense after acquittal; it protects against a second prosecution for the same offense after conviction; and, it protects against multiple punishments for the same offense. Calder v. State, Sup. Ct. Op. No. 2224 (File No. 4293), 619 P.2d 1026 (1980).

Prosecution for perjury. — A prosecutorial grant of immunity will not protect a witness from a prosecution for perjury if the witness testifies falsely. DeMan v. State, Ct. App. Op. No. 336 (File No. 7381), 677 P.2d 903 (1984).

The constitutional protection against double jeopardy encompasses the collateral estoppel doctrine; however, under the test and facts of this case, there were different episodes of perjury, and the second indictment following the post-trial dismissal of the original indictment was not precluded. DeMan v. State, Ct. App. Op. No. 336 (File No. 7381), 677 P.2d 903 (1984).

The double jeopardy clause does not preclude retrial after an order of dismissal if the order was erroneous. State v. Kott, Ct. App. Op. No. 58 (File No. 5570), 636 P.2d 622 (1981), aff'd, Sup. Ct. Op. No. 2774 (File No. 5570), 678 P.2d 386 (1984).

Retrial after mistrial on principal offense. — The double jeopardy clauses of the United States and Alaska Constitutions did not preclude retrial of a defendant for a principal offense when the jury, deadlocked on the principal offense, was permitted to convict on a lesser-included offense. Hughes v. State, Ct. App. Op. No. 283 (File No. 5217), 668 P.2d 842 (1983).

A jury's inability to agree on a greater offense constitutes "manifest necessity" permitting discharge of the jury despite a potential ability to agree on one or more lesser-included offenses. Staael v. State, Ct. App. Op. No. 454 (File No. A 78), 697 P.2d 1050 (1985).

A judgment in a criminal case favorable to one defendant should not bar prosecution of a codefendant in a subsequent proceeding. State v. Kott, Ct. App. Op. No. 58 (File No. 5570), 636 P.2d 622 (1981), aff'd, Sup. Ct. Op. No. 2774 (File No. 5570), 678 P.2d 386 (1984).

Appeal from acquittal. — Both the state and federal constitutional prohibitions against placing a defendant twice in jeopardy insulate him from an appeal from a judgment of acquittal however erroneous the trial judge's view of the facts or the law. State v. Kott, Ct. App. Op. No. 58 (File No. 5570), 636 P.2d 622 (1981), aff'd, Sup. Ct. Op. No. 2774 (File No. 5570), 678 P.2d 386 (1984).