HB

445

STATE OF ALASKA
THE LEGISLATURE

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

LEGISLATIVE AFFAIRS AGENCY

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May, 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

House Judiciary

2-18-88

HOUSE COMMITTEE REPORT

(7)

Date referred: 2/10/88

FURTHER REFERRALS:

DATE: 2-18-88

The Judiciary Committee has considered HB 445

"An Act relating to the applicability of ch. 77, SLA 1987, relating to mandatory and discretionary parole and residual probation; and providing for an effective date."

RECOMMENDS:

[✓] replace with CS HB 445 (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:

[signature]

[signature]

Chairman's signature

Original sponsors: Swackhammer, Gruenberg
and Rieger

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 445 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the applicability of ch. 77, SLA 1987, relating to mandatory and discretionary parole and residual probation; and providing for an effective date."

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

* Section 1. The provisions of AS 33.16.010(a), 33.16.010(c), 33.16.-210, 33.16.900(7), 33.16.900(8); AS 33.20.040(a), and 33.20.040(c), as amended by ch. 77, SLA 1987, apply to prisoners incarcerated on or after September 13, 1987, irrespective of the law in effect at the time the prisoner committed the criminal offense for which the prisoner was incarcerated.

* Sec. 2. This Act is retroactive to September 13, 1987.

* Sec. 3. This Act takes effect immediately under AS 01.10.070(c).

5-1842Aa ✓
Chenoweth

Adopted
H. Jud
2-18-88

AMENDMENT

Offered in the HOUSE By Swackhammer

TO: HB 445

Page 1, lines 11 and 12:

Delete "33.16.100(d),"

2/18/88

THE DELETED SECTION (33.16.100(d)) WOULD INCREASE THE TIME OF PAROLE ELIGIBILITY FOR CERTAIN OFFENDERS.

This is impermissible under the constitutional prohibition against *ex post facto* laws, because the increased scope of prohibited conduct is broadened or the penalty is increased.

U.S. CONSTITUTION, ART 1, SEC. 10

STATE OF ALASKA

DEPARTMENT OF CORRECTIONS

BOARD OF PAROLE

STEVE COWPER, GOVERNOR

ALASKA BOARD OF PAROLE
P.O. BOX T
JUNEAU, ALASKA 99811-2000
PHONE: (907) 465-3384

February 18, 1988

Honorable C. E. Swackhammer
Representative
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

RE: H.B. 445

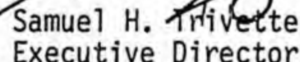
Dear Representative Swackhammer:

The Parole Board supports House Bill 445 for the reasons stated in my recent letter of February 8, 1988 to you. After reviewing the bill this morning, I would recommend one minor change.

I would recommend "33.16.100(d)" be removed from lines 11 and 12 of the bill. AS 33.16.100(d) is the section that deals with parole eligibility on Class A felony and the Unclassified sexual assault crimes. The Parole Board bill in 1985 inadvertently lowered parole eligibility down from one-third of the sentence to one-fourth of the sentence. H.B. 140 last year moved the eligibility back to one-third. Testimony from Corrections and the Parole Board is the actual impact of this amendment would be minimal. Applying this section retroactively would be in violation of the ex post facto provisions of the United States Constitution. Please refer to page 4 of the December 8, 1987 Attorney General's Opinion to me contained in your packet on H.B. 445. I will be most happy to explain this issue if necessary.

Except for this minor technical amendment, we fully endorse this bill and believe it will have an immediate impact on the workload of the Board and parole officers. Thanks for the opportunity to comment on this legislation.

Cordially,



Samuel H. Trivette
Executive Director

cc: Susan Humphrey-Barnett, Commissioner
Department of Corrections

Bill Parker, Special Assistant
Department of Corrections

20-08LH

REPRESENTATIVE
C.E. "SWACK" SWACKHAMMER

Alaska State Legislature

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JUNEAU

BOX V
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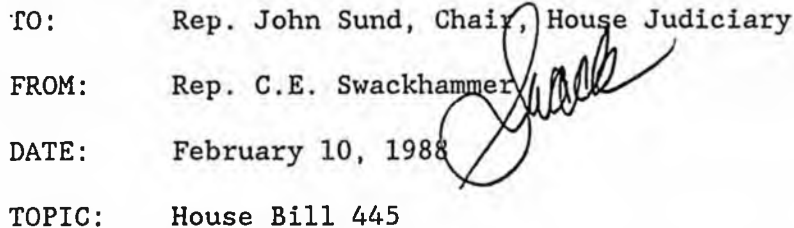
(907) 465-2689

House of Representatives

MEMORANDUM



TO: Rep. John Sund, Chair, House Judiciary

FROM: Rep. C.E. Swackhammer

DATE: February 10, 1988

TOPIC: House Bill 445

The aforementioned House Bill changes the effective date of HB 140 which passed last session to immediate applicability. Each day's delay negatively impacts the quality of supervision of those offenders with serious crime convictions.

House Bill 445 was referred to House Judiciary; your early scheduling would be greatly appreciated. Cover information is forthcoming.

Thanks.

STATE OF ALASKA

DEPARTMENT OF CORRECTIONS

BOARD OF PAROLE

STEVE COWPER, GOVERNOR

ALASKA BOARD OF PAROLE
P.O. BOX T
JUNEAU, ALASKA 99811-2000
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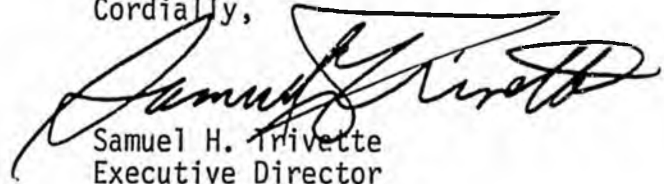

Samuel H. Trivette
Executive Director

cc: Susan Humphrey-Barnett, Commissioner
Department of Corrections

Bill Parker, Special Assistant
Department of Corrections

20-08LH

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U.S. CONSTITUTION, ART 1, SEC. 10

HOUSE BILL 445

COVER PACKET INDEX

Introduction Memorandum, Rep. C.E. Swackhammer

Support Letter, Sam Trivette, Exec. Dir. Parole Board

AG Opinion Re: House Bill 140

Leg. Legal Opinion Re: House Bill 445

REPRESENTATIVE
C.E. "SWACK" SWACKHAMMER

Alaska State Legislature

House of Representatives

SOLDOTNA

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(907) 262-7663

JUNEAU

BOX V
JUNEAU, ALASKA 99811
(907) 465-2689

MEMORANDUM

TO: All Interested Parties

FROM: Rep. C.E. Swackhammer Swack

DATE: February 10, 1988

TOPIC: House Bill 445

During the first session of the 15th Legislature, House Bill 140 passed both houses with virtually no opposition. This piece of legislation had an immediate and positive impact.

The bill changed the serving of mandatory parole from 181 day sentences to a minimum sentence of two years. It was demonstrated that this would basically impact those offenders who were guilty of misdemeanors or non-presumptive sentence felony offenses. Offenders routinely receive probation to follow their convictions.

The Alaska Board of Parole conducts approximately 1400 formal hearings a year, utilizing three professional staff and a clerk typist. In 1987, there were 135 final mandatory parole violation hearings. With only isolated exceptions, these violations could have been processed through probation. Parolees and probationers are seen by the same Probation Officers.

As stated in Sam Trivette's letter (attached), the legislation was enacted the effective date of the bill. Mr. Trivette states the positive impact was immediate, he attributes the majority of a 181 case reduction to this enactment. Approximately three months later, a Dept. of Law opinion indicated that the new legislation applied solely to those persons committing a crime after the effective date of the bill. The positive effects "ground to a halt." Consequently, they are also postponed for an extended period of time.

House Bill 445 merely establishes intent language that the effective date of House Bill 140 is immediate.

I solicit your support. The implied intent of House Bill 140 was to have it immediately effective. This bill, as in the case of HB 140, has a zero fiscal note. It simply allows more time for supervising offenders, having more serious offenses.

STATE OF ALASKA

DEPARTMENT OF CORRECTIONS

BOARD OF PAROLE

STEVE COWPER, GOVERNOR

ALASKA BOARD OF PAROLE
P.O. BOX T
JUNEAU, ALASKA 99811-2000
PHONE: (907) 465-3384

February 8, 1988

Representative C. E. Swackhammer
Alaska House of Representatives
Alaska State Legislature
P.O. Box V
Juneau, Alaska 99811

RE: House Bill 140

Dear Representative Swackhammer:

You have asked our opinion on the impact House Bill 140 [Chapter 77, SLA 1987] has had on the number of mandatory parolees. The following information is provided in response.

We met with the Department of Law staff this summer after the Governor signed the bill. Law agreed any prisoner being released on the effective date of the bill, September 13, 1987 or thereafter, would be subject to the 2 year minimum to be on mandatory parole. We notified all institutional parole officers of this, and effective 9/13/87, only prisoners with sentences of 2 years or longer went out on mandatory parole. On December 10, 1987, we received the Department of Law's opinion indicating we could only apply HB 140 to those prisoners whose crimes were committed on September 13, 1987 or thereafter. After discussing this opinion thoroughly with Law, we advised Corrections' employees through memorandum on December 11 to apply HB 140 only to those prisoners whose crimes were committed 9/13/87 or thereafter.

For the first six months of 1987, we set supplemental conditions on 348 mandatory parolees. During the second six months of 1987, we set mandatory parole conditions on 167 cases. I think this drop of 181 cases in the second half of the year can be attributed primarily to HB 140. Again, I have not kept actual figures, but we believe the number of mandatory parole packets has increased significantly in the last 1 1/2 months. We had over 2 feet of files awaiting action this morning.

As you know, it take a significant amount of time to process and supervise mandatory parole cases. Even if every mandatory parolee followed all conditions, handling this additional workload of about 181 case would take a tremendous amount of time. Unfortunately, many of these mandatory parolees appear before us at violation hearings. We held about 135 final mandatory parole violation hearings in 1987. This does not include preliminary hearings. Corrections gives the parole officer credit for 12 hours for each parole violation processed. Handling these 135 cases is the equivalent to the work of

more than one full-time parole officer spread out over a years time.

As you can see, not being allowed to apply the bill to all prisoners released on September 13, 1987, is having a significant impact on the workload of the Parole Board and on the Department of Corrections. We strongly support an amendment that would allow the immediate application of HB 140 to everyone released September 13, 1987 or thereafter.

I will be glad to supply any additional information we have.

Cordially,

Samuel H. Trivette
Executive Director

cc: Susan Humphrey-Barnett, Commissioner
Department of Corrections

Bill Parker, Special Assistant
Department of Corrections

STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF LAW

CRIMINAL DIVISION

REPLY TO

X CRIMINAL DIVISION CENTRAL OFFICE
P.O. BOX KC
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PHONE: (907) 465-3428

☐ OFFICE OF SPECIAL PROSECUTIONS AND APPEALS
1031 WEST 4TH AVENUE, SUITE 318
ANCHORAGE, ALASKA 99501-5993
PHONE: (907) 279-7424

December 8, 1987

The Honorable Samuel H. Trivette
Executive Director
Alaska Board of Parole
P.O. Box T
Juneau, Alaska 99811

Re: Application of changes in parole laws
Our file: 663-88-0148

Dear Mr. Trivette:

You have requested our advice regarding the application of recent changes to Alaska's parole laws. Specifically, you seek guidance as to which prisoners and parolees are covered by the amended statutes and which are covered by former statutes.

As you are aware, effective January 1, 1986, Alaska's Parole Administration Act (former AS 33.15.010 <u>et. seq.</u>) was repealed and reenacted in AS 33.16.010--AS 33.16.900. Additionally, the legislature further amended a number of provisions in AS 33.16 and AS 33.20 effective September 13, 1987. In light of these extensive changes, both prisoners and staff within the department of corrections have raised inquiries regarding which laws apply to which prisoners.

With one limited exception, the legislature made no mention of its intent as to the prospectivity or retrospectivity

of these newly adopted or amended provisions. 1/ Accordingly, consistent with the better policy view, persuasive case law authority, and Alaska's general saving statute, 2/ it is our opinion that the parole laws which are applicable to a particular prisoner are the ones in effect on the day the prisoner committed the criminal offense.

ANALYSIS

A. The Doctrine Of Abatement

At common law, the repeal or amendment of a criminal statute resulted in the abatement of all prosecutions under that statute which were not yet final. See, e.g., Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation, 121 U.Pa.L.Rev. 120, 121-127 (1972) (hereafter referred to as "L.Rev."). This rule of abatement applied not only to statutes that defined a substantive criminal offense, but also to changes in laws that addressed sentences or penalties. 3/ Thus, an amendment to a statute which merely

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1/ AS 33.16.090(b), which became effective on January 1, 1986, was made partially retrospective. The retrospective effect of this statute is discussed infra at 14-15.

2/ AS 01.10.100.

3/ In Warden v. Marrero, 417 U.S. 653, 657-58, 41 L.Ed.2d 383, 389, 94 S.Ct. 2532 (1974), the United States Supreme Court made (Footnote Continued)

reduced the possible maximum penalty for an offense resulted in dismissal of the action if it had not yet reached final judgment, unless the courts were able to find a specific parliamentary or legislative intent to the contrary. 4/ This result was reached by the courts as a canon of statutory construction which was based on the premise that, unless specifically stated otherwise, a legislature intended the enactment of a statute making criminal conduct noncriminal (or less criminal) to put an end to nonfinal prosecutions brought under the earlier statute. L.Rev. at 122-26 and authorities cited therein.

Thus the courts, when faced with silence or ambiguous language as to whom a statute applied, were attempting to discern and implement the intent of the legislature. Yet, the judicially created doctrine of abatement resulted in a considerable loophole whenever the legislature, in amending a statute, neglected to include a saving clause. 5/ Conviction or sentencing under the

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(Footnote Continued)
it clear that a statute addressing parole eligibility is a "penalty, forfeiture, or liability" which is saved by a general saving statute. See, discussion, infra at 4-11.

4/ L.Rev. at 123.

5/ "A saving clause refers to any language that would 'save' pending prosecutions or future prosecutions for acts committed under the repealed [or amended] statute from being abated." L.Rev. at 125 n.34.

former statute was precluded by the doctrine of abatement. Conviction under the newly amended statute for conduct which occurred before its effective date, at least where the scope of prohibited conduct was broadened or the penalty was increased, was impermissible under the constitutional prohibition against ex post facto laws. U.S. Constitution, Art. 1, § 10. 6/ Moreover, another common law rule mandated that absent specific retrospective language, amended statutes which provided for reduced or less restrictive sanctions, could only be applied to conduct which occurred after the effective date of the newly enacted legislation. L.Rev. at 124, particularly n.29.

The end result of these seemingly over-technical principles was that criminals occasionally escaped the consequences of their unlawful actions based solely on the fortuitousness of the effective date of amended legislation.

B. Saving Statutes

As indicated earlier, if legislation amending or repealing a criminal statute contained language that preserved prosecutions under the former statute, then a person charged

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6/ See, also, Weaver v. Graham, 450 U.S. 24, 67 L.Ed.2d 17, 101 S.Ct. 960 (1981). Thus, even if the legislature made such an amended statute specifically retroactive, prosecution would be barred by the prohibition against ex post facto laws.

under such a statute would not escape prosecution by virtue of the doctrine of abatement. All too often, however, legislatures, through inadvertence, neglected to provide specific saving clauses in criminal legislation, notwithstanding their intent that pending prosecutions under the former statute not be abated. L.Rev. at 126-27.

The legislative response to this inequity was the adoption, in most states and in Congress, of a general saving statute.

> [Such statutes are] applicable to all repeals, amendments, or re-enactments, and the consequent shifting of the legislative presumption from one of abatement unless otherwise specified to one of non-abatement in the absence of contrary legislative direction.

L.Rev. at 127. 7/

7/ As one court described this process,

> The history of legislation ... shows that through the inattention, carelessness and inadvertence of the law-making body, crimes and penalties have been abolished, changed or modified after the commission of the offense and before trial in such material way as to effect many legislative pardons. To prevent such mistakes and miscarriages of justice many of the states have enacted general saving statutes.

LaPorte v. State, 14 Ariz. 530, 533, 132 P. 563, 564-65 (1913).

General saving statutes vary in wording and content, but a majority of them apply in both civil and criminal actions and include a provision to the effect that an amendment to or repeal of a statute does not extinguish penalties, rights, or liabilities accrued or incurred under the former law. L.Rev. at 128. Alaska adopted such a general saving statute well before statehood. AS 01.10.100(a) presently provides:

> EFFECT OF REPEALS OR AMENDMENTS. (a) The repeal or amendment of any law does not release or extinguish any penalty, forfeiture, or liability incurred or right accruing or accrued under such law, unless the repealing or amending act so provides expressly. The law shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of the right, penalty, forfeiture, or liability.

Thus, ameliorative legislation (i.e., amendments to laws which make criminal sanctions or penalties 8/ less harsh) which fails to specifically provide for its retrospective application clearly applies <u>prospectively</u> only. 9/ <u>See</u>, <u>e.g.</u>, AS 01.10.090 which states "no statute is retrospective unless

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8/ Penalties or sanctions include statutes addressing parole eligibility. <u>See</u>, n.3 <u>supra</u>.

9/ As already stated, legislation which increases penalties or sanctions may only be applied prospectively because of the prohibition against <u>ex post facto</u> laws. <u>Cf.</u>, Elstad v. State, 599 P.2d 137, 140 (Alaska 1979).

expressly declared therein." Hence the critical question is the meaning of prospective application or, in the context of your specific request for advice, how ameliorative changes in Alaska's parole laws should be applied. The courts have adopted three responses to this kind of question.

The first view, taken by a number of jurisdictions including the federal courts, is that a statute that either ameliorates or repeals penalty provisions applies only to conduct that occurs after the change in law becomes effective. 10/ Under that view, a person who violated federal narcotics laws was not entitled to the benefit of a change in the sentencing laws which, five days before conviction and sentencing, had been amended to permit suspended sentences and parole eligibility and to do away with a mandatory minimum jail sentence. United States v. Bradley, 455 F.2d 1181, 1190 (1st Cir. 1972), aff'd, 410 U.S. 605, 35 L.Ed.2d 528, 93 S.Ct. 1151 (1973) (see, particularly, concurring opinion of Brennan and White, Justices, 410 U.S. at 611-12). The court in Bradley found that the specific saving statute in the legislative act that amended federal narcotics

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10/ Reported cases from more than 10 states reflect an adherence to this view. L.Rev. at 134-38.

laws and the general federal saving statute 11/ both required "that narcotics offenses committed prior to May 1, 1971, are to be punished according to the law in force at the time of the offense." 455 F.2d at 1190. 12/ See also, United States v. Brier, 813 F.2d 212, 215 (9th Cir. 1987) (no statutory retrospectivity unless specifically provided for).

A second view, and one that is apparently followed in only four states, is that any ameliorative changes to punishment statutes which become effective prior to the date of final appellate action inure to the benefit of a criminal defendant. See, e.g., In re Estrada, 408 P.2d 948 (Cal. 1965); People v. Roper, 181 N.E.88 (N.Y. 1932); L.Rev. at 132-33. Two principal criticisms may be made of this application of general saving statutes. Initially, it is disruptive to the criminal justice system in that it often takes months, and occasionally years,

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11/ The federal general saving statute, 1 U.S.C. § 109, is nearly identical to Alaska's general saving statute.

12/ Similarly, a person sentenced before the May 1, 1971, effective date of the federal narcotics statute does not, by virtue of having served a third of his sentence (the minimum necessary term to be eligible for parole under the May 1, 1971, Act) become eligible for parole. Warden v. Marrero, 417 U.S. 653, 41 L.Ed.2d 383, 94 S.Ct. 2532 (1974).

before a criminal appeal becomes final. 13/ Any mitigatory change to sentencing laws which may have occurred in the interim would then require resentencing. Secondly, this minority view results in inequities and encourages dilatory tactics by criminal defendants. If two co-defendants commit the same crime, then the one who flees the jurisdiction or otherwise evades apprehension for a period of time, is more likely to be brought to trial later and to have his appeal resolved later. That person would then benefit from a mitigatory change in law if it becomes effective prior to the finalization of his appeal. However, the co-defendant whose conviction and appeal is processed in a timely manner would not benefit from the change in law if it became effective after the time his appeal was resolved. Similarly, if the first person pled guilty, but the second went to trial and appealed his conviction, even on a meritless or frivolous point, only the second would benefit from any mitigatory change in the law which occurred prior to the finalization of his appeal.

13/ This amount of time is often needed simply to exhaust all possible appellate review within a state court system. Some prisoners spend years pursuing habeas corpus remedies in the federal court system. It took nine years from the date one prisoner in the Alaska prison system was convicted and sentenced before the federal courts finally foreclosed the possibility of habeas corpus relief. McCracken v. Corey, No. F77-6 (D. Alaska).

A third, and intermediate position, has been taken by a number of courts, largely dictated by the specific language of the general saving statutes in those jurisdictions. L.Rev. at 136. Under this view, the crucial date is the date of sentencing in the trial court. Any mitigatory change in sentencing or penalty provisions which becomes effective prior to the date a defendant is sentenced inures to the benefit of the defendant. Like the minority view however, this view is subject to inequities and encourages dilatory tactics by defendants.

For instance, in Belt v. Turner, 479 P.2d 791, aff'd on rehearing, 483 P.2d 425 (Utah 1971), a defendant pled guilty to an offense for which he received a suspended imposition of sentence. After violating his probationary conditions, he was sentenced to the maximum term of five years. The defendant failed to appear at the time his sentencing was originally scheduled, however, and a mitigatory change in the law which occurred after his original sentencing date, but prior to the date he was actually sentenced resulted in the appellate court remanding the case for resentencing under the more lenient statute. However, another person, who committed the same offense at approximately the same time, failed to receive the benefit of the mitigatory change in law. The appellate court ruled that the

general saving statute mandated that the higher penalty was proper. State v. Miller, 464 P.2d 844 (Utah 1970). 14/

It is helpful to remember that general saving statutes are only utilized when the legislature fails to indicate its intent as to whether a mitigatory change in law should apply retrospectively. Any specific indication by the legislature that a change in law should apply retrospectively results in the new law's application to those persons intended to be covered. AS 01.10.090. Absent any statement of intent to apply a mitigatory change in penalty provisions to persons who have already committed criminal offenses, we believe the most equitable application of a general saving statute is the view that looks at the date a criminal offense was committed.

Because Alaska's general saving statute is relevant to the question you raise, we now will review Alaska case law and policy to determine which view is the most appropriate to apply in this state.

14/ A dissenting opinion in Belt argued that the defendant in that case was improperly rewarded for failing to appear for sentencing, while the defendant in Miller, who properly appeared for sentencing received the higher penalty. 483 P.2d at 427.

C. <u>Case Law In Alaska</u>

Case law in Alaska follows the general rule that, absent specific retrospective intent language in new legislation, savings statutes are effective to preserve the law as it existed before a legislative change. <u>Alaska Public Utilities v. Chugach Elec. Ass'n</u>, 580 P.2d 687, 692 (Alaska 1978), <u>overruled on other grounds</u>; <u>City and Borough of Juneau v. Thibodeau</u>, 595 P.2d 626 (Alaska 1979), quoting <u>Territory of Alaska v. American Can Company</u>, 137 F.Supp. 181, 16 Alaska 71, 76 (1956), <u>aff'd</u>, 246 F.2d 493, 17 Alaska 280 (9th Cir. 1957), <u>rev'd on other grounds</u>, 358 U.S. 224, 79 S.Ct. 274, 3 L.Ed.2d 257 (1959). <u>See</u>, <u>also</u>, <u>Brice v. State, Div. of Forest, Land & Water</u>, 669 P.2d 1311, 1315 (Alaska 1983) (holding that, when a repeal is not accompanied by a specific saving provision, it is presumed that the legislature intended the general saving statute to apply).

Although the Alaska appellate courts have not explicitly chosen among the three views for determining at what point an amended penal statute is prospectively applied, <u>15</u>/ there are

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<u>15</u>/ In Davenport v. State, 522 P.2d 1140 (Alaska 1974), the Alaska Supreme Court held that a mitigatory change in law which occurred shortly after a juvenile was committed to the custody of the Department of Health and Social Services did not benefit the litigant in that case. The court acknowledged that there were two views as to the appropriate date for determining whether a (Footnote Continued)

strong indications that the Alaska courts would adopt the majority view that is based on the date an offense was committed.

For example, in P.H. v. State, 504 P.2d 837 (Alaska 1972), the supreme court held that the phrase "under 18 years of age" in juvenile delinquency statutes referred to the age of the accused at the time of the offense. The court went on to note that "as a general rule, the punishment for an offense is governed by the law in effect at the time the offense is committed." Id. at 841.

Similarly, in Parker v. State, 667 P.2d 1272 (Alaska App. 1983), the court of appeals acknowledged that the significant event for purposes of judging the ex post facto effect of a statute was the date of the offense, rather than the date of conviction, and stated that "[a] similar conclusion, in our view, is applicable to determinations of retroactivity under AS 01.10.-100(a)." 667 P.2d at 1274. As pointed out earlier, this is the view that avoids the inequities described in the previous section, infra at 10-11. Cf., Endell v. Johnson, 738 P.2d 769,

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(Footnote Continued)
defendant is entitled to the benefit of a new law--the date of commission of the offense or the date of final appellate action--but did not choose between the two because both had already occurred in that case. 522 P.2d at 1142. The court did not mention the intermediate view which is based on the date of sentencing.

771 (Alaska App. 1987) (interpreting credit for time served requirement in AS 12.55.025(c) to avoid inequities for persons similarly situated (i.e., persons sentenced for multiple charges where some remain incarcerated prior to trial and others are released on bail)).

In conclusion, we believe that the result that would be reached by the Alaska appellate courts and the one supported by the better policy view is that punishment, including parole laws, is based on the law which existed at the time of the commission of the offense.

D. Alaska's Parole Statutes

As discussed earlier, Alaska's parole statutes were totally rewritten effective January 1, 1986. Part of this revision resulted in specifically making certain persons eligible for parole who were sentenced under the presumptive sentencing scheme, albeit only during an aggravated portion of a presumptive sentence 16/ or during a consecutive sentence. AS 33.16.090(b). While persons in this category were not previously eligible for parole, section 9 of this legislative act (§ 9, ch. 88, SLA 1985) made this provision partially retrospective by permitting its

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16/ An aggravated portion of a presumptive sentence is that portion of a sentence which has been enhanced due to one or more of the aggravating factors set out in AS 12.55.155(c).

application to prisoners whose crimes occurred before the effective date, if the sentencing court so ordered.

Nowhere else in the act (ch. 88, SLA 1985) or in any of the provisions in the 1987 amendments (ch. 77, SLA 1987) is there any indication of the legislature's intent to apply the various other provisions retrospectively. The common law maxim, expressio unius est exclusio alterius, 17/ adds support to our view that, with this one exception, changes to Alaska's parole laws should be applied prospectively only. The fact that the legislature specifically expressed its intentions as to retrospectivity in one provision only, is strong evidence that it could have done so as to other provisions, but chose not to. Thus, for example, although the amount of time to be served prior to parole eligibility was reduced from one-third of a sentence to one-fourth for certain offenders (AS 33.16.100(c) and (d)), these provisions, by virtue of AS 01.10.090, AS 01.10.100(a), and the interpretation we believe the Alaska appellate courts would adopt, do not apply to prisoners whose offenses were committed before the effective date of the new law.

17/ When certain things are specified in a law, an intention to exclude all others from its operation may be inferred. Sutherland Statutory Construction § 47.23 (4th Ed. 1984).

Although it is our opinion that the applicable parole laws are those in effect at the time a person commits a criminal offense, that opinion is limited to those laws that affect substantive rights, such as parole eligibility or the length of time on parole. Any changes in laws that are solely procedural, e.g., the setting of parole conditions (AS 33.16.150 or AS 33.16.160) or the information that must be considered by the Parole Board in considering suitability for parole (AS 33.16.110), should be applied to all parolees irrespective of the date of their offenses.

Conclusion

In determining whether to apply mitigatory changes in parole laws to persons who committed criminal acts prior to the effective date of the new laws, you must be guided by the intent of the legislature. When the legislature is silent as to who is intended to be covered by the new laws, the general saving statute, AS 01.10.100(a) controls.

The most evenhanded and equitable application of AS 01.10.100(a) mandates that the law in effect at the time a person committed a criminal offense is the law that should be applied to that individual. The advice given in this opinion is intended to apply to penal statutes only. Any question of the retrospective application of changes to non-penal statutes requires a separate analysis.

If this opinion raises any questions, or we may otherwise assist in its application, please contact us at your convenience.

Very truly yours,

GRACE BERG SCHAIBLE
ATTORNEY GENERAL

By: [signature]
Michael J. Stark
Assistant Attorney General

MJS:so-04

cc: Susan Humphrey-Barnett
Commissioner
Department of Corrections

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

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

MEMORANDUM February 8, 1988

SUBJECT: Applicability of Ch. 77, SLA 1987
(Work Order 5-1842)

TO: Representative C.E. Swackhammer

FROM: Jack Chenoweth
Legislative Counsel

The December 8, 1987, Opinion of the Attorney General guides the Department of Corrections and the Parole Board in the administration of those provisions of AS 33.16 and AS 33.20 that were amended by ch. 77, SLA 1987. I am of the view that the opinion reaches a defensible conclusion and contains no obvious error that might prompt a request for its reconsideration.

While the testimony before one or more legislative committees probably supports the contention that the provisions of the bill were to apply to all prisoners, there is simply nothing in the record of the drafting file maintained by this office to confirm your assertion that the Legislature intended HB 140 to apply to persons incarcerated on the effective date of the Act.

As your request states, the Legislature may set aside the effect of the opinion by clarifying legislative intent in passing the 1987 legislation. Please do not assume that a committee report or letter of intent will do that. A draft of a bill to accomplish the effect you intended accompanies this memorandum.

If this memorandum and the accompanying legislation prompt questions, please contact me.

Enclosure

JC:gc
WKG1:072

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: HB 445
PUBLISH DATE: 2/10/88

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act relating to the applicability of ch77, SLA 1987."
Sponsor: Rep. Swackhammer, Gruenberg & Rieger
Requestor:

Agency Affected: Department of Corrections
BRU: Parole Board
Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
FULL-TIME	0	0	0	0	0	0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Susan E. Knighton

Prepared by: Susan Knighton, Director of Admin. Services
Phone: 465-3376
Division: Administration
Date: 2/18/88

Susan Humphrey-Barnett
Approved by Commissioner: Susan Humphrey-Barnett
Date: 2/18/88
Agency: Department of Corrections

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