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# HOUSE COMMITTEE REPORT

3/21

(7)

Date Referred: February 12, 1990

FURTHER REFERRALS:

JUDICIARY

Date of Committee Action: 3/14/90

*referred to def 3/21*

The HEALTH, EDUCATION, & SOCIAL SERVICES Committee considered: HB 544

HOUSE BILL NO. 544 PRESUMPTIVE SENTENCING

"An Act authorizing the Department of Corrections to establish alternative sentencing and related programs for prisoners."

### RECOMMENDATIONS:

- be replaced with \_\_\_\_\_  the same title
- have attached amendment(s)  a new title
- do pass
- do not pass
- no recommendation
- individual recommendations
- additional referral to the \_\_\_\_\_ Committee

FIN

ADOPTS: \_\_\_\_\_ letter of intent

ATTACHES NEW FISCAL NOTE(S): (Dept) APPROVES PREVIOUS: (Date/Dept)

- fiscal impact Corrections  fiscal note(s) \_\_\_\_\_
- zero fiscal note \_\_\_\_\_  zero fiscal note(s) \_\_\_\_\_
- zero with analysis \_\_\_\_\_  zero fn/analysis \_\_\_\_\_

SIGNING DO PASS:

SIGNING: (Check approp. column)

Do Not Pass No Rec Amend

_____			
<u>Mr. Gruenberg</u> GRUENBERG	<u>Ellis</u> ELLIS		
<u>Jacko</u> JACKO			
<u>Gohl</u> GOHL			
_____			
_____			
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_____			
_____			

Ellis  
Chairman's Signature

## FISCAL NOTE

**REQUEST:**

Revision Date: \_\_\_\_\_ Agency Affected: Department of Corrections  
 Title: "An Act authorizing the Department of Corrections to establish..." BRU: \_\_\_\_\_  
 Sponsor: Reps. Koponen, Gruenberg Components: \_\_\_\_\_  
 Requestor: \_\_\_\_\_

**EXPENDITURES/REVENUES:** (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	84.6	84.6	84.6	84.6	84.6	84.6
TRAVEL	7.5	7.5	7.5	7.5	7.5	7.5
CONTRACTUAL	180.0	180.0	180.0	180.0	180.0	180.0
SUPPLIES	25.0	25.0	25.0	25.0	25.0	25.0
EQUIPMENT	101.0		96.0		96.0	
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>398.1</b>	<b>297.1</b>	<b>393.1</b>	<b>297.1</b>	<b>393.1</b>	<b>297.1</b>
<b>CAPITAL</b>	<b>96.0</b>		<b>96.0</b>		<b>96.0</b>	
<b>REVENUE</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>

**FUNDING:** (Thousands of Dollars)

GENERAL FUND	302.1	297.1	297.1	297.1	297.1	297.1
FEDERAL FUNDS						
OTHER	96.0		96.0		96.0	
<b>TOTAL</b>	<b>398.1</b>	<b>297.1</b>	<b>393.1</b>	<b>297.1</b>	<b>393.1</b>	<b>297.1</b>

**POSITIONS:**

FULL-TIME	1	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

**ANALYSIS :** (Attach a separate page if necessary)

See Attached.

*Susan E. Knighton*

Prepared by: Susan E. Knighton, Director Phone: 465-3376  
 Division: Administrative Services Date: 03/20/90  
 Approved by Commissioner: Susan Humphrey-Barnett Date: 03/20/90  
 Agency: Department of Corrections

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

FISCAL NOTE  
HB 544  
Page 2

ANALYSIS

This legislation, as currently worded could have a tremendous fiscal impact upon the Department of Corrections. Legal counsel has advised us that the phrase "alternative sentencing programs and training, counseling, and " may be interpreted to expand the State's liability in the areas of training and counseling and cause the need to expend significantly more monies in this area to limit this liability. A conservative estimate of yearly funding to provide inmates with additional training and counseling is \$398.1 and is based upon requested but unfunded FY91 needs in statewide programs.

March 4, 1990

Rep. Nula Kogonen  
PO Box 1  
Juneau, AR. 99811

Ruby W. Cook  
4580 Hubert Martin Rd.  
Cumming, GA 30130

Dear Sir:

I would like to thank you  
for drafting 2+B 545-AS 33  
regarding Paroles for first time  
felony offenders.

My son William J. Cook is  
in the Fairbanks Correctional  
Center on a sex offender charge.  
He was given a 12 year non-  
Paroleable sentence in April 1986.  
The reason for the sentence is  
the judge said he was not remorse-  
ful and would not admit to the  
crime.

Since that time he has  
admitted guilt and has completed  
the two year sex offender treatment  
Program. He has never been  
written up and has been a (I think)

model ~~Prisoner~~ Prisoner. He has worked in various jobs while in Prison and at the present time is in the law library. In the past couple of years he has also become a Certified Paralegal and is an associate member of the American Bar Association. He is now in the process of trying to complete his college degree and plans on getting a degree in Law. Also, a lawyer in Fairbanks has told him he has a job for him as a Paralegal in his law firm as soon as he is released.

It appears to me it would be some Alaska, as well as other states, a lot of money if they would adopt a bill like you have drafted.

Thanks again for drafting this bill. Good luck with it and God Bless you.

Sincerely  
Ruby Cook

1992 Alaska State  
Legislature, S. 99911

March 22, 1992

March 22, 1992

Justice Judicial Committee  
P.O. Box 1  
Juneau, AK 99811

Dear Sirs:

I respectfully urge you to vote for HB 544 and SB 545.

The 1989 F.B.I. Uniform Crime Reports and Bureau of  
Justice Statistics show some facts that should concern all  
Alaskans. Alaska's incarceration rate is the 5th highest in  
the nation. Only 3 other states and the District of Columbia  
imprison more of their residents than Alaska. The crime  
rate in Alaska is 5th barely above the mid-line with 24  
states having a larger crime rate and 26 states having less.  
Now we are 5th highest in incarceration and 25th in  
crime.

Prisons are expensive to build, maintain or  
operate and are notoriously poor in rehabilitation of  
those of Alaska need to come up with better solutions to  
the crime problem.

Legislators agree that the break up of families  
contributes to the crime rate. Our laws should do everything  
possible to restore and keep families together and  
provide protection from violent offenders.

There is one aspect of HB 545 that I am a bit concerned  
about. I am not sure how to interpret Section 1 of HB 545. I  
do not believe in forced treatment. If Section 1 of HB 545  
allows forced treatment except in the most extreme circumstances  
perhaps this part should be examined again. As I read and  
hear of this paragraph in HB 545 I feel very uncomfortable  
requesting your opinion. Please do your best to get  
in order to make a decision available for voters beyond  
the most extreme cases.

There are two bills, with a possible amendment if you  
are suggested above, will bring a measure  
to the legislature and I am sure that our current sentencing laws  
are a try to make Alaska a leader in justice and care of  
our citizens. Please vote.

Ruth E. Talley



TO: Rep. Niilo Kiponen  
Pouch V, Capitol  
Juneau, Ak 99811

FROM: Thomas R Kuleck  
Box 317  
Fairbanks, Ak 99707

SUBJECT: Presumptive Sentencing of First Offenders

Mr. Koponen,

I am writting to express my concern about the practice of presumptive sentencing of first time offenders. It seems that the state of Alaska has taken a position that negates the power of the individual judge to weigh each case, based on its merits. In effect, they tell every judge they are not competent to do the job they are paid for. My particular case would tend to bear this out. I am presently incarcerated for a non-violent crime that bears a mandatory presumptive sentence. During some 60 hours of psychiatric evaluation it was determined that the major, if not the only, component to my offense was Post Traumatic Stress Disorder. All of the evaluating persons have recommended that I be placed in residential therapy at the American Lake Combat Veterans Center, Tacoma, Wa. Unfortunately, because of the presumtive sentencing, this will never happen. Is the state willing to accept the responsibility for my illness? I think not. At present there are many incarcerated veterans diagnosed as having PTSD with no treatment being made available. What of the judge being able to tailor a sentence to the individual? Again, not possible due to presumptive sentencing. I wonder, is the state more interested in "the pound of flesh" or in rehabilitation?

Presumptive sentencing has shown itself to be the same failure that capital punishment is, and has been. It's long overdue to look at the cause of crime and treat it. The good citizens of this state cannot, and will not, continue to support a prison system that warehouses rather than rehabilitate. The elimination of presumptive sentencing is a step in the right direction. Thank you for your time and interest.

Sincerely,



Thomas R Kuleck

3505 Mink Lane  
Fairbanks, AK 99719  
February 7, 1969

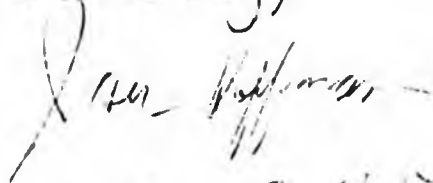
Representative Nilo Koponen  
P.O. Box V  
Juneau, AK 99811

Dear Rep. Koponen

I am writing to inform you of my opinion of article 17. I sincerely believe it is the most bumbling mistake that Alaska could make. Little by little Alaska's small town attitude is turning into that of the lower 48. The death penalty is just another ploy, a sign that we are getting meaner.

I don't know what your view of this issue is but I would like to encourage you to vote against the death penalty. It is a law that can be misused and is not a true representation of the "American Way."

Sincerely,



Jesse E. Hoffman

P.O. Box 1088  
Fairbanks, AK 99701  
January 20, 1990

Neil's Posner  
P.O. Box 1088  
Fairbanks, AK 99701

Dear Neil:

Could please find a copy of one more letter I've written to some of your colleagues. Just sent me a copy of your notes for this year on presumptive conditions. I ABSOLUTELY agree. It is very reassuring to know that there is at least one sane intelligent member of the legislature that holds the same opinion I do. I hope my letters have been of some help. If there is anything else please let us know.

I've just my got at a work and I will be leaving Alaska this evening. My husband is being incarcerated. The treatment of Viet Nam veterans suffering from Post Traumatic Stress Disorder is another issue that will have to be looked at. My husband desperately needs treatment. A Combat Veterans Program. Alaska has no treatment program for combat veterans and the state seems to think it is more important to be tract it's sound of first first. Unfortunately my husband is at real risk for suicide because he is unable to receive the treatment he needs to have. One chance he had, he has been accepted for treatment at the American Legion Combat Veterans Program in Washington but whether he can get to receive that treatment is a question.

I want to thank you for your interest and support in this matter. Please feel free to use what I have said in it if it helps.

Sincerely,

*Diane Huluk*

Diane Huluk

4390 Matt Hwy.  
Cumming, Georgia  
March 3, 1990

Mr. Niilo Koponen  
P.O. Box V  
Guneau, AK 99811

Dear Mr. Koponen:

Thank you for supporting the bill that would give first time felony offenders parole. My nephew William Cook is a first time offender in the Fairbank Correctional Institute. He has never done anything wrong in his life except this one time. Please allow me to try to briefly describe William's conduct to you.

William was an only child with an over-strict father. He was never allowed to do very many things and when he was eighteen years' old he joined the Army. He married a woman with three children. He loved these small children without a doubt and they loved him. When the girls grew up he did touch them

in a moment of weakness, I do not know all of the details that happened. I do know however that both girls said that they went to the family and Children's service because they were angry with him and when they found out how serious the offense was that they went to the Welfare Dept. to explain but was not allowed to do so. They are both happily married and visit their step-father often in prison.

Since William has been in prison he has been a model prisoner, works in the law library and has finished his education and is a Certified Paralegal. He has had several lawyers who have promised him a job the minute he is free because they have seen the work that he has done in appeals for other prisoners.

If William could be paroled, he would not be a burden to the American Tax Payer and would contribute something to the society in which he lives.

I will make this plea to you would you please look into his case William J. Cook Fairbanks Correctional Institute and help him

in any way possible. I do not know what happened to William. I do know that he is a kind generous person. I believe that he has been punished enough for his one time mistake. He has been in Jailbank since April of 1986.

Thank you for your concern and may God bless you in your effort to help first time offenders.

Sincerely yours,  
Lois Garner

STATE OF ALASKA  
THE LEGISLATURE

FOUCH Y STATE CAPITOL  
JUNEAU ALASKA 99811  
907 465 3800


LEGISLATIVE AFFAIRS AGENCY

MEMORANDUM

March 10, 1990

SUBJECT: House Bill 544 -- sectional analysis

TO: Representative Niilo Koponen  
ATTN: Drena McIntyre

FROM: Jack Chenoweth  
Legislative Counsel 

The measure directs the commissioner of corrections to initiate and carry out alternative sentencing practices in lieu of imprisonment and to provide training and counseling programs in addition to those now operated or provided by that department.

The range of alternative sentencing options contemplated by the measure is spelled out in bill section 4, offering a definition of the term. The general characteristics of alternative sentencing involve the prisoner's being free of institutional incarceration as well as the constraints associated with placement in a correctional restitution center or furlough assignment. Suggested alternative sentencing options explicitly identified in this section of the measure include home arrest and enforced detention.

The key alternative sentencing provision is bill section 3, adding a new section to AS 33.30. The section spells out the permissible elements of an alternative sentencing program, allowing the commissioner to establish the program by agency regulation. Under AS 33.30.096(a), to qualify for alternative sentencing, the commissioner must first determine that "with reasonable probability, a prisoner can live under reduced supervision without violating the law" or any conditions imposed to regulate the prisoner's personal conduct. That determination is to be made with reference to the four factors identified in that subsection; before placing the prisoner in an alternative sentencing venue, the commissioner must consider all factors identified in that subsection. Additionally, in allowing assignment to an alternative sentencing venue, AS 33.30.096(b) defines the minimum safeguards that the commissioner must impose.

Representative Niilo Koponen  
Page 2  
May 10, 1990

One portion of the amendment made by bill section 1 and the amendment made by bill section 2 are technical conforming changes, included in recognition of the alternative sentencing option that are set out in proposed AS 33.30.096.

Bill section 1 also incorporates, as a new duty imposed on the commissioner of corrections, the responsibility to provide training and counseling programs to persons who have been committed to the commissioner's custody.

JC:mi  
wkmi6/052

**Harold Wirum  
& Associates**  
Architects

500 L Street, Suite 500 • Anchorage, Alaska 99501-5996 • Tel. 907/278-3400 • Fax 907/258-7368

March 14, 1990

Legislative Information Office  
Public Opinion Office  
Anchorage

FAX # 562 4376

TO: Members of the Alaska Senate and House of Representatives

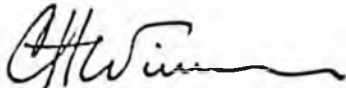
This is to urge your support of

House Bill No. 544 - Re alternative sentencing and  
related programs for prisoners  
and

House Bill No. 545 - Relating to sentencing practices  
and procedures

I believe these bills should be supported in the best interest of  
the general public - can save the state millions of dollars in cost  
- and will benefit deserving defendants and first-time offenders  
in cases where alternative sentencing is deemed appropriate.

Sincerely,



C. Harold Wirum

MARY LOU WIRUM  
500 L Street, Suite 501  
Anchorage, Alaska 99501  
(907) 276-3628  
Fax (907) 258-7368

Commercial  
& Investment  
Real Estate

March 14, 1990

Legislative Information Office  
Public Opinion Office  
Anchorage  
FAX # 562 4376

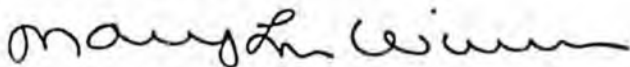
TO: Members of the Alaska Senate and House of Representatives

I am writing to urge your support of  
House Bill No. 544 - Re alternative sentencing and  
related programs for prisoners.  
and  
House Bill No. 545 - Relating to sentencing practices  
and procedures.

which I believe would benefit deserving defendants, and first time offenders, who have demonstrated excellent prospects for rehabilitation, as well as better serve the public by ensuring that a greater number receive counseling, occupational and living skills therapy - as well as save the State millions of dollars in cost. A large percentage of the prison population are first-time offenders, have most of their lifetimes still ahead of them, and are serving time in connection with drug-and-alcohol-related crimes, living in a prison-setting which is not conducive to the positive growth and rehabilitation which is desired. After serving appropriate sentences in terms of repayment for their offenses, these bills will parole deserving defendants under appropriate terms so that their growth and rehabilitation can continue in a normal (non-prison) setting. These young people can become contributing members of society - and hopefully can play a role in the education and determent of other young people who are susceptible to the same fate.

Most of the general public is uninformed concerning such matters unless personal experience has forced the learning experience upon them. Perhaps you as Legislators will first view this as unpopular vote-wise. However, I urge you to support these bills for the benefit of those defendants deemed deserving of alternative sentencing, and in the best interest of the general public as well.

Respectfully submitted,



Mary Lou Wirum



Certified Commercial Investment Member

# The Complex Case of Costly Corrections

By Julie Lays

One out of every 420 Americans is behind bars today—at a staggering price. Can we afford to be tough on crime?

*Julie Lays is an assistant editor of State Legislatures.*

After Oklahoma state Senator John McCune, a 20-year legislative veteran, advocated early release of some non-violent inmates to ease the costly prison overcrowding problem in Oklahoma, he was defeated in the next election.

McCune, once the Senate's expert on prisons, acknowledged that support for alternatives to incarceration is viewed by many as being "soft on crime." "It cost me my seat," he said.

Yet the increasingly high costs of corrections are causing prudent lawmakers to realize how "getting tough

on crime" is tough on the state budget. More stringent law enforcement, higher conviction rates and longer sentences are making already crowded prisons and jails even worse. The expense of building new prisons, as well as such operating costs as health care, salaries, food, clothing and security devices, continues to increase.

"The cost of operating the nation's prisons and jails has tripled during the past decade," says James Austin, director of research for the National Council on Crime and Delinquency. "Many states are now seeing that escalating prison budgets threaten to curtail vital services for health, education and transportation. Unless there is a significant reversal in these trends, prisons will continue to be the growth industry for most states. We are simply punishing beyond our means."

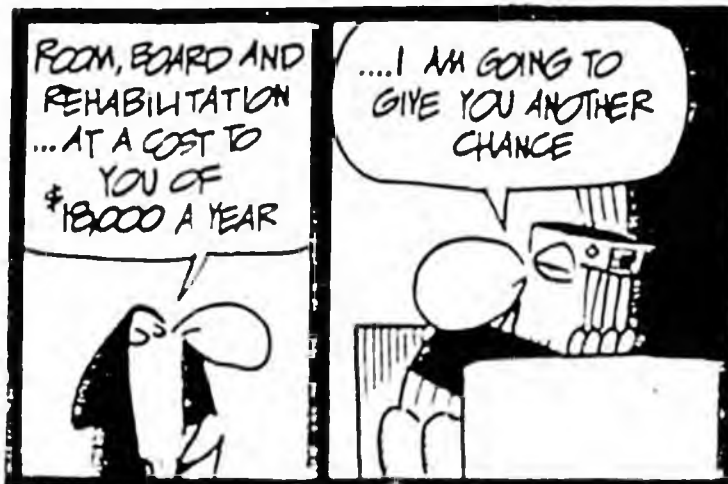
Nationwide, the prison and jail population has doubled in the past decade. There are about 600,000 prisoners in state facilities today—that is one of every 420 Americans—the highest rate in the Western world. State spending for corrections continues to grow at a faster rate than total state spending.

According to the Criminal Justice Institute, 68.4 percent of American prisons are operating above capacity, 36.7 percent are operating above 125 percent capacity, 21.7 percent above 150 percent, and 1.7 percent above 200 percent. In fact, at least 37 states are now under court orders to reduce prison overcrowding. This leads many lawmakers to assume the solution lies in building new prisons. But it is an expensive solution.

A new 500-bed prison typically costs between \$15 million and \$60 million. According to the Corrections Compen-



By permission of Johnny Hart and NAS Inc.



dium, depending on the type (low, medium or maximum security) and the location of the prison, new prison beds can cost between \$3,500 and \$116,000 to construct. The average cost is about \$42,000 per bed.

In North Carolina, the largest prison construction program in the state's history is under way—the construction of 2,554 beds and facilities at a cost of \$29.3 million. In Michigan they're building 19 new prisons. "There's no bigger growth industry in the last two years in Michigan than the corrections department," said Senator Jack Welborn. Alabama has spent \$90 million in the last five years for prison construction; that translates into almost \$1,000 per Alabama family per year. "Texas needs to build 25,000 beds immediately," says the mission statement of the Texas Department of Cor-

rections, "and then one prison every eight months to infinity" to keep up with the incarceration rates. And California estimates it will take up to \$6 billion worth of construction to solve its prison and jail crowding crises.

"This is craziness," said Senator Sue Wagner, referring to her state of Nevada, which has the highest incarceration rate in the country. "I can't believe the citizens of my state want to build a new prison every time we legislators get together in Carson City."

While building prisons is costly, keeping them going is even more expensive. Prisons are complete, miniature communities that provide health care, vandal-proof shelter, food, water and sewer, recreation and employment all in a secure environment. "Construction costs are only a fraction of the

operating costs of prisons," said Tennessee Senator Bill Richardson. Keeping an inmate in prison usually runs between \$10,000 and \$39,000 a year. In some states costs are far higher.

And if you think more liberal use of the death penalty would save money, think again. According to Jonathan Gradess, executive director of the New York State Defenders Association, the cost of life imprisonment for 40 years is around \$602,000 while the expense of a model New York capital case across the first three levels of review—the trial and penalty phase, the appeal and the review in the U.S. Supreme Court—is about \$1.8 million. He agrees with Justice Thurgood Marshall's statement of 15 years ago: "When all is said and done, there can be no doubt that it costs more to execute a man than to keep him in

## Ways to Cut Costs Are Already in Motion

### • *Intensive Probation.*

Georgia's intensive probation program, a model for projects in several other states, began in 1982. Costs are controlled by keeping certain non-violent offenders out of state prisons, sentencing them instead to intense probation that requires five face-to-face contacts per week with a surveillance officer, 132 total hours of mandatory community service work, mandatory employment, a weekly check of arrest records, and routine and unannounced alcohol and drug testing. Offenders spend six to 12 months in the program followed by a year on regular probation. Most have committed property or drug-related offenses. The program costs an average of \$1,600 per offender per year compared to \$9,000 to incarcerate one inmate.

### • *House Arrest.*

Florida has led the way in this area, but many states are beginning to see the benefits of such programs. The North Carolina General Assembly appropriated \$253,000 last year to expand the electronic house arrest program, whose first-year funding was \$65,000.

Wyoming is experimenting with a house arrest program at a start-up cost of only \$30,000. Its Surveil-

lance and Tracking of Offenders Program (STOP) places non-violent property offenders under house arrest monitored by special electronic devices, allowing them to leave home only to go to work or to pre-approved appointments. Governor Mike Sullivan said the cost of STOP is \$14 a day compared with \$35 a day in the state prison.

### • *Sentencing Guidelines.*

Chase Riveland, director of the Washington Department of Corrections, estimates that sentencing guidelines have saved his state the cost of three new prisons. Some \$30 million has also been returned to the general fund. In fact, the guidelines have been so successful in reducing prison populations that Washington can rent cells to other states, housing their inmates for \$60 per day, per cell. The program is expected to bring the state \$20 million between 1987 and 1989.

### • *Prison Industries.*

In California the Prison Industry Authority, which employs more than 5,000 inmates, says it saves taxpayers \$17 million annually in housing and program costs. By 1991 this savings is projected to increase to \$55 million.

In Minnesota, between 5 percent

and 10 percent is deducted from inmates' wages if they earn more than \$50 every two weeks, allowing the corrections department to transfer up to \$100,000 each year to the Public Safety Department's Crime Victims Reparations Board. The funds are used to pay such victims' costs as medical bills, counseling expenses, funeral expenses, support for dependents and loss of wages.

In Illinois, prisoners have been trained in the removal of asbestos and have begun to remove the material from correctional facilities. Correctional Industries Superintendent Robert Orr projects the cost of using the inmates for one building at \$150,000, compared to an estimate of \$300,000 to \$500,000 if a private contractor did the work.

Best Western International, a non-profit association of hotel and motel owners, installed and paid for a computerized telephone reservation system in a minimum-security facility near Phoenix, Ariz. The company trains inmates and pays them the same wages as other agents. Prisoners get to keep a third of their pay, a third goes to the state to offset the cost of incarceration, and a third goes to a trust fund set up for inmates being released.

—Julie Lave

## Annual Cost of Sentencing Options (Exclusive of Construction Costs)

Option	Annual Cost
Routine probation	\$ 300- 2,000
Intensive probation	\$1,500- 7,000
House arrest	
Without electronics	\$1,350- 7,000
With telephone call-back system	\$2,500- 5,000
With passive electronic monitoring	\$2,500- 6,500
With active electronic monitoring	\$4,500- 8,500
Local jail	\$8,000-12,000
Local detention center	\$5,000-15,000
State prison	\$9,000-20,000

*Source: Joan Peterulia in Expanding Options for Criminal Sentencing, Santa Monica, Calif.: The RAND Corporation, November 1987.*

prison for life.

Prisons are assailing state revenues. In Ohio, the corrections budget increased 16.5 percent last year while the general budget grew only 4 percent. Texas general budget grew by 0.8 percent, its corrections budget by 33.8 percent. California's operating budget for the department of corrections reached \$1.2 billion in 1985 and is expected to hit \$3 billion by 1990. According to Greg Schmidt, chief consultant to the California Senate Judiciary Committee, the department of corrections has become "California's version of the Defense Department."

In 1987, according to the Census Bureau, the 50 states spent more than \$11.7 billion on corrections, including \$9.3 billion for current operations and \$1.4 billion for construction.

One reason corrections costs are taking up a bigger portion of the general state budget is that state aid for local corrections programs is now the fastest growing category of state aid to local government. Total state spending for corrections was \$11.7 billion in 1987; local aid is 8 percent of all state corrections expenditures. In fiscal 1987, states provided \$932.5 million in aid to local governments. This represents nearly four times as much corrections aid as was provided in 1980.

Of course, state corrections aid to local governments varies tremendously from state to state. In five states—Connecticut, Delaware, Hawaii, Rhode Island and Vermont—all corrections expenditures are made by the state government. Nineteen states did not offer local aid in 1987. In the remaining states there are wide differences in how

specific responsibilities are allocated. For example, some states house state prisoners in local jails but in other states they must be housed in state prisons. In fact, many states use local jails to house state prisoners without fully reimbursing the local governments.

"We need to look more strongly at alternatives instead of building more prisons," says Parker Evatt, a member of the South Carolina House of Representatives for 13 years and now the commissioner of the South Carolina Department of Corrections. "Our prison system is growing by about 800 people per year. That's a new prison every year. Let's look at more home arrest, intensive probation, restitution centers, halfway houses and parole and probation. Let's really use electronic monitoring instead of playing with it."

Are these alternative programs cheap? No. Are they cheaper than incarceration? Usually. For example, Georgia has a number of alternative programs—from basic probation to intensive probation and home confinement to "boot camp" for young convicts—that range in daily costs from 75 cents to \$36.50 per person. The cost of keeping an inmate in a Georgia prison is estimated at \$36.85 per day.

Intensive probation supervision is one alternative being tried in 40 states. Most programs require community service, periodic checks of local arrest records, curfews or house arrest, random drug and alcohol testing, restitution to victims, employment and payment of a probation fee.

Home arrest, often using electronic monitoring devices, is another strategy being used in at least 50 different loca-

tions. Home arrest allows non-violent criminals to be incarcerated in the homes rather than in premium prisons. If they leave home without permission, the electronic anklets, bracelets will report that to the police.

Sentencing guidelines have been used successfully in a couple of states not only to standardize penalties but also to reduce costs. The guidelines are based on a grid that coordinates specific offense with the criminal record. The systems ensure that costly prison space is reserved for the most dangerous criminals, while the non-violent offenders are subject to a variety of alternative punishments.

Can states save money through inmates' labor? Most states operate prison industries, which can take least three different forms: production of such things as desks and license plates, for use directly by government; use of prisoner labor for prison maintenance; and private sector jobs within prison walls.

Forty-eight states and the federal prison system have more than 50,000 prisoners working in prison industries producing more than \$860 million in annual sales, mainly to federal, state and local governments and non-profit organizations. About 10 percent of inmates work in prison industries.

A major benefit of prison industries is that they are usually self-supporting or even if they are not, they are less expensive than alternative inmate services such as vocational training, basic education. In some states, inmate wages, which averaged about \$3 per day in 1986, have deductions made to reimburse the corrections department for a portion of the cost of the inmate's incarceration, to contribute to the financial support of their families, to pay into victims' compensation funds. In addition, 16 states have experimented to a lesser degree with private-sector prison industries which inmates work for a private company operating within the prison. Inmate may earn the minimum wage and contribute relatively large amounts to the costs of their incarceration.

With new prisons needed every year to keep up with the "lock 'em up" philosophy prevalent today, something is going to have to give. Until the public accepts alternatives to incarceration as legitimate punishment, legislators will be faced with tough decisions.

# N C C D FOCUS

THE NATIONAL COUNCIL ON CRIME  
AND DELINQUENCY

JULY 1988

## Ranking the Nation's Most Punitive and Costly States

By James Austin, Ph.D. and Marci Brown

### HIGHLIGHTS

This issue of NCCD FOCUS represents the second annual "Ranking the Nation's Most Punitive States." The United States, now with more than 625,000 inmates in prison, has long been recognized as a country that imprisons a large portion of its population. Since 1980, the nation's imprisonment rate has nearly doubled.<sup>1</sup> Presently, over 40 states are under some form of litigation related to crowding or unconstitutional conditions of confinement.

This surge in the number of inmates has been interpreted by some as an indication of a more punitive attitude toward the crime problem that characterizes the politics of contemporary criminal justice. Punitive attitudes have traditionally been cited as the reason certain states and regions have higher imprisonment rates than the nation as a whole.

As states respond to the pressure of overcrowding, more attention is being paid to comparing states in terms of their use of other forms of control in addition to prisons. And, states are also concerned with the high costs of these systems. State and federal prison population data, the most obvious means of calculating comparative imprisonment rates, reflect only a single component of a jurisdiction's correctional system and exclude other far-reaching forms of incarceration and control, including jails, juvenile facilities, and parole and probation.

For these reasons, the domain of prison control must be evaluated in relation to, and in many cases as overlapping with,

the control exercised by other correctional control systems. This has become all the more obvious in recent years, as many states, facing crisis situations in their prisons, have placed many offenders in a wide variety of non-prison correctional settings.

The major findings of this report are:

- The nation's use of prisons, jails, probation and parole continues to grow at record levels. More than one out of every 100 persons are under the control of the criminal justice system.<sup>3</sup>
- Washington, D.C., ranks number one in all forms of punishment and criminal justice expenditures. Despite an enormous investment in criminal justice agencies, policy makers have recently chosen the nation's capitol as the site for further investment in more incarcerative policies.
- The South continues to have the highest regional imprisonment rate and the highest total control rate. However, the West, fueled by dramatic increases in California, has the highest regional total incarceration rate (including jails and juvenile facilities, as well as prisons).
- In 1987, it cost each man, woman, and child \$211 per year to fund state and local criminal justice systems. This figure compares with \$95 in 1979.
- There is a strong correlation between rates of criminal justice expenditures and crime rates. States that spend the most on criminal justice have the highest crime rates. Despite a continuing increase in expenditures for criminal justice agencies and in the

use of formal punishment, crime rates continue to escalate.

### IMPRISONMENT VS. TOTAL INCARCERATION RATES

The most commonly used gauge of the punitive nature of a state or geographic region is the imprisonment rate. This rate typically refers to the number of persons in prison on a given day, per 100,000 state population. Southern states have historically had the highest levels of imprisonment in the country, which has been interpreted by some experts as reflecting the conservative political and social values of that region.

Table 1 shows the rates of imprisonment for the 50 states and Washington, D.C. Among the 15 states with the highest rates of imprisonment, 11 were Southern states (including Washington, D.C.). The table also shows that the Southern region had the highest imprisonment rate followed by the West, Midwest and Northeast. Among the 15 states with the lowest rates of imprisonment, seven states were in the Northeast and six were in the Midwest.

Overall, state rankings for imprisonment varied little from last year's report, which used 1986 data. However, a few states showed significant increases or decreases in their imprisonment rate between 1986 and 1987. Interestingly, Washington, D.C., which has the highest imprisonment rate in the nation, increased its imprisonment rate from 1,078.4 in 1986 to 1,197.4 per 100,000 in 1987. Alaska is second with a rate of 481.5 per 100,000 and replaced

Table 1: Imprisonment vs. Incarceration Rates

Rank	State	1987 Population*	1987 Prisoners	Imprisonment Rate***	Rank	State	1987 Persons in Jails**	Jail Rate***	1987 Juveniles in Custody	Total Incarceration Rate****
1	D.C.	622	7,448	1,197.4	1	D.C.	1,474	269.1	413	1,533.0
2	Alaska	2,328	2,328	101.3	2	Nevada	1,925	191.1	182	679.3
3	Delaware	644	2,931	455.1	3	Louisiana	10,300	230.8	1,028	398.6
4	Nevada	1,507	4,434	440.3	4	Alaska	0	0	178	323.4
5	South Carolina	3,423	12,664	369.8	5	California	60,802	219.7	14,712	315.1
6	Louisiana	4,461	15,375	344.7	6	Arizona	3,137	151.7	1,019	305.1
7	Arizona	3,386	10,948	323.3	7	South Carolina	1,675	107.2	713	497.8
8	Alabama	4,083	12,827	314.2	8	Florida	24,802	204.6	2,311	491.7
9	Georgia	6,222	18,373	295.3	9	Delaware	0	0	149	481.4
10	Maryland	4,533	13,467	297.0	10	Georgia	9,504	152.7	1,338	472.8
11	Oklahoma	3,232	9,639	298.4	11	Alabama	4,326	105.9	804	419.8
12	Florida	12,021	32,443	269.9	12	Maryland	6,985	109.9	1,032	429.6
13	North Carolina	6,413	17,249	269.0	13	Tennessee	10,314	214.5	1,024	391.8
14	Mississippi	2,623	6,831	260.2	14	Oklahoma	2,734	87.35	446	391.8
15	Michigan	9,200	23,879	259.6	15	Texas	23,453	139.6	2,121	385.3
16	California	27,663	66,975	242.1	16	Virginia	7,738	131.0	1,454	381.4
17	Kansas	2,476	5,881	237.5	17	New Jersey	13,107	170.8	1,997	374.9
18	Connecticut	3,211	7,511	233.9	18	New York	23,694	132.9	2,228	374.5
19	Texas	16,788	38,821	231.2	19	Michigan	8,347	92.60	1,816	372.2
20	New York	17,823	40,842	229.1	20	North Carolina	5,380	83.89	812	365.5
21	Arkansas	2,348	5,461	232.9	21	Kansas	1,914	17.10	142	342.1
22	Virginia	5,904	13,321	225.6	22	Ohio	7,729	80.94	3,126	334.7
23	Ohio	10,784	24,240	224.8	23	Arkansas	1,982	12.99	249	311.4
24	Missouri	5,103	11,357	222.6	24	Oregon	2,449	70.63	192	311.4
25	Hawaii	1,283	2,268	209.4	25	Mississippi	1,018	18.78	153	312.5
26	Oregon	2,724	5,482	201.2	26	Indiana	4,710	85.15	1,320	304.8
27	Indiana	5,331	10,827	195.8	27	New Mexico	1,428	93.2	491	304.5
28	Washington	4,490	8,400	191.8	28	Wyoming	1,377	76.93	173	304.1
29	New Jersey	7,672	13,662	178.1	29	Illinois	12,616	138.9	1,930	297.0
30	New Mexico	1,300	2,648	176.5	30	Missouri	2,834	53.92	815	294.5
31	Illinois	11,382	19,850	171.4	31	Kentucky	4,496	123.9	407	289.1
32	South Dakota	709	1,133	160.1	32	Washington	3,281	116.3	1,134	276.5
33	Tennessee	4,853	7,624	157.0	33	Colorado	3,793	113.0	303	276.2
34	Idaho	998	1,482	148.5	34	Wisconsin	3,750	119.6	684	258.7
35	Kentucky	3,727	5,471	146.8	35	Pennsylvania	13,195	110.5	1,103	236.1
36	Montana	809	1,187	146.7	36	Connecticut	0	0	227	241.0
37	Colorado	3,296	4,808	145.9	37	South Dakota	294	41.46	228	233.7
38	Rhode Island	984	1,429	144.0	38	Montana	412	50.92	228	225.8
39	Vermont	548	759	138.5	39	Idaho	610	83.12	117	223.3
40	Pennsylvania	11,938	16,267	136.3	40	Hawaii	0	0	149	223.2
41	Washington	4,316	6,131	135.1	41	Nebraska	1,174	73.63	274	221.7
42	Nebraska	1,594	2,086	130.9	42	Iowa	2,736	46.54	427	212.4
43	Wisconsin	4,807	6,001	124.8	43	Massachusetts	4,740	80.95	212	191.1
44	Utah	1,880	1,888	112.4	44	Utah	1,066	81.45	117	188.8
45	Maine	1,187	1,328	111.9	45	Maine	372	48.16	214	178.1
46	Massachusetts	5,833	6,238	106.8	46	New Hampshire	807	78.34	126	170.3
47	Iowa	2,814	2,863	101.0	47	Rhode Island	0	0	103	155.6
48	New Hampshire	1,057	867	82.0	48	Minnesota	3,106	73.15	981	146.8
49	West Virginia	1,897	1,461	77.0	49	West Virginia	1,154	60.83	141	145.3
50	North Dakota	672	430	64.0	50	Vermont	0	0	13	141.2
51	Minnesota	4,246	2,546	60.0	51	North Dakota	243	16.43	69	110.7
<b>REGION</b>					<b>REGION</b>					
<b>SOUTH</b>		83,885	221,592	264.2	<b>WEST</b>		83,320	167.4	19,665	432.7
<b>WEST</b>		49,489	111,719	224.8	<b>SOUTH</b>		117,715	120.4	15,235	422.8
<b>MIDWEST</b>		39,538	111,093	186.4	<b>NORTHEAST</b>		14,115	111.4	6,225	150.8
<b>NORTHEAST</b>		30,277	88,901	176.8	<b>MIDWEST</b>		52,675	68.5	11,948	295.1
<b>TOTALS</b>		243,399	531,309	219.1	<b>TOTALS</b>		309,845	127.3	33,503	368.6

\* Total population in thousands

\*\* Average daily jail populations for 1987 are estimates drawn from published reports and phone calls to individual state officials

\*\*\* Per 100,000 total population (1987), as reported in the 1987 UCR.

\*\*\*\* Number of persons in prison, jail, and juvenile facilities per 100,000 total population (1987)

\* In the states of Alaska, Connecticut, Delaware, Hawaii, Rhode Island, and Vermont, which maintain combined prison and jail systems all inmates are accounted for in the prison figures

Nevada as the state with the highest imprisonment rate. However, Alaska's high ranking is misleading as its prison figures include persons awaiting trial or serving short sentences. In most other states these inmates are counted in jail populations.

To correct for this bias, we created a "total incarceration rate" which includes prison and jail populations and juveniles in custody.<sup>4</sup> When the states are ranked according to this criterion, the West replaces the South as the nation's leader with a rate of 432.7 per 100,000. Nevada reassumes its number one state ranking, and D.C. continues to

have the highest rate of incarceration (four times the national average). California's dramatic increase in prison, jail and juvenile facility populations is the main reason the West has taken the lead in incarceration. Since the previous NCCD report, California added about 6,500 inmates to its prison population, more than 19,000 inmates to its jail population, and 2,100 children to its juvenile facilities.

When the total incarceration measure is compared to the imprisonment rate, significant changes occur among the states with respect to their national ranking. Tennessee, for example, moves from 33

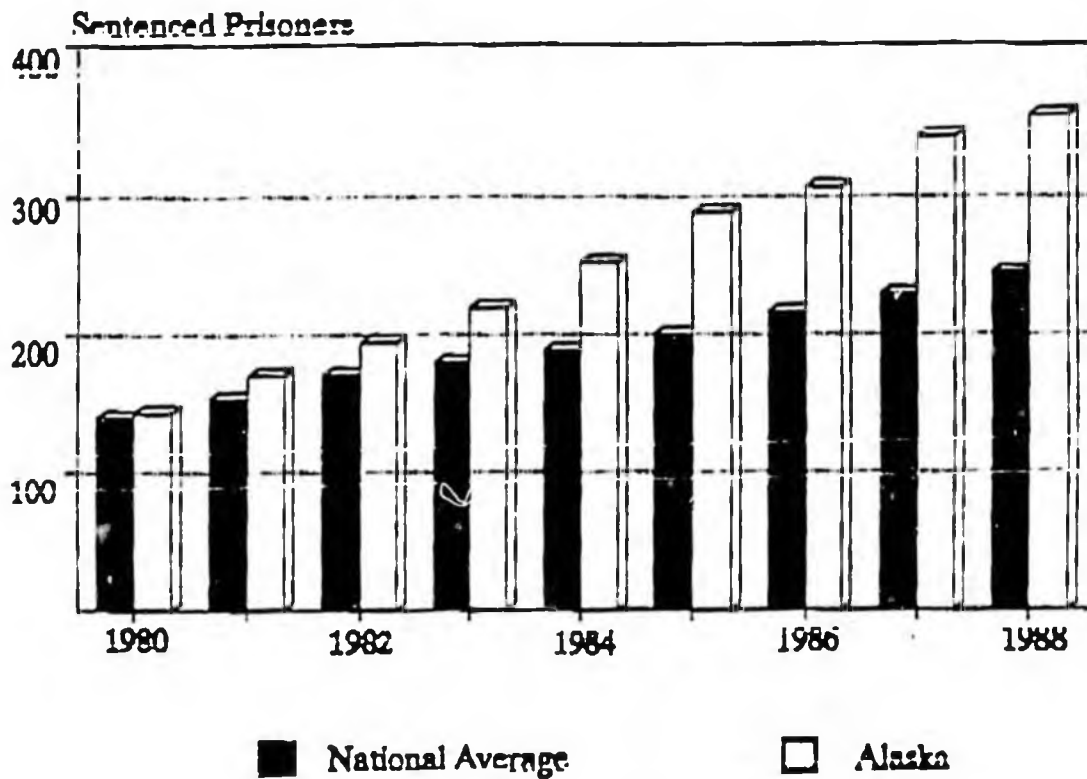
to 13 in total incarceration, in part because the state houses many state prisoners in local jails due to a consent decree restricting prison populations. The same phenomenon also explains increases in rankings for other states including New Jersey, Texas, and Louisiana.

Connecticut, on the other hand, moves down to a rank of 36 for total incarceration compared to a rank of 18 for imprisonment. Similar declines for other states, such as Hawaii, Rhode Island and Vermont, simply reflect that they also have consolidated jail and prison systems.

Alaska Department of Corrections

# Trends in Alaska Corrections

### Rates of Incarceration \* National Average vs Alaska



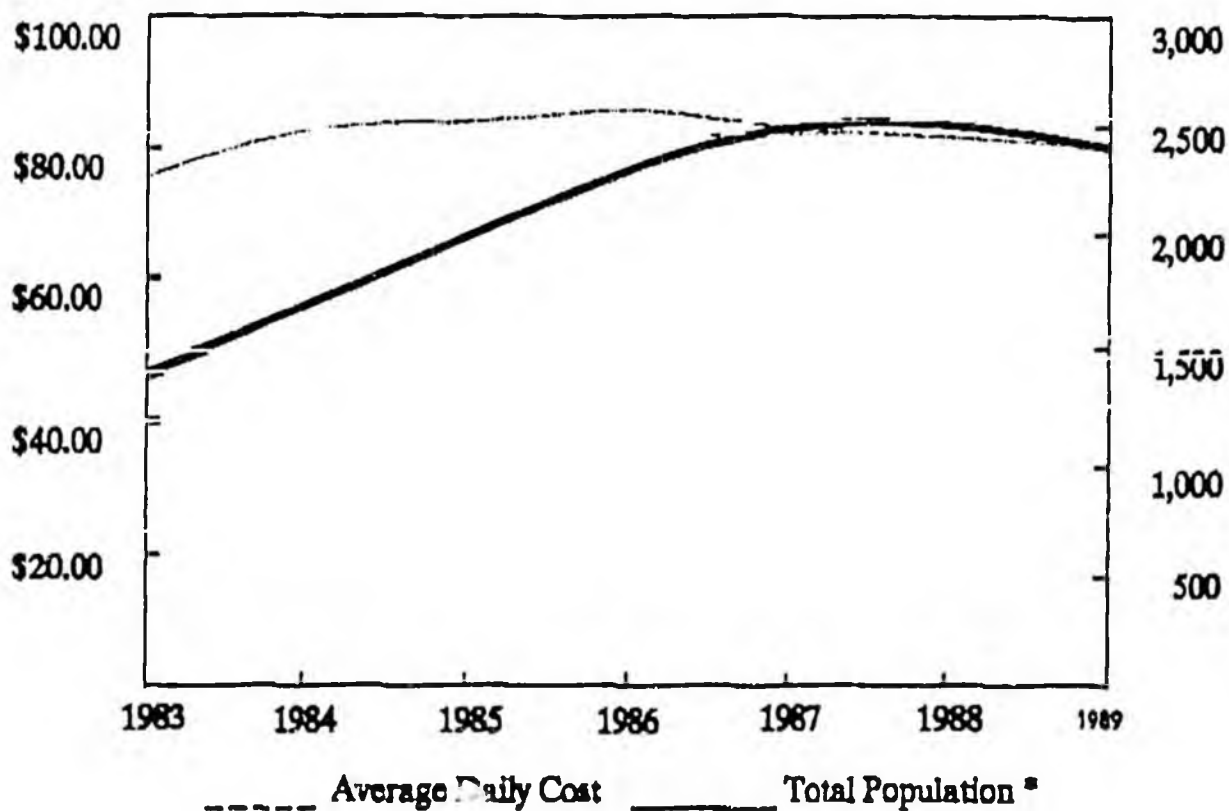
\* Rate per 100,000 resident population  
 Figures from Bureau of Justice Statistics, U.S.  
 Department of Justice

Department of Corrections

	<u>FY 85</u>	<u>FY 86</u>	<u>FY 87</u>	<u>FY 88</u>	<u>FY 89</u>	<u>FY 90</u>
Number of Inmates	2,027	2,340	2,491	2,541	2,603	2,846
Number of Employees	993	1,003	999	1,150	1,269	1,277
Operating Budget	\$71,497.2	\$78,470.6	\$78,291.4	\$84,935.2	\$94,624.3	\$96,759.9

## Trends in Alaska Corrections

Population vs Cost of Supervision  
Fiscal Year 1983 - 1989



\* Total population on December 31st of each year

## FISCAL NOTE

**REQUEST:**

Revision Date: \_\_\_\_\_ Agency Affected: Department of Corrections  
 Title: "An Act authorizing the Department of Corrections to establish..." BRU: \_\_\_\_\_  
 Sponsor: Reps. Koponen, Gruenberg Components: \_\_\_\_\_  
 Requestor: \_\_\_\_\_

**EXPENDITURES/REVENUES:** (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES	84.6	84.6	84.6	84.6	84.6	84.6
TRAVEL	7.5	7.5	7.5	7.5	7.5	7.5
CONTRACTUAL	180.0	180.0	180.0	180.0	180.0	180.0
SUPPLIES	25.0	25.0	25.0	25.0	25.0	25.0
EQUIPMENT	101.0		96.0		96.0	
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>398.1</b>	<b>297.1</b>	<b>393.1</b>	<b>297.1</b>	<b>393.1</b>	<b>297.1</b>
<b>CAPITAL</b>	<b>96.0</b>		<b>96.0</b>		<b>96.0</b>	
<b>REVENUE</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>	<b>-0-</b>

**FUNDING:** (Thousands of Dollars)

GENERAL FUND	302.1	297.1	297.1	297.1	297.1	297.1
FEDERAL FUNDS						
OTHER	96.0		96.0		96.0	
<b>TOTAL</b>	<b>398.1</b>	<b>297.1</b>	<b>393.1</b>	<b>297.1</b>	<b>393.1</b>	<b>297.1</b>

**POSITIONS:**

FULL-TIME	1	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

**ANALYSIS :** (Attach a separate page if necessary)

See Attached.

*Susan E. Knighton*

Prepared by: Susan E. Knighton, Director Phone: 465-3376  
 Division: Administrative Services Date: 03/20/90  
 Approved by Commissioner: Susan Humphrey-Barnett Date: 03/20/90  
 Agency: Department of Corrections

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

FISCAL NOTE  
HB 544  
Page 2

ANALYSIS

This legislation, as currently worded could have a tremendous fiscal impact upon the Department of Corrections. Legal counsel has advised us that the phrase "alternative sentencing programs and training, counseling, and " may be interpreted to expand the State's liability in the areas of training and counseling and cause the need to expend significantly more monies in this area to limit this liability. A conservative estimate of yearly funding to provide inmates with additional training and counseling is \$398.1 and is based upon requested but unfunded FY91 needs in statewide programs.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

MICHAEL CLEARY, DEMETRY KENEZUROFF, )  
HARRY MORGAN, BOB OWEN, THOMAS WALTER, )  
and ERNEST MORGAN, on behalf of )  
themselves and all other persons who )  
are now or will be similarly situated, )

Plaintiffs, )

vs. )

ROBERT SMITH, Commissioner, Department )  
of Health and Social Services; ROGER )  
ENDELL, Director, Division of Adult )  
Corrections, Department of Health and )  
Social Services; VERNON CAULKINS, )  
Assistant Director, Division of Adult )  
Corrections, Department of Health and )  
Social Services; REVEREND WILLIAM LYONS, )  
BEVERLY DUNHAM, FREDERICK PETTYJOHN, AL )  
WIDMARK, and CONRAD MILLER, all of the )  
Alaska Parole Board; SAMUEL TRIVETTE, )  
Executive Director of the Alaska Board )  
of Parole; and their subordinates, )  
employees, and agents, )

Defendants. )

Case No. 3AN-81-5274 Civil

MEMORANDUM DECISION  
AND FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Introduction

In this Memorandum Decision, the Court explains its principal findings of fact and conclusions of law adopted in this case. Separate, detailed sets of findings of fact and conclusions of law, along with a separate order setting forth specific remedies, have been issued simultaneously with this Memorandum Decision.

Initially, the Memorandum Decision summarizes the Court's findings of fact and conclusions of law. The Decision then discusses the procedural background of this complex litigation, and then addresses general principles of law applicable to this case, as well as general findings of the Court. Thereafter, the Decision separately considers each issue litigated at trial, namely, overcrowding, health care, search and seizure, staffing, training, programs, access to files, regulations and

urinalysis testing. Remedies and attorneys' fees and costs are briefly discussed at the end of the Decision.

## II. Summary

The Court's most significant findings of fact and conclusions of law, and remedies, are summarized on an issue-by-issue basis below.

### A. Legal Principles Generally

Consistent with applicable federal authority, the Court has adopted the "cruel and unusual punishment" standard evolved under the Eighth Amendment to the United States Constitution for analyzing prison conditions of convicted and sentenced prisoners, and the punishment standard evolved under the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution for analyzing prison conditions for pretrial detainees. The Court has also adopted the "totality of conditions" analysis of federal cases under federal law in examining plaintiffs' federal and state constitutional claims in this case.

The Court has also interpreted the cruel and unusual punishment prohibition of Article I, §12 of the Alaska Constitution for sentenced offenders, as well as the due process clause of Article I, §7 of Alaska's Constitution for pretrial detainees, in a manner similar to the federal standards. The Court has additionally looked to relevant Alaskan statutory authorities, e.g. AS 33.30.020, in considering plaintiffs' claims.

### B. Analysis Of Individual Issues

#### 1. Overcrowding

Generally, the Court concludes that defendants' institutions were not, at the time of trial, unconstitutionally overcrowded. In so holding, the Court concludes that "double bunking" of cells is not unconstitutional per se, but that the "totality of conditions" of each institution must be considered.

The Court finds and concludes that the single largest and most difficult problem facing defendants and DCC is "overcrowding:" defendants' ability to provide, through limited resources, constitutionally adequate housing, staffing and programming for Alaska's spiraling prison population. Alaska's

prisons were, at the time of trial, generally filled to their operating capacities and/or extended capacities, and indeed, have occasionally exceeded such capacities. The Court concludes that in order to prevent unconstitutionally overcrowded housing conditions from occurring in such prisons, presumptive population "caps" or ceilings for each institution, and for the state-wide system generally, must be established. In a "tentative decision," the Court has tentatively established such population "caps" for each institution and for the system. After an opportunity for comment from the parties, such decision will be transformed into a final order.

The Court also finds that defendants' prison population projections for the near future, and plans to accommodate such population increases, are unreliable. First, although defendants have examined the frequency of prison admissions over the recent past, defendants admittedly have not studied the effects of Alaska's presumptive sentencing scheme, and have not factored such effects into their population projections. Understanding the effects of Alaska's presumptive sentencing scheme on Alaska's increasing prison populations is, in the Court's view, critical to making credible population projections in the future. Second, the Court finds that defendants' ambitious construction and expansion plans to meet such increased populations also lack credibility. One set of plans was presented at trial, and a vastly different set of plans was offered at a post-trial, post-legislative hearing. Accordingly, the Court has ordered defendants to conduct a reliable study of the effects of Alaska's presumptive sentencing on DOC's prison population projections, and to report to the Court, at a subsequent hearing, on such revised population projections along with defendants' revised plans to meet prison population increases.

The Court has also ordered certain other relief in connection with the housing of inmates in nonresidential areas of defendants' institutions, multiple occupancy of punitive and administrative cells, and defendants' long term plans for Third

Avenue, Pidgeview, and dormitory residential arrangements at the various institutions.

The Court also finds that the costs of increased prison populations present serious financial burdens to defendants. Specifically, the Court finds the cost of maintaining a prisoner in an institutional bed to be approximately \$75.00 per day; in a halfway house bed to be approximately \$43.00 per day; and under parole or probationary supervision to be approximately \$2.50 per day; and the ratio of operating costs to construction costs, over 30 years, to be 16 to 1.

The Court also concludes that to meet Alaska's spiraling prison population, defendants will likely have to involve various alternatives currently available to them, including procuring or building new housing, expanding the use of halfway houses, increasing the use of work and rehabilitation furloughs, and continuing the use of the executive clemency or commutation program.

## 2. Health Care

The Court finds and concludes that generally, defendants' health care system meets constitutional and statutory requirements. Areas where improvements are indicated include backup physician services in the Anchorage bowl area, mental health and psychiatric or psychological services in the more remotely located institutions, increased dental care services, increased medical-related transportation services, and a medical records clerk position for Anchorage.

The Court has also required defendants to promulgate a regulation or policy requiring medical personnel only to dispense medications to inmates.

## 3. Search And Seizure

The Court concludes that prisoners retain diminished rights to privacy under the federal and state constitutions. The Court also concludes that random and unannounced cell searches or "shake-down" searches, even in the absence of the

prisoner, do not violate federal or state constitutional privacy provisions.

With respect to "strip" searches or visual body cavity searches, the Court concludes that under Alaska's Constitution, defendants must have, in non-emergency, non-contact visit situations, a reasonable basis to conclude that contraband is being concealed by inmates on their person before conducting such searches.

With respect to intrusive body cavity searches, the Court concludes that under Alaska's Constitution, defendants must have a showing of probable cause to believe that contraband is being secreted in a prisoner's body cavity before conducting an intrusive body cavity search. Additionally, such searches must be conducted by medical personnel only.

Defendants have been ordered to submit proposed regulations and/or policy statements conforming to the Court's conclusions and holdings.

#### 4. Adequacy of Staffing

Generally, the Court finds and concludes that defendants' level of staffing throughout its institutions meets minimal constitutional and statutory requirements. In so holding, however, the Court notes that defendants' expert, Dr. Allen Ault, recommended that defendants obtain 184 new staff positions system-wide in 1984, but that the legislature appropriated funds for less than 50% of such positions recommended. The Court also notes that certain institutions, notably CIPT, were marginally staffed at the time of trial. The Court generally finds that staffing needs will increase with increased prison populations, additional institutions, and programming needs. Accordingly, the Court has ordered defendants to report to the Court, at a hearing in the future, on the level of staffing funded by this year's legislative session.

#### 5. Training

The Court finds and concludes that generally, the training procedures and activities of defendants are

constitutionally adequate. The Court declines to require, as a matter of constitutional or statutory requirement, any particular entrance-level screening instrument to be utilized by defendants. The Court finds that the recommendation of experts to the effect that additional training in areas such as cross-cultural awareness, interpersonal skills, communications abilities and the like, are sensible, and recommended. The Court has required defendants to submit to the Court a proposed regulation or policy statement regarding the retraining of corrections officials who have been disciplined or suspended.

#### 6. Rehabilitative Programming

The Court has held that under the "reformation principle" of Article I, §12 of the Alaska Constitution, prisoners have a right to receive, and correctional officials have an obligation to provide, at least minimal rehabilitative programming offerings, adopted in good faith and on a rational basis by correctional officials, and designed to assist prisoners in reforming their criminal conduct and rehabilitating themselves into useful, contributing members of society. Statutory authority, including AS 33.30.020, likewise requires the provision of some rehabilitative programming to prisoners, including pretrial detainees. The Court also holds that prisoners have standing to litigate the issue of their right to receive reformation programming or treatment.

In so holding, however, the Court concludes that neither the Alaska Constitution nor Alaska statutes guarantee or assure any particular prisoner or groups of prisoners that they will, in fact, be rehabilitated or reformed by the end of their incarceration. Nor has the Court held that prisoners must receive rehabilitative programming at all times during their period of incarceration. Finally, the Court has not held that any single or particular model or theory of rehabilitative programming -- including the so-called "cognitive deficit theory" or model urged by the plaintiffs at trial -- is mandated by Alaska's Constitution or statutes.

The Court generally finds that, with certain exceptions, the defendants' programming offerings throughout their institutions meet the requirements of Article I, §12 of the Alaska Constitution as well as relevant statutory provisions.

The Court finds, however, that as of the time of trial, no ongoing evaluation study has been utilized by defendants to determine the efficacy of their programming. Accordingly, the Court has ordered defendants to develop and implement a medium and long term evaluation study, including recidivism studies, to provide defendants with information by which they may be able to evaluate the efficacy of rehabilitative programs, and mixes of programs, offered to particular inmates.

The Court also concludes that defendants' policy of requiring prisoners to have a high school or G.E.D. diploma and to score at the 9th grade functional level on the Iowa Basic Skills Test, before being given access to post-secondary educational classes, is arbitrary, inconsistent with applicable statutes, and invalid. Defendants are ordered to discontinue this policy.

The Court finds that the use of entry-level, basic needs screening procedures and tests is desirable, but requires defendants to utilize testing instruments which are validated and "normed" for prisoners taking the test, particularly including minority prisoners, such as Alaska Natives.

Finally, the Court has ordered the provision of additional limited programming offerings at Fairbanks Correctional Center for women inmates, Third Avenue, and Ketchikan Correctional Center (post-secondary educational offerings).

Of general concern to the Court is the serious problem of idleness which exists to varying degrees throughout the institutions in Alaska's correctional system. The availability of meaningful work opportunities, along with rehabilitative programming offerings, would reduce the level of idleness throughout the system, increase rehabilitative prospects, and decrease the risks of violence, conflict and tension.

7. Access To Files

The Court concludes that there is no merit to plaintiffs' contention that defendants' procedures and restrictions on access to prisoners' files violate prisoners' statutory or constitutional rights.

8. Constitutionality Of Regulations

The Court concludes that three of defendants' regulations are invalid or unconstitutional, and must be revised.

Specifically, the Court holds that 7AAC 60.400(b)(21), which defines "prohibited conduct," including a "major infraction" is unconstitutionally vague.

The Court also holds that 7AAC 60.320(a), and 7AAC 60.330, which disqualify prisoners from consideration for eligibility for work furloughs until they have six months or less remaining on their sentences is arbitrary, irrational, and inconsistent with AS 33.30.250(g).

The Court also holds that 7AAC 60.335, pertaining to the revocation of furlough without a prerevocation hearing, in the absence of an emergency, is unconstitutional.

The Court has ordered defendants to submit revised drafts of the foregoing regulations, consistent with these holdings, within 30 days.

9. Constitutionality Of Urinalysis Testing Program

The Court has rejected as without merit plaintiffs' claims that disparate sentences imposed on different inmates resulting from positive urinalysis tests are unconstitutional or unlawful.

The Court also finds that defendants' present policy and practice of preserving urine samples until the conclusion of any disciplinary proceeding, to enable a prisoner to have a separate analysis conducted thereon at his own expense, is appropriate and should be continued in the future.

C. Remedies

The Court has ordered a number of specific remedies in a simultaneously-issued remedial order.

Generally, the Court does not intend to engage in any day-to-day management or administration of Alaska's prisons or prison system. Rather, the Court will monitor compliance with the partial settlement agreements previously entered herein, as well as the remedial order issued simultaneously herewith. In so doing, the Court will continue to use a Special Master as may be appropriate, and will continue to require periodic compliance reporting and/or will hold such additional hearings in the future as may be appropriate.

D. Attorneys' Fees And Costs

The Court has concluded that on balance, plaintiffs are the prevailing parties in this litigation, in view of the substantial change in defendants' policies, practices and procedures effected, prompted and/or adjudicated as a result of the two settlement agreements previously entered herein, and the trial herein.

### III. Procedural Background

This complex prisoners' rights class action was originally brought in 1981. Over the ensuing several years, the scope of the litigation was expanded, through four successive amendments to the complaint, to assert the alleged rights of three "sub-classes" of plaintiffs-prisoners confined in correctional institutions maintained by the State of Alaska and in institutions maintained by the Federal Bureau of Prisons (FBOP) under contract to the State of Alaska. In their Fourth Amended Complaint For Declaratory Judgment And Injunctive Relief, filed herein on April 22, 1983, the various sub-classes of plaintiffs challenged a variety of conditions at each of the adult correctional institutions operated by or under contract to Alaska's Department of Corrections ("DOC" or "Department"). The plaintiffs sought extensive declaratory judgment and injunctive relief in their complaints pursuant to federal and state constitutions and statutes, and 42 U.S.C. §1983.

#### Parties

More specifically, sub-class A of the plaintiffs' class consists of all persons who are or will be confined as pretrial detainee prisoners in adult correctional institutions owned or operated by the State of Alaska. Sub-class B consists of all other prisoners who are, or will be, so confined with certain limited exceptions. Sub-class C consists of all Alaskan prisoners who are or will be confined in penal institutions outside of the State of Alaska which are owned or operated by FBOP.

The defendants named in this action are the Commissioner of the Department of Health and Social Services, Robert Smith; the Commissioner of DOC, formerly the Division of Adult Corrections, Roger Endell; the Deputy Commissioner of Corrections, Kevin Bruce (substituted by operation of law by Vernon Caukins, Assistant Director, Division of Adult Corrections); the members of the Alaska Parole Board and the Executive Director of the Alaska Parole Board.

### Partial Settlement Agreements

In 1982, during the pendency of this litigation, the parties engaged in extensive settlement discussions toward the end that many of the issues and claims initially brought by the plaintiffs were settled. As a result of such negotiations, two detailed and extensive settlement agreements were reached.

The first settlement agreement, the Partial Settlement Agreement And Order As To Sub-classes A and B, was executed by the parties, approved by the plaintiffs' class action, and ultimately approved by the Court on January 21, 1983. Among other things, this settlement agreement resolved issues and plaintiffs' claims regarding the following conditions or issues relating to the in-state correctional facilities: lighting, heat, ventilation and noise; clothing, bedding, hygiene and sanitation; exercise and recreation; prisoner visitation rights; telephone and mail communications; attorney-client relationships and activities; law library and prisoner access to the library and books; safety issues; certain counseling, drug and alcohol treatment issues; food service issues; certain issues regarding staff training; fire and safety and other codes; provision of certain inmate information; certain pretrial detainee rights; certain rehabilitation and treatment issues; certain pre-release and post-release support services; certain staffing issues; the establishment of a "classification" system; the development of disciplinary procedures; the establishment of staff advocates; issues regarding administrative segregation of prisoners; parole preparation issues; a procedure prohibiting retaliation against the filing of grievances; various fire and life safety issues; certain health care issues; the submission of periodic compliance reports; reasonable plaintiffs' attorney fees and costs; commissary issues; transportation issues; certain overcrowding questions; certain issues regarding religion; various infractions and penalty procedures; and other matters. As discussed below, this partial settlement agreement left unresolved a

limited number of claims of subclasses A and B, which were ultimately tried.

The second settlement agreement, Settlement Agreement And Order With Respect To Sub-Class C, executed by the parties, approved by the subclass C plaintiffs, and ultimately approved by the Court on February 4, 1982, addressed the return of Alaskan prisoners housed in FBOP facilities on or before December 31, 1987, on the condition that DOC receive legislative appropriations sufficient for the construction of a sizeable correctional facility; the development of interim standards for the transfer of Alaskan prisoners to FBOP facilities; the development of procedures for psychiatric transfers; the development of interim standards for return; the need for tentative release dates; the availability of legal materials; access to attorneys issues; the development of standards for determining statutory good time; certain Parole Board procedures; the establishment of DOC staff positions for dealing with inmates incarcerated in FBOP facilities; the establishment of classification hearings; the question of access to records; compliance procedures; and also the issue of plaintiffs' attorney fees and costs. The second settlement purported to settle all of sub-class C's claims in this litigation.<sup>1</sup>

#### Special Master For Noncompliance Issues

In connection with the foregoing settlement agreements, the Court appointed a local attorney, Eric T. Sanders, to serve as the Court's Special Master to monitor compliance with

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<sup>1</sup> A separate "Interim Settlement Agreement Regarding Third Avenue Correctional Institution" and pertaining to the availability of exercise and recreation at such institution, ventilation and fire and life safety issues, was executed by the parties and approved by the Court on August 13, 1982. Similarly, a second "Interim Settlement Agreement Regarding Pretrial Detainees At Fairbanks And Juneau Correctional Institutions" providing for separate housing for felons and pretrial detainees, telephone call procedures, recreation, medical care, punitive segregation procedures, contact visitation procedures, and other issues, was executed by the parties and approved by the Court on August 4, 1982.

the agreements and to initially hear any contentions regarding noncompliance with or violations of the provisions of the agreements. Several hearings on such noncompliance (or contempt allegations) have been, and are being, held by the Special Master.<sup>2</sup> Such issues were not presented at the trial herein, and will not be addressed in the instant Memorandum Decision or accompanying findings of fact and conclusions of law.

#### Classification Procedure

A separate set of hearings and proceedings has been held regarding the development of a classification plan by defendants for convicted and sentenced inmates as well as for pre-trial detainees. The hearings on such issues and related proposed administrative regulations were also not a part of the instant trial proceedings, and will also not be addressed in this Memorandum Decision or the accompanying findings of fact and conclusions of law.

#### Issues Remaining For Trial

Following the execution of the two partial settlement agreements, the parties continued their negotiations over the remaining issues in this action. By September, 1983, the parties were able to resolve only three additional issues: plaintiffs' claims regarding a marriage policy, access to cabin paper and pens, and visitation hours. The parties were unable to reach agreement on any other issues, which were then remaining to be tried.

A dispute arose between the parties as to what issues had been settled, and what issues remained preserved for trial in this matter. See Statement of Unresolved Issues, filed by plaintiffs on September 23, 1983; and defendants' Statement of

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<sup>2</sup>In late 1984, following DCC Commissioner Endell's July, 1984 testimony indicating a disinclination to return Alaskan inmates housed in FBOP facilities to Alaskan facilities due to inadequate financial resources, Subclass C brought a contempt or non-compliance motion and sought a hearing. That matter is still pending.

Issues, filed on September 26, 1983. Following consideration of defendants' Motions For Partial Dismissal And Exclusion Of Evidence, as well as the parties' cross-motions for summary judgment on the urinalysis testing question, the Court issued two orders on January 3, 1984, clarifying the issues remaining for trial as follows:

1. Overcrowding (generally);
2. Health care (limited to the issues of medical staffing and practices or procedures generally);
3. Search and seizure (excluding defendants' procedures regarding inmate mail and telephone monitoring);
4. Adequacy of staffing;
5. Training of staff members;
6. Adequacy of educational, work and rehabilitation programs (including the alleged unconstitutional denial of inmate access to higher education);
7. Inmate access to records files;
8. Constitutionality of regulations contained in AAC 60 (except as specifically addressed in the Partial Settlement Agreement); and
9. Constitutionality of defendants' urinalysis testing program (insofar as this issue was left open following the Court's ruling on the parties' cross-motions for summary judgment as to this issue). See Order Granting in Part and Denying in Part Defendants' Motions for Partial Dismissal and Exclusion of Evidence; and Order Regarding Parties' Cross Motions for Summary Judgment on the Issue of Defendants' Urinalysis Testing Policies and Procedures; both dated January 3, 1984.

The thirteen in-state correctional facilities (owned or operated by DCC) which were the subjects of plaintiffs' class claims, are:

1. Third Avenue (in Anchorage)
2. Ridgeview (a misdemeanor housing facility in Anchorage)

3. Cook Inlet Pre-Trial ("CIPT") (a pretrial detainee facility in Anchorage)
4. Wildwood (near Kenai)
5. Fairbanks
6. Nome
7. Lemon Creek (in Juneau)
8. Johnson Human Services Center ("JHSC") (a women's and juvenile facility in Juneau)
9. Hiland Mountain Correctional Center ("HMCC") (a men's facility near Eagle River)
10. Meadow Creek Correctional Center ("MCCC") (a women's facility near Eagle River)
11. Ketchikan
12. Palmer Minimum (a minimum security work camp)
13. Palmer Medium<sup>3</sup>

Throughout the course of this litigation, several pre-trial orders were issued and trial dates set. Ultimately, the trial commenced on January 4, 1984, and continued for approximately two months. The issues were tried to the Court, sitting without a jury. The parties presented nearly 100 witnesses (both live and by deposition), extensive briefing and legal argument, and various demonstrative aids, charts and diagrams. Approximately 290 plaintiffs' exhibits and 80 defendants' exhibits were admitted into evidence at trial. Following the conclusion of the case, the parties submitted, on April 5, 1984 and April 19, 1984, written summations along with proposed findings of fact and conclusions of law, totaling hundreds of pages.

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<sup>3</sup>The DOC-operated facility at 6th and C Streets in Anchorage was the subject of a prior suit, Mosely v. Beirne, 3AN-76-1899 Civil. After a final post-trial order was entered therein by Judge Carlson, that action was consolidated into this action. No evidence was presented at trial regarding conditions at 6th & C.

New DCC facilities at Nome, Bethel and "Goose Bay" (near Wasilla) were not yet built or opened at the time of trial, but were, to varying degrees, discussed at trial.

### Tours Of Prisons

Following the conclusion of the main trial herein, and during late March of 1984, the Court took a "view" or personally inspected each of the thirteen facilities which had been the subject of litigation in this trial. On such inspection tours, the Court was accompanied by counsel for both parties and/or their representatives, as well as the Special Master on certain occasions. After each inspection tour, the Court dictated on a cassette tape a summary of the activities which occurred at such institution, and made such cassette tapes a part of the record of this trial proceeding.

### July 13 And 23, 1984 Hearing

At the trial, the testimony of certain key officials of defendant DOC, such as Commissioner Roger Endell and Deputy Commissioner Kevin Bruce, outlined DOC's proposed building and expansion plans designed to accommodate increases in Alaska's prison population. Such plans, in turn, depended upon funding from the 1984 Alaska Legislature, which was in session at the time of this trial. In view of the dependency of such plans on the appropriation of funding by the legislature, the Court felt it would be useful to hold a supplemental evidentiary hearing, following the conclusion of the 1984 legislative session, in order to update defendants' evidence in these areas. Two days of hearing were held on July 13, 1984 and July 23, 1984. Additional testimony was taken from various witnesses, including Susan Knighton, Commissioner Endell, and Programming Director Susan Humphrey Barnett. The parties then submitted, on August 2 and 3, 1984, supplemental proposed findings of fact and conclusions of law pertaining to the evidence adduced at the July 13 and 23 hearing.

### Motions

At the close of plaintiffs' evidence during trial herein, defendants filed, on January 23, 1994, a Motion for Judgment in Favor of Defendants on Specified Issues. Defendants sought therein judgment on the issues of search and seizure, use

of urinalysis testing, adequacy of prison staffing, training of prison staff, access to inmate files, and health care. The motion was taken under advisement at the time, and the trial proceeded to a conclusion.

Similarly, in July of 1984, defendants filed another motion, i.e., their Motion for Judgment on Search and Seizure Issues. The parties submitted additional briefing and memoranda on this latter motion. Both of defendants' motions will be addressed under the appropriate subject headings below.

With the submission of the parties' supplemental proposed findings of fact and conclusions of law following the July 13 and 23 hearing, the trial proceedings on the issues litigated were concluded, and the Court took the matters under advisement. The instant Memorandum Decision, along with the accompanying findings of fact and conclusions of law and order, set forth the Court's adjudications of each of these issues.

#### IV. Legal Principles - Generally

##### A. The Federal Constitutional Standards

For purposes of defining the applicable federal constitutional standard to be applied to the conditions challenged in Alaska's prison system, pretrial detainees and convicted prisoners must be considered separately.

###### 1. Convicted Prisoners

Convicted prisoners are protected by the Eighth Amendment to the United States Constitution which prohibits the imposition of cruel and unusual punishment. The Eighth Amendment has been made applicable to the states through the Fourteenth Amendment. Like most constitutional declarations, the exact meaning of "cruel and unusual punishment" is less than clear. Consequently, courts have, in interpreting this concept, looked to the broad principles underlying the constitutional terms. "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. [T]he words of the Amendment are not precise, and ... their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 100-101, 78 S.Ct. 590, 598, 2 L.Ed.2d 596 (1958) (footnote omitted). The Amendment prohibits penalties "that transgress today's 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency.'" Hutto v. Finney, 437 U.S. 678, 685, 98 S.Ct. 2565, 2571, 57 L.Ed.2d 522 (1978) (quoting Estelle v. Gamble, 429 U.S. 97, 102, 197 S.Ct. 285, 290, 50 L.Ed.2d 251 (1976)). Conditions of confinement, even those that compose the punishment at issue, "must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment." Rhodes v. Chapman, 452 U.S. 337, 347, 69 L.Ed.2d 59, 69 (1981).

###### 2. Pretrial Detainees

The conditions under which unconvicted persons are imprisoned are to be judged by the due process standard of the

Fifth and Fourteenth Amendments. Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). Since the due process clause prohibits punishment prior to conviction, the constitutional issue rests on a determination of whether the conditions of confinement are punitive in nature. This inquiry, in turn, looks first to whether the detention officials have acted with intent to punish the inmates. Even if no express intent is shown, such unconstitutional intent to punish may be inferred by the court. This inference hinges upon whether "a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective" or whether "it is arbitrary or purposeless." Bell v. Wolfish, 441 U.S. at 539. "Legitimate governmental objectives" include insuring the detainees' presence at trial, managing the facility and maintaining jail security. Id. at 540. In deciding whether a specific condition bears a reasonable relation to a legitimate corrections objective, courts must be mindful that, "in the absence of substantial evidence in the record to indicate that [corrections] officials have exaggerated their response to [considerations of management, security and order], courts should ordinarily defer to their expert judgment in such matters." Id. at n.23, (quoting Pell v. Procunier, 417 U.S. 816, 827, 41 L.Ed.2d 495 (1974)).

In addition, the Court in Bell recognized that pretrial detainees "retain at least those constitutional rights that ... are enjoyed by convicted prisoners." Id. at 545, 99 S.Ct. at 1877. Within a given institution, then, conditions found to constitute cruel and usual punishment when imposed on convicted inmates would also be viewed as unconstitutional punishment when imposed on similarly situated unconvicted detainees. See Inmates of Allegheny County Jail v. Pierce, 612 F.2d 754, 762 (3rd Cir. 1979); Detainees of Brooklyn House of Detention for Men v. Malcolm, 520 F.2d 392, 398 (2d Cir. 1975).

In applying these constitutional standards, courts must be mindful of their limited role in reviewing the practices

of penal institutions. In the absence of constitutional (or statutory) violations, courts normally should defer to the judgment of prison administrators. See Bell v. Wolfish, *supra*, 441 U.S. at 538-539, 99 S.Ct. at 1873-1874; Pell v. Procunier, 417 U.S. 817, 827, 94 S.Ct. 2800, 2806, 41 L.Ed.2d 495, 504 (1974). Nevertheless, courts must not "abdicate [their] constitutional responsibility to delineate and protect fundamental liberties." Pell, 417 U.S. at 827, 94 S.Ct. at 2806, 41 L.Ed.2d at 504.

### 3. "Totality of Conditions" Analysis

In cases challenging conditions of confinement in prisons, some courts have employed a "totality of conditions" approach, whereby the constitutionality of challenged conditions is examined not only as to each condition in isolation, but also as to the cumulative effects of the conditions on the inmate population. The rationale to this approach is stated in Laaman v. Helgemoe, 437 F.Supp. 269, 323 (D.N.H. 1977) (cited with approval in Rhodes v. Chapman, 452 U.S. 337, 364, 69 L.Ed.2d 59, 80 (1981) (Brennan, J., concurring)):

The touchstone is the effect upon the imprisoned. Where the cumulative impact of the conditions of incarceration threatens the physical, mental, and emotional health and well-being of the inmates and/or creates a probability of recidivism and future incarceration, a federal court must conclude that imprisonment under such conditions does violence to our societal notions of the intrinsic worth and dignity of human beings and, therefore, contravenes the Eighth Amendment's proscription against cruel and unusual punishment.

### 4. "Basic Needs" Analysis

Several United States Circuit Courts of Appeals, however, have rejected the "totality of conditions" analysis for a "basic needs" approach, reasoning that:

'An institution's obligation under the eighth amendment is at an end if it furnishes sentenced prisoners with adequate food, clothing, shelter, sanitation, medical care, and personal safety.'

. . .

There is no Eighth Amendment violation if each of these basic needs is separately met. A number of conditions, each of which

satisfy Eighth Amendment requirements, cannot in combination amount to an Eighth Amendment violation.

Hoptowit v. Ray, 682 F.2d 1237, 1246-47 (9th Cir. 1982) (citation omitted).

5. United States Supreme Court's Approach

The "totality of conditions" approach seems to have been adopted by the Supreme Court in several cases. For instance, in Hutto v. Finney, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), the Court affirmed a lower court's remedial order regarding isolated confinement by noting that:

The court was entitled to consider the severity of . . . [past constitutional] violations in assessing the constitutionality of conditions in the isolation cells. The court took note of the inmates' diet, the continued overcrowding, the rampant violence, the vandalized cells, and the 'lack of professionalism and good judgment on the part of maximum security personnel.' The length of time each inmate spent in isolation was simply one consideration among many. We find no error in the court's conclusion that, taken as a whole, conditions in the isolation cells continued to violate the prohibition against cruel and unusual punishment.

437 U.S. at 687, 98 S.Ct. at 2571, (emphasis added; citation omitted). And in Rhodes v. Chapman, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981), the Court stated that:

Conditions other than those in Gamble [denial of medical care] and Hutto [deprivation of basic human needs, including nourishment], alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities. Such conditions could be cruel and unusual under the contemporary standard of decency that we recognized in Gamble.

452 U.S. at 347, 69 L.Ed.2d at 69. In his concurring opinion in Rhodes, Justice Brennan explained that:

It is important to recognize that various deficiencies in prison conditions 'must be considered together.' The individual conditions 'exist in combination; each affects the other; and taken together they [may] have a cumulative impact on the inmates.' Thus, a court considering an Eighth Amendment challenge to conditions of confinement must examine the totality of the circumstances." Even if no single condition of confinement would be unconstitutional in itself, 'exposure to the cumulative effect

of prison conditions may subject inmates to cruel and unusual punishment.'

n. The Court today adopts the totality-of-the-circumstances test.

452 U.S. 337, 362-63 (concurring opinion) (citations omitted).

To the extent applicable, this Court has also adopted and applied the "totality of conditions" approach in analyzing plaintiffs' federal constitutional claims in this case. Thus, the Court has looked to the entire record at trial in analyzing each of the specific claims or issues presented at trial.<sup>4</sup>

B. The Alaska Constitutional Standards

1. Convicted Prisoners

Alaska's Constitution also contains a "cruel and unusual punishment prohibition," similar to the Eighth Amendment to the United States Constitution. Specifically, Article I, § 12 of Alaska's Constitution provides:

Section 12. Excessive Punishment. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and [unusual] punishments inflicted. Penal administration shall be based on the principle of reformation and upon the need for protecting the public.

The standard for determining what constitutes cruel and unusual punishment was set out by the Alaska Supreme Court in Green v. State, 390 P.2d 433, 435 (Alaska 1964):

Only those punishments which are cruel and unusual in the sense that they are inhuman or barbarous, or so disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice may be stricken as violating the due process [and cruel and unusual punishment] clauses  
....

(Footnotes omitted); see also Thomas v. State, 566 P.2d 630, 635 (Alaska 1977).

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<sup>4</sup> Although plaintiffs were precluded from asserting, on the eve of trial, a separate "totality of conditions" claim, since that issue was not included in plaintiffs' September 23, 1983 Statement of Unresolved Issues, the Court did expressly allow plaintiffs to make legal arguments and to propose remedies pursuant to such theory on the basis of the evidence actually adduced at trial. See January 3, 1984 Order Granting In Part And Denying In Part Defendants' Motions For Partial Dismissal.

Since this standard is, if anything, more stringent than the "evolving standards of decency" test which this Court must apply in an Eighth Amendment analysis, any conduct violative of the state constitutional standard will also necessarily violate the federal constitutional standard, and so, no separate analysis under the state constitution is required.

2. Pretrial Detainees

Consistent with the foregoing federal constitutional analysis and authorities, this Court holds that the due process clause of Alaska's Constitution, Article I, §7, applies to persons who are not convicted of crimes but who have been arrested and detained or incarcerated prior to trial.

Under both Article I, §7 and Article I, §12 of the Alaska Constitution, the Court has adopted and applied the federal "totality of conditions" analysis in determining whether violations of state constitutional provisions have occurred or are about to occur.

3. Alaska Statutes

Finally, in connection with certain issues raised by plaintiffs at trial, the Court has also looked to relevant Alaskan statutes, in addition to state and federal constitutional authority, in resolving such issues. See e.g., AS 33.30.020; .050; .225(a); .250(a) and .260.

V. Analysis Of Individual Issues

A. Overcrowding

Generally

The issue of overcrowding in this case has two aspects. First is the impact which population densities, both systemwide and institutionwide, have upon essential services provided by the Department of Corrections. These services (e.g. educational programs, health care, correctional staffing) constitute separate issues in this case, and the effects of overcrowding on the adequacy of such resources are considered as separate issues, and as factors in a totality of conditions evaluation.

The other aspect of the overcrowding issue, considered here, concerns the housing itself provided to the inmates. Federal issues raised in this regard are whether, under the Eighth Amendment, or the due process clause of the Fourteenth Amendment to the United States Constitution, the housing conditions constitute cruel and unusual punishment for convicted and sentenced felons or punishment for pretrial detainees. Stated differently, the question is whether such housing conditions "transgress today's 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency.'" Hutto v. Finney, 437 U.S. 678, 685, 98 S.Ct. 2565, 2571, 57 L.Ed.2d 522 (1978) (quoting Estelle v. Gamble, 429 U.S. 97, 102, 197 S.Ct. 285, 290, 50 L.Ed.2d 251 (1976)). To the same effect, the cruel and unusual punishment issue is presented under Article I, §12 and Article I, §7 of Alaska's Constitution. As noted above, the Court has applied the "totality of conditions" analysis in examining these constitutional issues.

In evaluating the totality of conditions of defendants' housing facilities, the Court must consider all the housing-related factors and, relying on its own experience and knowledge of contemporary standards, arrive at its conclusion as to whether society's standards of decency are being met. Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion).

Expert opinions and standards recommended by government agencies and professional associations are helpful to the Court's constitutional analysis but not determinative in evaluating the specific conditions of confinement. Rhodes v. Chapman, 452 U.S. at 348 n.13, 69 L.Ed.2d at 70 n.13.<sup>5</sup>

#### Constitutionality Of Double Bunking

Under the federal constitution, the United States Supreme Court has held that "double bunking" or "double celling" of convicted and sentenced prisoners is not per se unconstitutional. Rhodes v. Chapman, 452 U.S. at 348, 69 L.Ed.2d at 70. To the same effect, the Court held in Bell v. Wolfish, 441 U.S. 520, 541, 60 L.Ed.2d 447, 470 (1979) that double celling of pretrial detainees is not per se unconstitutional. In addition to double celling, the Court in those cases looked to such additional factors as the size and contents of the cells, the number of inmates housed in each cell, the average length of a prisoner's stay in the overcrowded conditions, the frequency and length of time inmates are allowed out of their cells, the availability and quality of dayroom and other space available for inmates' use, and the adequacy of plumbing and ventilation facilities. Rhodes v. Chapman, 452 U.S. at 340, 69 L.Ed.2d at 65; Bell v. Wolfish, 441 U.S. at 543, 60 L.Ed.2d at 471. The Court, "employ[ing] common sense, observation, expert testimony, and other practical modes of proof," also "examine[d] the actual effect of challenged

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<sup>5</sup>Numerous professional association standards, setting forth minimal space requirements per prisoner, have been cited by plaintiffs and discussed by some expert witnesses at trial. These include standards set by organizations such as the Department of Justice, the American Public Health Association, the Commission on Accreditation for Corrections and the National Sheriff's Association. The standards recommended variously between 50 and 80 square feet of living space per prisoner, depending on other conditions. See plaintiffs' proposed findings of fact and conclusions of law at 37-39. As the United States Supreme Court commented in Rhodes v. Chapman, 452 U.S. at 348 n.13, 69 L.Ed.2d at 70 n.13 ("They simply do not establish the constitutional minima; rather, they establish goals recommended by the organization in question.")

conditions upon the well-being of the prisoners." Rhodes v. Chapman, 452 U.S. at 367 (Brennan, J. concurring) (emphasis in original).<sup>6</sup>

This Court interprets Alaska's cruel and unusual punishment clause, Article I, §12, and due process clause Article I, §7, in a like manner, and holds that under Alaska's Constitution, double celling is not per se unconstitutional. Rather, additional factors, such as those delineated above, must be examined.

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<sup>6</sup>An example of an overcrowded prison situation which did not reach constitutional dimension is the situation considered by the Supreme Court in Rhodes v. Chapman. Conditions there were described as follows:

SOCF was built in the early 1970's. In addition to 1,620 cells, it has gymnasiums, workshops, school-rooms, 'dayrooms,' two chapels, a hospital ward, commissary, barbershop, and library. Outdoors, SOCF has a recreation field, visitation area, and garden. The District Court described this physical plant as 'unquestionably a top-flight, first-class facility.'

Each cell at SOCF measures approximately 73 square feet. Each contains a bed measuring 36 by 80 inches, a cabinet-type night stand, a wall-mounted sink with hot and cold running water, and a toilet that the inmate can flush from inside the cell. Cells housing two inmates have a two-tiered bunk bed. Every cell has a heating and air circulation vent near the ceiling, and 960 of the cells have a window that inmates can open and close. All of the cells have a cabinet, shelf, and radio built into one of the walls, and in all of the cells one wall consists of bars through which the inmates can be seen.

The 'dayrooms' are located adjacent to the cellblocks and are open to inmates between 6:30 a.m. and 9:30 p.m. According to the District Court, '[t]he day rooms are in a sense part of the cells and they are designed to furnish that type of recreation or occupation which an ordinary citizen would seek in his living room or den.' Each dayroom contains a wall-mounted television, card tables, and chairs. Inmates can pass between their cells and the dayrooms during a 10-minute period each hour, on the hour, when the doors to the dayrooms and cells are opened.

...

At the time of trial, SOCF housed 2,300 inmates, 67% of whom were serving ... long-term sentences ... . Approximately 1,400 inmates were double celled. Of these, about 75% had the choice of spending much of their waking hours outside their cells, in the dayrooms, school, workshops, library, visits, meals, or

In general, the Court finds that on the record before it, the single largest and most serious problem facing defendants and DOC is defendants' ability to continue to provide constitutionally adequate housing, staffing and programming resources to Alaska's burgeoning prison population. This difficulty is reflected most clearly in defendants' necessity to double cell or double bunk many of its cells in its institutions in order to keep abreast of the escalating prison population. At

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(Footnote Continued)

showers.

452 U.S. at 341-42 (citations and footnote omitted).

In contrast, the court in French v. Owens, 538 F.Supp. 910 (S.D. Ind. 1982), a post - Rhodes case, found prison conditions in the Indiana Peformatory to be unconstitutionally crowded. The court described the conditions there as follows:

The cells in G and H cellhouses contain 44 square feet, and cells in J cellhouse contain 47.6 square feet. The cells have three solid walls and a barred front. Each cell contains a sink with cold running water, an uncovered toilet, one or two lockers, and one or two beds. The furniture and fixtures take up half the floor space. The back of each cell contains a 96 square inch grate with 12 to 15 holes in it, which is to serve as a ventilation duct. The grates are not cleaned and are clogged with dirt and lint.

The living quarters do not have adequate positive ventilation systems. The heat comes into the cellhouses in the lower part of the outside walls. There is no mechanism to disperse the heat to the cells. There is no summertime forced-air system to the cells. The cold and hot air systems are inadequate. For the most part the manipulation of the windows and the heating systems in the living quarter is the method of ventilation control. Many of the window opening and closing devices are defective. Consequently many windows must be sealed in the winter, disallowing any opportunity for manipulation when it is found necessary. The cells are too cold in winter and too hot in summer.

In general, in-cell lighting is inadequate.

Moreover, we find that no cells contain hot water, the plumbing is cracked and dirty to the point that it cannot be made completely clean, and the number of showers in both the cellhouses and dormitories is inadequate ... . The kitchen is unsanitary and cannot be sanitized because of physical deterioration: it would be condemned were it not operated by the State.

(Footnote Continued)

trial, for example, evidence established that the design capacity of CIPT was approximately 180 prisoners (single cell occupancy). When the institution opened in February, 1983, the population at CIPT already exceeded its design capacity. At the time of the July, 1984 hearing, the population of the institution had risen to 282 prisoners. And, with double celling throughout the institution, CIPT's prisoner population was projected, at the July, 1984 hearing, to be 391 prisoners. Indeed, with future expansion, CIPT's population may rise as high as 424. This extraordinary population growth experience of CIPT is, in a sense, reflective of the population pressures and problems faced by defendants throughout the entire Alaska correctional system.

At the same time, expert testimony at trial, by witnesses called by both parties, was nearly unanimous in criticizing the practice of double bunking cells. See, e.g., testimony of T. D. Hutto, 2/6/84, tape G-1475, log numbers 370, 2167,

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(Footnote Continued)

... The cell houses contain no day room or equivalent space for exercise/movement/recreation, so the several hundred inmates in idle-hold and administrative segregation, including self-lockups, are required to spend from 20 to 23 hours per day locked in their cells ... . There is inadequate staff supervision to insure the safety of committed individuals.

It is in this environment that we find 336 double cells, providing each occupant with from 22 to 23.8 square feet of space, less that taken up by the beds, the lavatory, and the commode. All dormitories are double bunked, which allows an average of 55.8 square feet per prisoner, less that taken up by the bunks, day rooms, toilets, lavatories and showers. All witnesses, including the defendants' experts, agree that the prison is severely overcrowded and that such overcrowding, in particular the double celling and double bunking, coupled with all of the other conditions in evidence, has caused the confined persons unusual stress, discomfort, aggravation, and pain.

This Court finds that the present overcrowding of the institution, coupled with all of said other conditions, considered as a whole, constitutes cruel and inhuman treatment of its inmates, in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States.

2306. Experts explained that double bunking relatively small cells had the effect of increasing tensions between occupants of the cells, further diminishing the limited privacy of prisoners, and making inmate-staff relations more difficult. See, e.g., testimony of Stanley Brodsky, 1/27/84, tape G-1469, log number 2949. Collectively, the effect of double celling on an institution's overall population is, of course, to significantly increase that institution's population. Experts observe that such increases would tax already-strained staffing and programming resources, and could create further tensions and even violence in the institutions. See, e.g., testimony of William G. Nagel, 1/26/84, tape G-1469, log numbers 840, 1072.

Nevertheless, applying the foregoing constitutional analysis to the facts in the instant case, the Court finds and concludes that, except as otherwise noted below, defendants' institutions are not currently unconstitutionally overcrowded. Stated differently, the Court concludes that at present, the current populations in Alaska's institutions, except as noted below, do not presently amount to cruel and unusual punishment or punishment under either the Eighth Amendment and Fourteenth Amendment to the United States Constitution or Article I, §12 and Article I, §7 of the Alaska Constitution. The Court emphasizes that its findings and conclusions in this regard are based on the conditions existing at time of trial. As discussed below, however, the Court has serious concern about the adequacy of defendants' housing conditions in the very near future.

#### Defendants' Population Projections

At trial, both plaintiffs and defendants presented extensive testimony about future population projections for Alaska's correctional institutions, and defendants' capital improvement plans to meet future requirements.

More specifically, in testimony and exhibits offered at trial, principally by Assistant Commissioner of Corrections Kevin Bruce, defendants projected future growth of inmate populations at Alaska's correctional institutions at the static rate

of 25 net per month, or 300 net per year, for the next three years. Testimony of Kevin Bruce, 2/2/84, tape G-1471, log numbers 2368-2408; testimony of Susan Knighton, 2/13/84, tape G-1496, log numbers 165-431; testimony of Roger Endell, 7/23/84, tape G-1496, log number 1689. The Court is not persuaded that these figures are reliable or realistic for several reasons.

First, defendants' projections stand in striking contrast to the growth pattern actually experienced over the last several years. Commissioner Endell testified as to the "dramatic increase" and "tremendous growth" of prisoners which has made population pressure the most critical problem facing DOC. Testimony of Roger Endell, 2/3/84, tape G-1474, log numbers 1612, 1748. Thus, for example, defendants' Exhibit A shows an increase of from 581 to 1380 inmates, or 138%, in Alaska prison population from 1979 to mid-September, 1983. Moreover, Endell stated that he "definitely" expected this pattern to continue "for quite some time," absent changes in law or policy. Id. at 612.

Defendants' exhibits illustrate that this increase has been geometric, not linear. The monthly DOC Activity Summaries in Exhibit C show these increases in average instate population:

Jan. 1979 - Jan. 1980	34
Jan. 1980 - Jan. 1981	69
Jan. 1981 - Jan. 1982	206
Jan. 1982 - Jan. 1983	315
Jan. 1983 - Nov. 1983	334 [10 months] <u>Id.</u>

Similarly, Exhibit IJ shows increases in total inmate population as follows:

FY 80-81	92
FY 81-82	189
FY 82-83	260
FY 83-84	417 <sup>7</sup>

It is not clear to the Court why this geometric trend should now, without explanation, yield to a three year period of static or linear growth.

Secondly, the Court notes apparent inconsistencies in the population statistics presented by defendants. Assistant Commissioner Kevin Bruce testified at trial that the figure of a 25 per month net increase in prison population was drawn from a base period of March, 1982, to March, 1983. Testimony of Kevin Bruce, 2/3/84, tape G-1474, log number 209. This corresponds to the figures in Exhibit C which show an increase of 316 instate inmates for this period. However, the last 12 month period covered by Exhibit C, from November 1982 to November 1983, shows an increase of 360 instate inmates. Id.

Similarly, defendants' Exhibit MH, offered at trial in January 1984, projected a prison population of 1569 by July, 1984. However, DCC Research Analyst Susan Knighton testified on July 13, 1984 that the actual average population in June, 1984 was 1606. Testimony of Susan Knighton, 7/13/84, tape G-1496, log number 416. Moreover, this actual figure reflected in part the release of prisoners through commutation; the average population for May was 1631. Id. at 374.

Additionally, the six month average growth figure of 21.3 for the first half of 1984 cited by Knighton in the July hearings is apparently not even supported by her own monthly

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<sup>7</sup> While this exhibit includes prisoners housed under contract by the FBCP, the number of these prisoners increased only from 163 in January 1980 to 197 in November 1983. See Exhibit C.

figures given in testimony. The figures in fact reflect an average increase of 30 inmates per month.<sup>8</sup> Id.

Such discrepancies suggest that the 25 per month increase forecast made by Assistant Commissioner Bruce at trial is unreliable and perhaps seriously understates future population increases.

Finally, and perhaps most importantly, defendants' figures admittedly have not taken into account the longer incarceration terms mandated by Alaska's presumptive sentencing statutes. See testimony of Kevin Bruce, 2/3/84, tape G-1474, log numbers 256-382; testimony of Roger Endell, Id. at 1612-1673; testimony of Susan Knighton, 7/13/84, tape G-1496, log number 409.

These laws have had a critical impact on growth of prison populations in Alaska. Commissioner Endell noted "a very definite reflection in increase in inmates coming into the system as related to the sentencing practice change," as well as "ample evidence to indicate prisoners are also staying longer." Id.<sup>9</sup> Testimony of Roger Endell, 2/3/84, tape G-1474, log number 1632. However, while effects of presumptive sentencing may be reflected in defendants' projections in the form of increased admissions into correctional institutions, the decreased outflow resulting from longer mandatory incarceration apparently is not.

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<sup>8</sup> Knighton noted the following population changes:

Dec. - Jan.	increase of 75
Jan. - Feb.	57
Feb. - Mar.	57
Mar. - Apr.	10
Apr. - May	11
May - June	decrease of 30 <u>Id.</u>

Net gain: 180. Average: 30.

<sup>9</sup> The Court takes judicial notice of the fact that under Alaska's presumptive sentencing scheme, inmates are generally sentenced to longer periods of incarceration, and will in fact serve longer terms. Under the scheme, inmates must serve all but statutory good time. Thus, for example, an inmate presumptively sentenced for eight years must serve at least six years of his term. In the absence of presumptive sentencing, the inmate might be eligible for parole in 2 1/2 to 3 years.

Without reliable figures on the average duration of mandatory sentences and the number of inmates serving them, any population projection will be speculative and unreliable at best. In particular, the Court finds that defendants' prison population projections do not fully reflect the total future populations resulting from inmates serving longer presumptive sentences. Defendants' figures are derived from a base period of 1982 to early 1983, which was not far removed from the inception of presumptive sentencing in 1980. See testimony of Kevin Bruce, 2/3/84, tape G-1474, log number 209; AS 12.55.125-175. Significantly, the Court notes that no evidence was adduced at trial that the cumulative impact of such longer sentences on prison populations had by that time, or indeed has yet, levelled off.

At the July, 1984 hearing, Commissioner Endell stated his belief that "it is absolutely essential that a scientific research study be undertaken as quickly as possible to evaluate the impact of presumptive and mandatory sentencing statutes." Testimony of Roger Endell, 7/13/84, tape G-1496, log number 1053. The Court agrees, and has ordered defendants to perform just such a study.

#### Defendants' Future Housing Plans

Much testimony at trial also centered on DOC's plans to meet the rising needs for housing capacity in Alaska's correctional institutions. The Court again finds defendants' evidence unreliable and lacking in credibility, for several reasons.

First, the Court notes that, whatever the future prison population figures may turn out to be, it is undisputed that Alaska's prisons are in a continuing period of unprecedented growth. Moreover, the current situation is such that unacceptable overcrowding beyond the system's maximum capacity is, at times, prevented only through the implementation of the Governor's emergency commutation program. See e.g., testimony of Kevin Bruce, 2/2/84, tape G-1471, log numbers 2624-2651, 2803,

2889. It is against this backdrop that defendants' capital improvements program must be viewed.

In testimony at the July, 1984 hearing, Commissioner Endell acknowledged "there have been delays in nearly all our projects." Testimony of Roger Endell, 7/13/84, tape G-1496, log number 1417. The Court agrees and finds in particular that significant delays have been encountered in the construction of new facilities at Anvil Mountain (Nome), Bethel, and Goose Bay; that renovations in existing institutions such as Wildwood have been slower than anticipated; and that by the time of the July, 1984 hearing, the prospective on-line date of the major new Spring Creek facility at Seward had already been moved back at least six months from the original date forecast at trial in January, 1984. See defendants' Exhibit MH; testimony of Roger Endell, 7/13/84, tape G-1496, log numbers 1384-1428, and 7/23/84, tape G-1496, log numbers 2140-2216.

Such delays may be inherent in the construction process and no fault of the DOC. Nevertheless, the cumulative effect of such construction delays is to exacerbate an already critical housing situation.

Secondly, the Court notes the drastic reduction of DOC's optimistic capital improvements plan offered at trial, in light of the limited funds appropriated to DOC by the 1984 legislature.

Defendants sought funding from the 1984 legislature for an ambitious program of capital improvements, totalling \$112,000,000, to be expended over three years. Testimony of Kevin Bruce, 2/2/84, tape G-1471, log numbers 2681. The centerpiece of this program was to be construction of the 704-bed, medium and maximum security Spring Creek facility at Seward. Commissioner Endell testified that the Seward prison was, in the long run, the key to accommodating Alaska's spiraling prison population growth. Testimony of Roger Endell, 2/3/84, tape G-1474, log number 2348.

Completion of the capital improvements projects was to effect widespread improvements in the present filled-to-capacity system. The antiquated and dilapidated Third Avenue and Ridgeview institutions were to be closed early in 1985, if not earlier. Testimony of Kevin Bruce, 2/2/84, tape G-1471, log numbers 2570, 2591; testimony of Roger Endell, 2/3/84, tape G-1474, log number 2995. Double bunking of existing facilities would be ended. Testimony of Kevin Bruce, 2/2/84, tape G-1471, log number 2613. Finally, the approximately 200 Alaska felons currently housed under contract by the FBOP were to be returned to Alaska institutions, as earlier stipulated in this case.<sup>10</sup> Id.; see Settlement Agreement With Respect To Sub-Class C, approved on February 4, 1982.

However, the 1984 legislature approved funding for construction of only a 320 bed prison at Seward, 384 beds less than requested. Testimony of Roger Endell, 7/13/84, tape G-1496, log numbers 611, 788.

As a result, DOC has rescinded its plans to close Third Avenue. Id. at 1106. Ridgeview will remain open in its present capacity for at least three more years. Id. at 1155. Double bunking will be continued and in fact increased, as for example at CIPT. Id. at 1319. The return of Alaska felons in the FBOP is now in doubt. Id. at 907. In short, prospects for real improvement in the status quo are now much bleaker than DOC anticipated at trial.

Yet, despite the foregoing setbacks in construction deadlines and in capital projects funding, DOC still projects increases in bed capacity of 408 in FY 85, 179 in FY 86, and 340 in FY 87. Testimony of Roger Endell, 7/13/84, log numbers 659. Considered together with defendant's 300 per year predicted net increase in inmates for this period, these additions supposedly

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<sup>10</sup> As noted above, the issue of whether defendants have violated this settlement agreement is the subject of another proceeding. The Court expresses no opinion on the merits of this issue.

will create, according to defendants, bed surpluses of 169-209 for FY 85, 69-113 for FY 86, and 134-178 for FY 87. Id.

But even accepting defendants' prison population projections of a net increase of 900 prisoners over 3 years, defendants' present housing expansion plans project a total 3-year increase of only 927 new beds -- barely enough to keep pace with defendants' own projections.

On the basis of the record at trial, the drastic reduction in future housing plans between trial and the July, 1984 hearing, significant construction delays in existing expansion projects, and past difficulties in obtaining requested funding for capital projects from the legislature, the Court is frankly unpersuaded that defendants' future housing plans are credible, and that defendants will in fact be able to accommodate Alaska's burgeoning prison population.

#### Presumptive Population "Caps" Adopted

In assessing the constitutionality of inmate housing in Alaska's correctional institutions, the Court relies both on its own firsthand observations obtained from its tours of all state prisons and on the extensive testimony and exhibits offered at trial, including the opinions of several expert witnesses. In particular the Court finds the testimony of defense expert T. D. Hutto to be objective and credible, in part because of his in-depth familiarity with Alaska institutions acquired in preparation of a 1982 Consultant's Report on DOC population capacity. See defendants' Exhibit D. The Court also notes that both plaintiffs and defendants have substantially relied upon Hutto's testimony in their proposed findings and conclusions.

As stated above, the Court has applied the "totality of the conditions" test to determine if there is constitutionally impermissible overcrowding in Alaska prisons. Although the Court has found and concluded that defendants' institutions were not, at the time of trial, unconstitutionally overcrowded, the

Court further finds that Alaska institutions are essentially filled to their housing capacities.

Conflicting evidence was presented at trial on the concepts of housing "capacities." Various witnesses testified regarding "design capacity," "operating capacity," "extended capacity," "total capacity" and "emergency capacity." Whatever terminology was used, however, the experts were generally in agreement that in order to effectively operate and administer institutions, prisons should be somewhat less than completely full, i.e., having every single bed in the institution, whether infirmary, segregation or general residential beds, filled. Thus, for example, defendants' expert witness Allen Lee Ault expressed the opinion that maximum capacity should be set at the design capacity of an institution. Testimony of Allen Lee Ault, 2/1/84, tape G-1473, log number 1491. Similarly, defendants' expert, William Nagel, stated his opinion that any use of an institution beyond its design capacity was overcrowding, as was any double bunking. Testimony of William Nagel, 1/26/84, tape G-1473, log number 1072.

However, as Assistant Commissioner Bruce testified, and the example of CIPT noted above indicates, the design capacity of an institution often represents an "optimum" or ideal housing capacity rather than an actual one as extra beds are often installed. See testimony of Kevin Bruce, 2/2/84, tape G-1471, log number 2441.

As expert witness T. D. Hutto noted in his 1982 Consultant's Report,

An erroneous, but all too persistent myth, is that correctional facility capacities are determined by the number of beds that can be crowded into "X" amount of space and that the number of beds equals population capacity ...

Most experienced correctional administrators would agree that it becomes increasingly difficult to fulfill the institution's obligation to public safety when 95% of the beds are filled and some would place this figure as low as 85%.

In setting capacities, then, it is necessary to determine the number of beds which the facility and its resources will adequately accommodate and to recognize that capacity is reached prior to the actual filling of all beds.

Defendants' Exhibit C at 2.

Defendants' expert Peter Trivisano similarly testified that it is considered preferable to operate an institution at 10-15% below its rated, or total, bed capacity. Testimony of Peter Trivisano, 1/24/84, tape G-1466, log number 2727.

In the instant case, defendants offered their own definitions of "operating capacity" and "extended capacity." According to Assistant Commissioner Kevin Bruce, "extended capacity" connotes that circumstance which gives rise to an emergency overcrowding situation and which is "the level at which it becomes increasingly difficult to house inmates." Testimony of Kevin Bruce, 2/2/84, tape G-1471, log numbers 2408-2454. "Extended capacity," according to Bruce, includes multiple bunking or celling wherever possible in residential areas as well as single celling in infirmary and segregation cells. Id. Defendants define "operating capacity" as generally being 95% of "extended capacity." As noted above, a number of experts have set the effective operating level of a prison at significantly less than 95% of its total bed space capacity.

According to defendants' Exhibit MH, offered at trial in January, the "operating capacity" of Alaska's correctional institutions was 1413; the actual population was 1441; and the "extended capacity" was 1487. Id. The Court thus finds that, at the time of trial, Alaska's prison system was thus beyond "operating capacity."

The Court also finds that severe overcrowding has already caused defendants to implement the Governor's emergency commutation plan. See testimony of Kevin Bruce, 2/3/84, log number 2624. Further, approximately 200 Alaskan felons remain housed in the FPCP because there is no room for them in the this

state. See testimony of Roger Endell, 7/13/84, tape G-1496, log number 907.

Not only is Alaska's prison system basically filled to its present capacity, but, as discussed further below, such present capacity is based on some housing situations which the Court and expert witnesses found to be undesirable, and even unconstitutional. Among these undesirable situations are the use of large dormitory-housing arrangements, the double bunking of cells, the use of outdated facilities at Third Avenue and Nome, and the housing of prisoners in nonresidential areas at MCCC and HMCC. Regarding these undesirable housing situations, T. D. Hutto disapproved of double bunking and was critical of the outmoded Third Avenue facility, the dormitories at Lemon Creek, and inadequate staffing at CIPT, Meadow Creek and Ridgeview. Id. at 1258, 2167, 1346, 1168, 1728.

In view of the Court's finding that defendants' facilities are already filled beyond their operating capacities, the Court also finds and concludes that any overcrowding beyond the total regular residential housing capacity of such institutions presumptively presents constitutionally impermissible housing conditions. Moreover, for reasons stated above, the Court finds that the rapid growth in inmate population could give rise to such an unconstitutional situation in the immediate or very near future.

Accordingly, while not ordering reductions in present prison populations, the Court finds and concludes that it is necessary to adopt presumptive population "caps" or ceilings for Alaska's correctional institutions and its state-wide system which may not be exceeded without the permission of the Court. That is, the Court is adopting population caps beyond which housing conditions will be deemed to be presumptively unconstitutional, unless otherwise demonstrated to the Court.

Population caps have been widely recognized as an appropriate equitable remedy to rectify constitutionally problematic housing conditions in prison cases. "[P]opulation

caps ... are ... proper and necessary to afford inmates ... constitutionally adequate conditions of confinement." Benjamin v. Malcolm, 564 F.Supp. 608, 688 (S.D.N.Y. 1983). Indeed, population caps have previously been judicially imposed in Alaska in a prior prison case. Such a limit was set for the 6th and C correctional facility in Anchorage by the Alaska Superior Court in Mosely v. Beirne, Case No. 3AN-76-1899 (Singleton, J.) See also Duron v. Elrod, 713 F.2d 292 (7th Cir. 1983), French v. Owens, 538 F.Supp. 910 (S.D.Ind. 1982), Gross v. Tazewell County Jail, 533 F.Supp. 413 (S.D.W.Va. 1982); testimony of William G. Nagel, 1/26/84, tape G-1469, log numbers 1137-1242.

In setting these presumptive population "caps," the Court has relied on defendants' "FY 84 Current Operating Capacity" figures, as detailed in the DOC capital budget report of July 13, 1984. Plaintiffs' Exhibit 2, 7/13/84 summarized on the following page, for institutions actually in operation as of the July, 1984 hearing. The population caps adopted for each institution reflects the total number of regular residential beds available in each institution (i.e., "general housing" beds), exclusive of "special beds" (such as infirmary beds and administrative or punitive segregation cell bunks) and temporary bedding (such as cots or mattresses on the floor).<sup>11</sup>

As explained more fully in the accompanying order, the Court has adopted such presumptive population caps for each institution and for the entire state-wide prison system on a tentative basis. The parties will be afforded 30 days from the date of this Memorandum Decision to review such figures and submit their responses, supporting or contesting such caps, to the Court. These responses could, for example, suggest expanded housing capacities occasioned by new or remodeled institutions, which have come "on line" since the July, 1984 hearing herein.

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<sup>11</sup>The previous judicially-imposed population caps of 60 for Third Avenue and 100 for 6th & C will remain in effect after reductions for "special beds" have been made.

TABLE OF PRESUMPTIVE POPULATION CAPS

<u>FACILITY</u>	<u>CAPS</u>
Third Avenue C.C.	53 <sup>1</sup>
Sixth Avenue C.C.	90 <sup>2</sup>
Cook Inlet Pre-Trial	282
Ridgeview C.C.	60
Hiland Mountain C.C.	160
Meadow Creek C.C.	28
Palmer C.C.	231
Palmer Pre-Trial	--- <sup>3</sup>
Goose Bay C.C.	--- <sup>4</sup>
Wildwood C.C.	186
Spring Creek C.C.	--- <sup>5</sup>
Fairbanks C.C.	202
Anvil Mountain C.C. (old Nome)	24
Yukon-Kuskokwim C.C. (Bethel)	--- <sup>6</sup>
Lemon Creek C.C.	162
Johnson Center C.C.	10
Ketchikan C.C.	<u>63</u>
TOTALS:	1,551

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<sup>1</sup>Court imposed total capacity is 60 (less special beds).

<sup>2</sup>Court imposed total capacity is 100 (less intake cells).

<sup>3</sup>This facility was not open at the time of trial.

<sup>4</sup>This facility was not open at the time of trial.

<sup>5</sup>This facility was not open at the time of trial.

<sup>6</sup>This facility was not open at the time of trial.

Once the Court has reviewed such submissions, a final order will be issued, setting forth the final presumptive population caps for each institution, as well as for the entire system.

Should the population at any institution exceed its population cap for a period of more than 30 days, the Court will require notice and application by defendants for Court approval of such situation to continue. However, notice within such 30 day period that defendants have invoked the Governor's emergency commutation program to reduce prison populations will result in a stay of Court action for a period of up to an additional 30 days. The Court will also consider, upon such application, whether the totality of conditions at any specific institution, such as increased staff or programming or other factors, would permit additional housing beyond the caps without constitutional violation.

#### Other Areas Of Concern Regarding Overcrowding

In addition to the need for institutional population "caps," and a system-wide "cap," the Court has a number of specific areas of concern relating to the overcrowding issue.

#### Housing In Non-residential Areas

First, to the extent that the residential areas -- cells and dormitories -- are already or will be filled to capacity, prisoner access to nonresidential areas in the institutions, such as dayrooms, hallways, gymnasiums, classrooms and the like, becomes essential to the constitutional maintenance of such populations. This means, in the Court's view, that prisoner access to such nonresidential areas must be realistic and reasonably frequent. It also means that nonresidential areas may not be constitutionally used for residential purposes. In particular, the Court concludes and orders that defendants may not lawfully use dayrooms, hallways, gymnasiums, etc. for the regular housing of prisoners. As the Second Circuit in Lareau v. Manson, 651 F.2d 96, 100 (2nd Cir. 1981) observed, in holding unconstitutional a double-celled facility where dayroom space

was the only real alternative to inmates' confinement to their cells,

'Most inmates therefore spend nearly all of their time either in their cells or the day-rooms.' Thus, there is no real respite for the double-bunked inmate from the pressures of overcrowding.

Other post-Rhodes courts have similarly banned housing inmates in nonresidential areas. As the Court in Inmates of Allegheny County Jail v. Wecht, 565 F.Supp. 1278, 1295 (W.D.Pa. 1983), observed:

Problems created by overcrowding include increased idleness because recreational and educational facilities have been converted into sleeping areas; increased noise level; increased psychological problems; a decrease in the ratio of staff to inmates; meals being served constantly; privacy becoming nonexistent; mattresses and blankets strewn across floors for people to sleep on; increased fire hazards and increased tensions.

See also Martino v. Carey, 563 F.Supp. 984(d) (D.Ore. 1983) (banning the practice of having inmates sleep on floors).

In this case, evidence was presented at trial of at least two instances in which inmates were housed in nonresidential areas. The first instance involves the housing of a number of male inmates at HMCC in a hallway in the administrative segregation area. Cots were aligned down the center of the hallway for sleeping purposes, while a single open cell provided the only toilet and bathroom for the prisoners. See, e.g., testimony of Francis Sauser, 2/7/84, tape G-1476, log numbers 3109-3165, and 2/8/84, tape G-1477, log numbers 277-315, 391-471; testimony of Allen Lee Ault, 2/1/84, tape G-1473, log number 1137.

The second instance of housing prisoners in nonresidential areas occurred at MCCC, where women inmates were housed in dayroom or activity center areas, in bunk beds, with cloth partitions separating them from the activity area. This circumstance obtained when the Court toured this particular facility in March, 1984.

The Court finds and concludes that both of these housing arrangements were, under Alaska's Constitution, unconstitutionally overcrowded situations. The Court hereby concludes that except in emergency circumstances and as may be specifically approved by the Court, defendants may not house inmates in nonresidential areas. This prohibition has been incorporated into a provision of the accompanying order.

#### Dormitory Housing

A second area of concern to the Court in connection with the overcrowding issue is defendants' practice of housing inmates at certain institutions in a dormitory arrangement. Specifically, large numbers of inmates are housed presently at Third Avenue, Fairbanks Correctional Center and Lemon Creek in dormitory arrangements. In these dormitories, bunk beds are stacked side by side in most of the available space; very limited bathroom and toilet facilities are available for a large group of people; electric lights, televisions and radios are operating most of the time; inmates are entering and leaving the dormitories periodically; inmates within the dormitories experience difficulty in having uninterrupted sleep; and generally the noise and potential tension levels are high.

Considerable expert testimony at trial held that dormitory housing arrangements are among the least desirable residential arrangements for a correctional institution. See, e.g., testimony of William G. Nagel, 1/26/84, tape G-1469, log number 602; testimony of T. D. Hutto, 2/6/84, tape G-1475, log number 1792; testimony of Peter Trivisano, 1/24/84, tape G-1466, log numbers 3035, 3092; testimony of Stanley Brodsky, 1/27/84, tape G-1469, log numbers 2492, 2511, 2600, 2992, 3020. This is so because of the problems and limitations previously indicated, as well as the lack of privacy, the significantly-reduced ability of staff corrections officials to supervise prisoners and activities in such dormitories, and the opportunity for serious violence to occur, including assaultive and sexual assaultive behavior among inmates. Experts stated that indeed, much

inmate-inmate violence and assaultive behavior occurs in dormitory settings. Id.

Evidence regarding violence in dormitories in Alaska's institutions is consistent with the foregoing expert opinion. Specifically, the Court finds that perhaps the single most violent episode involving prisoners, prisoner-staff confrontation, and property destruction occurred at Lemon Creek in a residential dormitory uprising.

On the basis of the foregoing evidence, the Court agrees with the expert opinion to the effect that residential dormitories constitute a highly undesirable, and potentially problematic way of housing inmates. On this record, however, and particularly in view of the relatively low level of serious violence between inmates as well as the relatively high level of prisoner access to space and activities outside of the dormitories, the Court does not conclude that such dormitories are unconstitutional at the present time. Under the totality of circumstances analysis, however, the Court's conclusion could change in the future, if prisoner access to non-dormitory areas and activities were severely restricted and/or if the level of violence within dormitories were significantly increased. The Court therefore urges defendants to consider developing alternate housing means to the dormitory arrangement, and requires defendants to report to the Court regarding defendants' plans to eliminate such housing arrangements in the future. In the order accompanying this Memorandum Decision, the Court has set out such reporting requirement.

#### Third Avenue And Ridgeview

Yet another area of concern to the Court are two specific facilities, Third Avenue and Ridgeview, and the conditions under which prisoners are housed or maintained therein. Expert testimony at trial from witnesses from both plaintiffs and defendants was nearly unanimous in concluding that Third Avenue is the most undesirable facility or physical plant in Alaska's systems, may well have outlived its usefulness, and should be

closed for residential purposes or transformed into some nonresidential use. For example, defendants' expert witness, William G. Nagel, labeled Third Avenue as "very submarginal" and "a throwback to another era" while recommending its closure. Testimony of William G. Nagel, 1/26/84, tape G-1469, log number 765. See testimony of J. D. Hutto, 2/6/84, tape G-1475, log number 1258; testimony of Peter Trivisano, 1/24/84, tape G-1466, log numbers 2332, 3035-56; testimony of Stanley Brodsky, 1/27/84, tape G-1469, log numbers 2275, 2320. The Court notes that in fact, defendants have, in the past, both prior to trial and at trial, proposed closing Third Avenue for residential purposes, and transforming it to administrative use. This plan, however, was dropped, according to Commissioner Endell's testimony at the July, 1984 hearing, as a result of fiscal limitations.

Similarly, experts testified as to the relatively run-down and depressing physical plant or facility at Ridgeview, along with various physical plant problems there. Defendants' expert witness Stanley Brodsky compared this institution to an "old fashioned poorhouse," while Nagel called it "awful" and "a correctional slum." Testimony of Stanley Brodsky, 1/27/84, tape G-1469, log number 2200; testimony of William G. Nagel, 1/26/84, tape G-1469, log number 793. See testimony of T. D. Hutto, 2/6/84, tape G-1475, log number 1679. Again, the Court notes that in the past, defendants had planned to close Ridgeview, and house misdemeanants at the new Goose Bay facility. And again, as of the July, 1984 hearing, Commissioner Endell testified that this plan was likewise abandoned as a result of fiscal considerations.

The Court has inspected both of these facilities, and agrees with the expert opinions that the two institutions may well have outlived their usefulness as residential housing institutions, that they are extremely limited in space for not only housing, but programming and other activities, that the physical plants are undesirable, and that the environments are

generally depressing. While the Court declines, at the present time and on the present record, to conclude that Third Avenue and Ridgeview are unconstitutional and to require their closure, the Court's conclusion could change in the future as the conditions of such physical plants or facilities continue to deteriorate. In particular, the Court's conclusion regarding Third Avenue is dependent, to some extent, upon the recognition that one of the three original housing dormitories has been transformed into an indoor exercise facility, that a roof exercise facility has been added and that, to a limited extent, some remodeling has provided some additional programming space. The Court therefore urges defendants to reconsider defendants' original plans to close these institutions or transform them into nonresidential purposes. In the accompanying order, the Court has required defendants to report to the Court on their plans to do so in the future.

#### Punitive And Administrative Segregation Cells

Another concern the Court has regarding overcrowding and housing conditions is the practice of double celling punitive or administrative segregation cells. Unless otherwise specifically authorized by the Court, the Court concludes that housing more than one prisoner in small or moderate sized administrative or punitive segregation cells, where prisoners are "locked down" in such cells for a majority of the day, violates Article I, §12 of the Alaska Constitution. Punitive or segregation cells should, in this Court's view, be limited to one prisoner per cell. To the same effect is the testimony of T. D. Hutto that he would never double bunk a maximum security cell. Testimony of T. D. Hutto, 2/6/84, tape G-1475, log number 1080.

At trial, evidence of multiple occupancy in small or moderate sized administrative or punitive segregation cells at defendants' institutions was presented. Perhaps the single clearest instance of this was the administrative segregation "mod" or module at CIPT, where inmates were double celled and "locked down" for 22 hours a day. The Court concludes that this

particular practice violates the Alaska Constitution, and must be discontinued. In the accompanying order, the Court has incorporated a provision prohibiting multiple occupancy of administrative or punitive segregation cells, except as otherwise specifically reviewed and approved by the Court.

(Old) Nome

Yet another area of concern to the Court is the present Nome Correctional Center. On the basis of the expert testimony presented at trial, along with the Court's own observation during an inspection tour of this facility, the Court finds that the Nome physical plant is extremely old and limited -- indeed, the most limited facility in defendants' system from the standpoint of available space. Although the Court also finds that the superintendent of this facility and her staff have managed the population admirably under the circumstances, the Court would have serious reservations about the continued long term use of this institution for residential purposes. Indeed, defendants' expert Hutto, though noting that the institution works well at present, warned that there is opportunity for everything to go wrong and that the situation could deteriorate overnight. Testimony of T. D. Hutto, 2/6/34, tape G-1475, log number 1529. The Court is, of course, aware that a new correctional facility is in the process of being constructed, and urges defendants to effect a transition to such new facility as soon as practicable.

Costs And Alternatives

In addition to being presented with a population management problem resulting from increased prison population pressures, the Court finds that defendants are also facing growing costs associated with increased administration and housing needs.

More specifically, the Court finds, on the record at trial, that the approximate costs of housing prisoners at permanent facilities or institutions (so-called "hard beds" or "bricks and mortar" institutions) to be approximately \$75.00 per

day per prisoner; that the approximate costs of maintaining prisoners at halfway houses or "community residential centers" or "CRCs" (so-called "soft beds") to be approximately \$43.00 per day per prisoner; and that the approximate cost of supervising a non-housed prisoner, such as a prisoner released on probation or parole, to be approximately \$2.50 per day per prisoner. See testimony of Roger Endell, 2/3/84, tape G-1474, log number 1773; defendants' Exhibit G at 2. (Endell in Exhibit G: FY 83: \$75.53, \$43.14, \$2.82.)

Moreover, the Court finds that DOC's long term operational costs for newly constructed prisons will be very substantial. Testimony at trial established that the ratio of operating costs to capital or construction costs, over 30 years, was approximately 16 to 1. See testimony of Kevin Bruce, 2/3/84, tape G-1474, log number 1210; testimony of William G. Nagel, 1/26/84, tape G-1466, log numbers 961, 1242.

Clearly, the costs of maintaining growing numbers of prisoners in institutional beds over long periods of time -- not to mention the capital costs of constructing new "bricks and mortar" prison facilities to keep abreast of the growing prison population (assuming that such institutions could be constructed rapidly enough) presents defendants with a serious financial burden. As previously mentioned, the problem of accommodating and managing Alaska's burgeoning prison population, from both the sense of available bed space or housing as well as related financial considerations, is, in this Court's view, the single most significant problem confronting DOC and defendant correctional officials for the foreseeable future.

#### Solutions And Alternatives

Plainly, the solution to the overcrowding problem is, and must be, at least initially committed to the judgment of defendants' correctional administrators, particularly where such administrators have indicated their awareness of these problems and an intention to address them. Among the alternatives presently available to defendants' correctional officials in

remedying the overcrowded institutions problem are the following:

1. The creation of new and/or expanded housing and bed space. In this connection, the Court notes that expansion construction has occurred at Fairbanks Correction Center, Juneau Correction Center and CIPT; that new facilities are being constructed at Nome, Bethel and Seward; and that remodeling activities to create additional bed space were occurring at Goose Bay and Wildwood Correctional Centers. The Court also notes that defendants have considered acquiring additional housing space or bed space through leasing, and that defendants have utilized temporary housing facilities, such as a large mobile home-type trailer at Ketchikan Correctional Center.

2. Expanded use of "halfway houses" or "community residential centers" (CRCs). In this regard, the Court finds that the CRCs used by defendants included the Glenwood Center and Akeela House in Anchorage, the Fairbanks Re-entry Center in Fairbanks, and the Glacier Manor in Juneau. Also at time of trial, defendants had approximately 125 beds available for furloughs by inmates, a significant increase over the approximately 20 halfway house beds available to inmates for furloughs in 1979. The Court further finds that between FY 1980 and FY 1984, defendants had increased their budget for community corrections from \$436,000 to \$3.6 million, an increase of over 600%. However, the Court also finds that a substantially greater number of prisoners could qualify for halfway house or CRC programs, including work and rehabilitation furloughs, than there exists available bed space in such halfway houses or CRCs. The Court further finds that defendants intend to expand their use of halfway houses or CRCs, and that in particular, Ms. Humphrey Barnett, defendants' statewide Director of Programming, testified that she would like to have additional halfway house facilities added in Bethel, Nome, and Anchorage.

3. Increased use of work and rehabilitation furloughs pursuant to AS 33.30.250 and .260, and regulations promulgated pursuant thereto.<sup>12</sup>

4. Continued use of the executive clemency or commutation program for appropriate prisoners when the total population exceeds the population cap for the system. The Court finds that prior to and during the pendency of this litigation, defendants have utilized this procedure on more than one occasion, and have released screened and eligible prisoners prior to the conclusion of their normal periods of incarceration.

These and other options are presently available to defendants in dealing with the serious problem of overcrowding. The Court fully expects defendants to implement solutions to maintain constitutionally acceptable levels of prison populations in defendants' institutions. In any event, this Court intends to monitor the prison population situation in defendants' institutions and system to ensure that Alaska's already full prisons do not become unconstitutionally overcrowded.

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<sup>12</sup>In §V(H) below, pertaining to the constitutionality of certain regulations, the Court has held invalid defendants' restriction of limiting inmates' eligibility for furlough programs to those inmates with six months or less remaining on their sentences.

B. Health Care.

At trial, plaintiffs contended that defendants' health care system was inadequate, and failed to meet applicable federal and state constitutional requirements, as well as statutory requirements. Evidence adduced at trial by plaintiffs in connection with this issue tended to be testimony of certain individual inmates regarding delays and difficulties they experienced in receiving medical treatment which they believed to be necessary in their own cases. There was also some evidence that at certain institutions, corrections officials rather than medical personnel had, at least in the past, been dispensing medications to prisoners, which may have contributed to a mix-up in the provision of appropriate medications for certain individual inmates. Further evidence established significant delays in the provision of medical services, some of which were attributable to limited transportation resources.

Defendants' evidence on this issue included the testimony of Physician's Assistant Wilson, the corrections official in charge of medical services in the Anchorage area, and Dr. Hudson, the contract physician for the Anchorage area, who explained in detail the regular medical services provided to each of the Anchorage area institutions. Institutional superintendents and other medical personnel described medical services and resources available for the other correctional institutions in the state. More detailed findings about such medical coverage are set forth in the findings of fact and conclusions of law issued simultaneously herewith.

Defendants also provided evidence regarding the Anchorage Psychiatric Institute (API) Forensic Services Team, and the psychiatric and psychological services provided to Anchorage area inmates by such Team. Defendants offered other evidence regarding in-house mental health care services offered by defendants, as well as mental health clinics in various areas around

the state under contract with DOC to provide mental health care services to remote area institutions.

Some evidence was offered by the parties on the question of the provision of dental care services, transportation needs, and medical records keeping procedures and needs.

#### Applicable Law

The parties do not dispute the applicable federal constitutional standard regarding the provision of medical care. That standard is set forth in Estelle v. Gamble, 429 U.S. 97, 104, 97 S.Ct. 285; 50 L.Ed.2d 251 (1976); and provides:

Deliberate indifference to serious medical needs to prisoners constitutes the unnecessary and wanton infliction of pain proscribed by the Eighth Amendment.

The United States Supreme Court in Estelle also explains that such "deliberate indifference" is not established through inadvertent omissions to provide medical services, or the negligent provision of such services. Id. at 105-106.

Consistent with the foregoing constitutional standard, inmates under federal law also have a right to receive medically necessitated psychiatric and psychological treatment. Bowering v. Goodwin, 551 F.2d 44 (4th Cir. 1977).

In Alaska, the Alaska Supreme Court has adopted and applied the foregoing holdings in Estelle and Bowering in Rust v. State, 582 P.2d 134, 141-143 (Alaska 1978).

The provision of health care and medical services to inmates in Alaska is further governed by statute. AS 33.30.020 and .050 require the Commissioner to provide for the safety and care of prisoners, and more specifically, to furnish "necessary medical services" to such prisoners.<sup>13</sup>

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<sup>13</sup> AS 33.30.020 provides:

The commissioner shall establish prison facilities and classify the prisoners in prison facilities. He shall provide for the safety, subsistence, proper government, and discipline of prisoners. He shall establish programs for the treatment, care, rehabilitation and reformation of prisoners.

In Rust, the Alaska Supreme Court interpreted the foregoing statutes in the following way:

In short, we hold that pursuant to the provisions of AS 33.30.020 and AS 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<sup>34</sup> or denial of care could be substantial.

N.34 provides:

34. Generally these criteria are to be interpreted and applied in a manner so that prisoners will have the right to receive medical care under circumstances in which a reasonable person would seek medical care.

Id. at 143. (Emphasis added.)

In reviewing the evidence adduced at trial on the health care issue generally, the Court has applied the foregoing federal and state constitutional tests as well as the Alaska statutory requirements set forth above.

#### Findings And Conclusions

Generally, the Court finds and concludes that defendants' program for providing health care and medical services to

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AS 33.30.050 provides:

The Commissioner shall detail physicians, nurses, and psychiatrists, or their aides, and laboratory technicians, employed by the department to any prison facility where state prisoners are detained or confined, for the purpose of furnishing necessary medical services, including examinations for communicable and infectious diseases. However, if medical services cannot be furnished by physicians, nurses, psychiatrists, or their aides, and laboratory technicians, regularly employed by the department, the Commissioner may contract with private practitioners located in the area of a prison facility to furnish these services. The cost of contracted services shall be paid out of appropriations made to the department.

inmates throughout the state correctional institutions does not violate federal or state constitutional provisions, or AS 33.30.020 and .050. In so holding, however, the Court is making its findings and conclusions regarding the system as a whole, and not with respect to any individual inmate's claim regarding the possible denial of a right to medical treatment in a particular case. Additionally, the Court also recognizes that the defendants' health care system varies considerably throughout the state.

More specifically, the Court finds and concludes that defendants are providing necessary medical services in a reasonably prompt fashion to its inmates, and are not manifesting deliberate indifference to serious medical needs of Alaskan prisoners. In this regard, the Court finds that the provision of normal medical coverage, sick calls, physician availability, and the like, for the various institutions substantially exceeds the minimal constitutional and statutory requirements. Indeed, the Court finds that the provision of such regular medical services to the institutions in the Anchorage area in particular is exemplary, and a credit to the substantial efforts of Physician's Assistant Wilson, as well as the contract physician, Dr. Hudson.

The Court notes the testimony of Dr. Hudson, however, to the effect that the level of physician coverage to the Anchorage institutions lacks depth or backup resources, and that should the contract physician be unavailable for any extended period of time, the ability to provide ongoing necessary medical coverage may be jeopardized. Plainly, additional backup physician resources would further ensure that defendants' provision of medical care to the Anchorage area institutions will continue to meet the constitutional and statutory requirements.

In the accompanying findings of fact, issued herewith, the Court has also detailed its specific findings with respect to the medical staffing and coverage at each of the correctional institutions throughout the state. Again, the Court generally

finds that such coverage meets the constitutional and statutory requirements.

#### Areas Of Concern

Although the Court has found no constitutional or statutory violation in this area, the Court has concerns about the following areas of defendants' health care system, in addition to the lack of depth or backup physician resources problem in Anchorage.

One such area of concern to the Court is the delay in the provision of medical services resulting from limited medical transportation resources. As a result of limited transportation officers and vehicles, and as the further result of DOC's dependency, to some extent, on state troopers to transport inmates to medical appointments (which troopers are also busy doing other necessary tasks), the Court finds that significant delays have occurred in the delivery of medical services to inmates where such inmates are required to be transported to clinics, specialists, doctors and the like outside the institutions. In this connection, the Court notes that defendants are aware of the transportation problem, and have requested seven additional corrections officers for transportation purposes in future budgets. With the addition of such additional correctional staff transportation officers, defendants should be able to provide medical services on a more efficient and timely basis.

Another area of concern to the Court is the evidence indicating that in certain instances, non-medical personnel were dispensing medications to inmates, resulting in at least a few instances of mixed up prescriptions. The Court concludes that pursuant to AS 33.30.050, defendants should detail such sufficient physicians, nurses or their aides or technicians for the purpose of dispensing medications to inmates.

A further area of concern to the Court is the defendants' ability to provide adequate mental health care services to inmates, particularly those inmates in more remotely located institutions such as Nome and Ketchikan. Although the Court is

impressed with the performance of the API Forensic Services Team in the Anchorage area institutions, and with the services rendered by psychiatrist Dr. Rothrock in Fairbanks, and although the Court recognizes that defendants have contracts with various mental health clinics around the state, the Court is concerned that defendants have the capacity to provide adequate mental health care services to inmates in the more remotely located institutions.

Similarly, the evidence at trial indicated significant delays in the provision of dental services to inmates. Of all the areas of health care services addressed at trial, the Court finds that the area of dental care services is perhaps the most deficient in the sense that very significant delays have occurred in the provision of normal dental services to inmates needing such services. The Court notes defendants' plans to provide additional dental services both through in-house visits and increased transportation to outside clinics. Nevertheless, although at the present time, the Court cannot conclude that this aspect of defendants' health care program violates constitutional or statutory standards, the Court does find that this is one area in which significant improvement in the delivery of health services is indicated.

Finally, the Court has some concern about the adequacy of staffing or resources for the maintenance of medical records of the inmates. At trial, plaintiffs adduced some evidence to the effect that certain medical charts or records of inmates had been mislaid or lost for periods of time. Dr. Hudson testified that one additional staff person and office resources would considerably facilitate defendants' ability to better maintain control over inmates' medical records. While the state of the trial record in this case, at this time, does not lead this Court to find constitutional or statutory violations resulting from lost medical records, the problems presented by lost or mislaid or mixed up medical records in the delivery of future medical services are obvious. Again, the Court notes this is an area in

which a need for improvement in defendants' health care program is indicated.<sup>14</sup>

C. Search And Seizure Issues

Plaintiffs also assert, in ¶ XIII(30) of their Fourth Amended Complaint, various search and seizure issues regarding defendants' policies and practices concerning cell searches, strip searches or visual body cavity searches, and intrusive body cavity searches. Plaintiffs base such claims on the search and seizure provisions and privacy notions embodied in the federal and Alaska Constitutions.<sup>15</sup>

Additionally, defendants have sought dispositive rulings dismissing such search and seizure claims in defendants' January 23, 1984 Motion For Judgment in Favor of Defendants on Specified Issues, as well as defendants' July 20, 1984 Motion For Judgment on Search and Seizure Issues.

Each claim will be addressed separately below.

1. Cell Searches

Evidence at trial indicated that at many institutions, random cell searches or "shake-down" searches were conducted, typically out of the presence of inmates, and that on occasion, such searches yielded contraband. DOC officials testified that they believed such searches were necessary in order to control the introduction of contraband, such as drugs, weapons or money, into an institution, and in order to maintain security at the institution. Certain inmates testified that they found their

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The health care issue was one of the issues addressed in defendants' January 27, 1984 Motion For Judgment In Favor Of Defendants On Specified Issues. Defendants' motion is granted, to the extent that the Court has held herein that defendants' present health care system does not violate applicable federal and state constitutional standards or state statutory standards.

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Although defendants have argued that plaintiffs did not specifically plead any violation of Article I, Section 14 of the Alaska Constitution in their Fourth Amended Complaint, the Court concludes that under Alaska's general notice pleading, the issue of claimed violations of the Alaska Constitution has been adequately alleged in plaintiffs' Fourth Amended Complaint. See Fourth Amended Complaint, ¶¶ X, XII, XIII(30), and XVIII(3).

possessions in a state of disarray after such "shake-down" searches, that they feared corrections officials could "plant" contraband in their absence, and that such incidents led to increased conflicts between inmates and guards.

Plaintiffs contend that as pretrial detainees and convicted prisoners, they retain at least some residual privacy rights under both the federal and Alaska's Constitution. Further, plaintiffs argue that defendants' unannounced cell searches or "shake-down" searches of a prisoner's cell and the contents therein, violate such privacy rights. In this connection, plaintiffs argue that non-disruptive prisoners have a constitutional right to remain in their cells during cell searches to observe officers conducting such searches, as well as a right to an inventory from corrections officials as to personal property seized. See Steinberg v. Taylor, 500 F.Supp. 477 (D.Conn. 1980).

To the extent that plaintiffs' claims are brought under the Fourth and Fourteenth Amendments of the United States Constitution, such claims must fail. Recently, the United States Supreme Court held that a "shake-down" search of a convicted prisoner's locker and cell is not prohibited by the Fourth Amendment nor is the damage to property destroyed during such "shake-down" search violative of the prisoner's due process rights, so long as a post-deprivation remedy exists. Hudson v. Palmer, 52 U.S.L.W. 5051 (U.S. July 3, 1984). Similarly, in Block v. Rutherford, 52 U.S.L.W. 5063 (U.S. July 3, 1984), the United States Supreme Court held that irregular "shake-down" searches of cells of pretrial detainees in the absence of cell occupants did not violate the pretrial detainees' due process rights. See also Bell v. Wolfish, 441 U.S. 520, 557, 60 L.Ed.2d 447, 480 (1979). As a result of these holdings, the Court concludes that plaintiffs' claims of federal constitutional violations fail, and that defendants' aforementioned motions pertaining to such claims are granted.

The question remains, however, whether cell searches violate the due process and privacy rights of pretrial detainees and convicted prisoners under Alaska's Constitution, Article I, Sections 7, and 22, respectively. This Court concludes that random searches of prisoners' or pretrial detainees' cells or rooms in their absence do not violate plaintiffs' residual due process or privacy rights under Alaska's Constitution.

The Court agrees with the analysis set forth in Bell v. Wolfish, supra, that in determining the constitutionality of searches of cells of inmates housed in penal or pretrial detention institutions, courts must balance the "significant and legitimate security interests of the institution against the privacy interests of the inmates." 60 L.Ed.2d at 482. As the Court in Bell explained,

[G]iven the realities of institutional confinement, any reasonable expectation of privacy [with respect to his room or cell] that a [pretrial] detainee retained necessarily would be of diminished scope.

Id. at 480. Generally, the legitimate security interests of the institution in periodically or even randomly inspecting the cells or rooms of pretrial detainees or convicted prisoners, in order to discover contraband, weapons, or other materials which relate directly to the security of the institution and the safety of the prisoners and guards, must prevail over the inmates' diminished privacy interests in such prison cells or the contents thereof.

Plaintiffs argue, however, that non-disruptive prisoners should be allowed to be present during cell searches to observe such searches, so that the possibility of corrections officials "planting" contraband or weapons would be eliminated and that subsequent confrontations or conflicts between inmates and corrections officials avoided. Similarly, plaintiffs argue that documents seized during such searches should be listed on written inventories and given to inmates, and that certain documents, such as legal writings prepared by the inmates and regarding their cases, should not be seized at all.

While the Court agrees with plaintiffs that policies such as those suggested by plaintiffs and/or ordered by district court in Steinberg v. Taylor, supra,<sup>16</sup> are sensible and may well lead to the diminution of conflicts, arguments and confrontations between inmates and corrections officials, the Court concludes that the promulgation of such policies falls within the defendants' executive discretion, and are not mandated by Alaska's Constitution.<sup>17</sup>

## 2. Strip Searches -- Visual Body Cavity Searches

Plaintiffs further challenge defendants' practices and procedures pertaining to routine and random "strip searches" and/or visual body cavity searches of pretrial detainees and convicted prisoners.<sup>18</sup>

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<sup>16</sup>The district court in Steinberg v. Taylor, 500 F.Supp. 477, 480 (D.Conn. 1980) required that the following procedural safeguards be provided when seizures of property were made by prison officials:

(a) A brief statement to the inmate of the asserted justification for the seizure.

(b) A notice of the right to respond in some reasonably simple and convenient fashion and assert grounds, if any, why the seizure is claimed to have been unwarranted.

(c) Some suitable opportunity to meet and answer controverted evidence thought to warrant confiscation.

(d) A decision, with reasons, however brief.

<sup>17</sup>The Court is particularly concerned about the seizure and/or destruction of bona fide legal documents prepared by a prisoner in pending or future litigation relating to his case. Plainly, procedures could be developed by which the contents of such legal instruments could be protected from disclosure to officers conducting the cell searches, while still enabling such officers to inspect the box, envelope or container in which such documents are placed for the existence of contraband, cash, weapons and the like.

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A "strip search" is a search of an inmate's clothing and body. A male prisoner is required to open his mouth and move his tongue around, up and down and from side to side, removing any dentures, running his hands through his hair, allowing his ears to be visually examined, removing all of his clothes, and lifting his arms to expose his armpits, spreading his fingers to expose the areas between his fingers, lifting his feet, wiggling his toes, lifting his testicles to expose the area behind the testicles and bending over approximately ninety degrees and spreading the cheeks of his buttocks to expose his anus. For females, the procedures are similar to those for the men except they must squat to expose both their anus and vagina. Such

Evidence at trial established that it was DOC's policy to conduct routine strip searches of both pretrial detainees and convicted prisoners. According to such policy, strip searches may be performed without any showing of probable cause or reason to believe that a pretrial detainee or convicted prisoner has drugs or other contraband on his or her person. Implementation of the policy varies somewhat from institution to institution, depending on the individual superintendent or shift supervisor on duty.

The evidence indicated that pretrial detainees and convicted prisoners were sometimes strip searched and subjected to a visual rectal search after such activities as attorney visits, church services, attendance at classes and counseling, contact visits with family and friends, and after using the law library. In addition, strip searches may be performed when a prisoner is moved from one part of an institution to another area of the institution, and when a prisoner returns from outside of the institution, such as following work furloughs.

Defendants' officials testified that such searches were necessary to the maintenance of security in the institutions. Contraband, such as drugs, tools, weapons, money and the like, could be secreted into the institution on the inmate's person, particularly if the prisoner has had a contact with non-prisoners, has been outside the institution (such as on work or educational furloughs) and/or has had access to certain equipment such as tools in workshop or crafts rooms.

Prisoners testified that the strip searches were personally demeaning, humiliating and degrading. Corrections officials and plaintiffs alike testified that such searches were unpleasant. Some plaintiffs testified that as a result of an institution's strip search policy, they were deterred from

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searches were performed by officials of the same sex as the inmate, and usually in a secluded location.

attending religious services and participating in certain classes or activities.

To the extent that plaintiffs' claims are grounded on federal constitutional bases, such claims must be rejected, and defendants' motions granted in this regard. Bell v. Wolfish, supra, 441 U.S. at 558-560, 60 L.Ed.2d 480-482.

As with cell searches, plaintiffs' constitutional claims regarding strip searches and visual body cavity searches are also based on Alaskan constitutional provisions. Plaintiffs specifically argue that pursuant to Reeves v. State, 599 P.2d 727 (Alaska 1979), searches of a detainee or convicted inmate's person must be conducted in the least intrusive or intensive fashion under the circumstances.

Although Reeves involved a pre-incarceration inventory search of an arrestee, the Alaska Supreme Court did observe in that case:

The search of an arrestee's person should be no more intensive than reasonably necessary to prevent the entry of weapons, illegal drugs, and other contraband or potentially dangerous items into the jail.

Id. at 737. In so holding, the court followed the reasoning of the Hawaii Supreme Court in State v. Kaluna, 55 Hawaii 361, 520 P.2d 51 (1974); Reeves v. State, supra, 599 at 737 n.28.

While the Alaska Supreme Court has not yet addressed the issue of the state constitutional standards for visual body cavity inspections or strip searches of inmates in penal institutions, the Hawaii Supreme Court has done so under its own constitution in State v. Bayaqa, 656 P.2d 1330 (Hawaii 1982). Specifically, in Bayaqa, the Hawaiian Supreme Court noted that Bell v. Wolfish represented the view of a "bare majority of the [United States] Supreme Court" and that Hawaii was free to interpret the protections of its own state constitution more broadly than the United States Supreme Court had construed similar provisions of the United States Constitution. The Hawaii Court held that:

[I]n order to conduct the more intrusive body searches such as strip searches in non-emergency, non-contact visit situations, prison officials must have a reasonable basis to conclude that contraband is being concealed by inmates on their person. Relying on such a basis, they may conduct the search in a reasonable, non-oppressive manner.

Id. at 1334.

In this Court's view, the due process and privacy provisions of the Alaska Constitution require the same showing before a strip search or visual body cavity search, in a non-emergency, non-contact visitation situation, or other normal circumstance, may be conducted. That is, this Court interprets Article I, Sections 7 and 22 of the Alaska Constitution as requiring prison officials to demonstrate a reasonable basis to conclude that an inmate or pretrial detainee is concealing contraband on their person, in normal circumstances, before such a search may be conducted.<sup>19</sup> As the Hawaiian Supreme Court required in Bavaoa, this Court likewise concludes that such searches must be conducted "in a reasonable, non-oppressive manner" -- meaning at least that the search be conducted in a private location, out of the presence and observation of inmates or officers of the opposite sex, by an officer of the same sex as the inmate, and in a manner least offensive to the prisoner's dignity.

### 3. Intrusive Body Cavity Searches

Finally, plaintiffs challenge, on federal and state constitutional grounds, defendants' practice of conducting non-consensual, intrusive body cavity searches of pretrial detainees and prisoners.

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<sup>19</sup>In so holding, however, the Court concludes that a reasonable basis may be presumed for strip searches or visual body cavity searches where the inmate or pretrial detainee has conducted contact visitation with non-prisoners, has been released from the institution on an educational or work furlough, is entering the institution for the first time, or is returning from a classroom with tools, and other similar circumstances.

Evidence at trial established that body cavity searches were infrequently conducted, at certain institutions. Not all institutions have conducted body cavity searches. The searches were conducted by medical personnel, in secluded areas, before corrections officials of the same sex as the inmates.

Results from some of such searches were positive. That is, examples of contraband secreted by inmates in their body cavities included a syringe, a roll of cash and money orders totalling \$1900, and balloons filled with drugs. And of the three body cavity searches performed on inmates at CIPT since that institution opened in February, 1983, two produced positive results.

Such intrusive body cavity searches are clearly viewed by inmates as being the most offensive violations or intrusions of their persons and personal privacy. Corrections officials, too, find such searches to be the most offensive and unpleasant.

No competent evidence adduced at trial indicated that intrusive body cavity searches, or visual body cavity searches for that matter, were being conducted by defendants for the purpose of harrasing any particular prisoner or groups of prisoners.

At some institutions, defendants have followed a policy that probable cause must exist, or that a search warrant must first be obtained, before an intrusive body cavity search can be conducted. No evidence was adduced at trial to establish that such policy caused significant administrative disruptions or jeopardized institutional security.

To the extent that plaintiffs' claims are again based on federal constitutional grounds, the Court concludes that such claims must fail. While the United States Supreme Court has apparently not yet addressed the issue of the constitutionality of intrusive body cavity searches of pretrial detainees or convicted prisoners, this Court concludes that, pursuant to the rationale regarding visual body cavity searches adopted in Bell v. Wolfish, supra, the United States Supreme Court would hold

that intrusive body cavity searches are not prohibited by due process or privacy notions embodied in the federal Constitution. Again, defendants' motions in this regard must be granted.

Turning to the provisions of the Alaska Constitution, however, this Court concludes that the due process and privacy provisions of Alaska's Constitution require the existence of probable cause that contraband will be found in an inmate's body cavity, before defendants may conduct an intrusive body cavity search of a prisoner.

Clearly, intrusive body cavity searches are the most offensive searches to both prisoners and corrections officials. Such searches violate a prisoner's sense of personal privacy to the maximum degree, and require, therefore, a substantial showing of institutional security interests in order to justify them.<sup>20</sup> As the Hawaiian Supreme Court in Bayaoa observed, body cavity searches "constitute the most objectionable of searches." Id. at 1334 n.7.

In Bayaoa, the Hawaiian Supreme Court cited generally State v. Merjil, 655 P.2d 864, 867 (Hawaii 1982) a border body cavity search case, wherein the court laid out the following prerequisite for such searches under those conditions:

To conduct a body cavity search, however, there must be a clear indication that contraband will be found ... Also, any such

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<sup>20</sup> The Hawaii Supreme Court in State v. Bavaoa, 656 P.2d 1330, 1334 n.7 (Hawaii 1982) also cited State v. Clark, 654 P.2d 355, 359 n.8 (Hawaii 1982), wherein that Court characterized body cavity searches as follows:

One court aptly summarized the various described effects of government intrusion into this paramount expectation of privacy as follows:

'A search of [this] ... type ... including the visual inspection of the anal and genital areas, has been characterized by various witnesses here, and by judges in some other cases, as demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, [and] signifying degradation and submission ... .' (Citations omitted.)

intrusive search must be conducted in a reasonable manner.

Id. at 867. (Emphasis added.) Presumably, the "clear indication" standard is a somewhat higher or more stringent standard than the "probable cause" standard adopted here. Such a higher standard may well be justified in the context of that case, where the arrestee was not already a prison inmate but a free individual stopped at the state's border. See also State v. Clark, 654 P.2d 355, 362 n.11 (Hawaii 1982) ("The situation here is different from that of a prisoner entering the main prison. The prison presents special security problems.") See also, Constitutional Limits On Body Searches In Prisons, 82 Colum.L.Rev. 1033 (1982). In the Court's view, a showing of "probable cause" to believe that contraband is being secreted in a prisoner's body cavity is the appropriate standard under Alaska's Constitution, and strikes the proper balance between the most important privacy interest of plaintiffs and the institutions' legitimate security needs.<sup>21</sup> In this regard, defendants' motions are denied.

Further, as the Hawaii Supreme Court held in Merjil, this Court concludes that such searches must be conducted in "a reasonable manner," meaning that such searches should be performed only by a trained medical technician, of the same sex as the inmate, in an appropriate secluded area out of the presence or observation of other prisoners, and in the manner least offensive to the prisoner's sense of personal dignity. Moreover, in view of the intrusive and offensive nature of such searches, the Court further construes "reasonable manner" to mean that the probable cause basis for each body cavity search must be documented and such basis reviewed and approved in writing by a

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<sup>21</sup>The Court notes that this standard has already been followed in certain of defendants' institutions, without undue administrative inconvenience or security risk.

responsible, management-level corrections official at the institution where such search is being conducted.

In the order accompanying the instant Memorandum Decision and Findings of Fact and Conclusions of Law, defendants are ordered to develop regulations and/or written policies and procedures embodying the foregoing holdings.

D. Adequacy Of Staffing.

In ¶XIII(8) of their Fourth Amended Complaint, plaintiffs contend that they have been subjected to unreasonable risks of harm as a result of inadequate supervision and understaffing at defendants' correctional institutions.

Defendants contend that plaintiffs have failed to adduce sufficient evidence to establish constitutional or statutory violations as a result of any understaffing at any institution.

Generally, the Court agrees with defendants' position, and finds and concludes that on the basis of this record, the level of staffing at defendants' institutions has not violated the Eighth Amendment or the Fourteenth Amendment to the United States Constitution, Article I, §7 or 12 of the Alaska Constitution, or AS 33.30.020 and .050. In this regard, the Court grants that aspect of defendants' January 23, 1984 motion.

In so holding, however, the Court emphasizes that its general findings and conclusions are based on the record at trial, and on the level of staffing existing at such time. In this connection, the Court finds that defendants' institutions were, at time of trial, variously understaffed, i.e., not staffed to optimum levels.

More specifically, a report conducted for defendants in late 1982, by defendants' expert, Dr. Allen Ault, purported to identify optimum staffing needs at each of the institutions in Alaska. Dr. Ault recommended 184 total new staff positions (not including new positions needed to staff CIPT or Wildwood). In fiscal year 1984, however, the legislature appropriated funds for slightly less than 50% of the positions recommended by Dr. Ault.

While Dr. Ault had recommended additional positions for each of defendants' institutions, the understaffing situation and needs for additional staff positions were most serious at CIPT. As Assistant Superintendent of CIPT Briggs testified at trial, there were 54 full time and 11 temporary

correctional officers at CIPT when this matter commenced trial. At the time CIPT opened in February of 1983, it was understaffed by 22 positions for its design capacity of 180 prisoners. Briggs testified that to accommodate an inmate population of 225 prisoners at CIPT, CIPT would need an additional 25 correctional officers, 3 additional counselors, 4 clerks, 2 additional cooks, and additional food service help. To accommodate an inmate population of 285, Briggs testified that CIPT would require an additional 40 correctional officers, 3-5 additional counselors, 4-5 additional clerical personnel, 2 additional cooks, and 2 additional food service workers. To accommodate an inmate population of 424 prisoners -- the size to which this Court understands CIPT will ultimately be expanding in the future -- Briggs testified that CIPT would require an additional 56 correctional officers plus additional support staff. Similarly, defendants' expert Hutto also noted the serious understaffing problem at CIPT. Accordingly, the Court finds that while understaffing exists to some degree at all of defendants' institutions, the problem is most seriously presented at CIPT.

Next to CIPT, understaffing and manpower shortages exist to a serious degree at Fairbanks Correctional Center.

The Court further finds that with the double bunking of cells in defendants' institutions, and increases in the prison population in the future, increases in correctional staff positions will be necessary in order to prevent an exacerbation of the understaffing problem.

The importance of maintaining adequate inmate-staff ratios cannot be overemphasized, in this Court's view. One consequence of the understaffing problem is that correctional officials are required to work substantial overtime at most, if not all, of defendants' institutions. Such substantial overtime work can have a negative impact on the correctional officers' morale and job performance, which in turn can have a negative impact on staff-inmate relations.

Nevertheless, the Court concludes that on the basis of this record, plaintiffs have failed to prove, by a preponderance of the evidence, that the understaffing problem rises to the level of a state of federal constitutional or statutory violation -- i.e., amounts to cruel and unusual punishment, undue exposure to security risks or risk of mental, emotional or physical harm, or a right to receive reformation programming or treatment.<sup>22</sup>

E. Training.

In ¶XIII(22) of their Fourth Amended Complaint, plaintiffs claim that they have suffered harm or risk of harm as a result of the lack of adequate screening of correctional staff applicants and the lack of adequate training of correctional staff.

At trial, plaintiffs adduced evidence regarding a number of particular conflicts or confrontations between individual inmates and individual corrections officers generally. Additionally, plaintiffs produced evidence regarding complaints about certain particular corrections officers at a few institutions.

Defendants contend that they have no constitutional or statutory duty to provide psychological screening of the correctional officials, and that on this record, plaintiffs have failed to demonstrate any state or federal constitutional or statutory violation.

Generally, the Court agrees with defendants, and finds plaintiffs' claims regarding inadequate training of corrections staff to be without merit on this record. Specifically, the Court holds that, on the basis of the evidence adduced at trial,

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<sup>22</sup>As Programming Director Susan Humphrey Barnett testified at trial, additional programming and counseling positions would be highly desirable, and would enable defendants to provide more programming opportunities and treatment throughout the institutions. The issue of the Alaska Constitutional and statutory requirements regarding reformation programming is discussed below in §V. (F).

plaintiffs have failed to establish, by a preponderance of the evidence, that defendants' training procedures, policies and activities, or the lack thereof, violate applicable federal or state constitutional provisions, or state statutory provisions.

The principal training function performed for defendants is provided by the Correctional Officers Academy, located in Anchorage. As Chief Training Officer Epperson testified at trial, the Academy has made significant progress since its opening in 1976, and has trained hundreds of correctional officers in subjects such as custodial techniques, criminal justice, crisis management, first aid, stress awareness, use of force, disciplinary procedures, and other issues. The Academy can conduct eight 160 hour training courses per year, with 20 correctional officers in each course. Moreover, the training officer in charge of the Academy has the authority to call new correctional officers in for Academy training to ensure training at the earliest possible opportunity after hiring. Generally, new hires are placed on a probationary status, and are sent to the Academy within the first six months from their date of hire.

In fact, as of January 11, 1984, the evidence at trial established that only 55 of the approximately 487 correctional officers had not yet attended the Academy. And, of these 55, 33 (or 71%) had been recently hired and were employed for a period of 3 months or less. Successful passage from correctional officer I to higher levels of employment can be obtained only through the successful passage of Academy training courses.

The evidence also established that Academy training officers have conducted on-site training sessions at the various institutions, and that at least some institutions had staff training officers. Ideally, in the Court's view, staff training officers should be appointed at each individual institution.

Also, at some institutions, extensive on-the-job training procedures are offered. Certain supplemental courses from the American Correctional Association are also available to correctional officers.

At trial, defendants offered evidence indicating that they were planning to institute Academy retraining for disciplined or suspended correctional officers. The Court finds this to be an appropriate addition to the training program, and will require defendants, subsequent to trial, to specifically advise the Court as to such plans for retraining of disciplined or suspended officers.

To be sure, some evidence was adduced at trial from a number of witnesses suggesting that additional training in various areas would be desirable and useful. Thus, defendants' state-wide Program Director, Susan Humphrey Barnett, testified that retraining of certain staff would be desirable and that training in the area of interpersonal skills would likewise be desirable. Further, Ms. Humphrey Barnett testified that training for probation officers, secretaries, maintenance personnel, cooks and the like would also be useful. Similarly, training in cross-cultural communications and cultural awareness would be very desirable, in view of Alaska's Native and other minority prison populations. In this regard, Father Michael Oleksa testified that in his view, at least 15 hours of cross-cultural communications training would be desirable.

Plaintiffs' evidence on this issue consisted largely of testimony regarding specific problematic instances between particular inmates and particular correctional officials. The evidence does suggest that, at least with respect to a few inmate-staff interactions, conflicts and tensions have existed. It is, in the Court's view, possible that additional training in the areas of cross-cultural awareness, interpersonal skills, communications abilities, stress management and the like, may have prevented or reduced such conflicts, or the risk thereof. However, on the entire record, this Court concludes that plaintiffs have failed to demonstrate, by a preponderance of evidence, that system-wide, defendants' training policies, procedures and activities present a constitutional or statutory violation.

Nor is this Court persuaded that the federal or Alaska Constitutions, or Alaska statutes, require any particular entrance-level screening instrument to be used by defendants in hiring new correctional officers. Plaintiffs argue that defendants should utilize a psychological testing or pre-screening instrument when correctional officers are hired, in an attempt to identify candidates who may be unsuitable for corrections work in areas such as psychological, personality, or emotional makeup. Whatever the desirability of the utilization of such a device might be -- and the Court agrees with plaintiffs that the use of such testing procedures may well be desirable -- the Court concludes that the use of this particular screening device is not mandated by constitutional or statutory authority.<sup>23</sup>

F. Rehabilitative Programming.

Of the various claims and issues presented at trial, plaintiffs presented perhaps the greatest amount of evidence on the issues of overcrowding and rehabilitative programming. With respect to programming, plaintiffs argued that under Article I, §12 of the Alaska Constitution, as well as relevant statutory authority, they had a right to receive rehabilitative treatment and/or programming. Defendants dispute the existence of any constitutional or statutory general right to rehabilitative programming, challenge plaintiffs' standing to raise such issues, contend that the "reformation principle clause" of Article I, §12 of the Alaska Constitution merely sets forth a philosophical goal or objective, and argue that any specific "right to treatment" holdings declared by the Alaska Supreme Court in Alaskan authorities pertain to particular definable and curable medical needs of prisoners.

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<sup>23</sup> The issue of the training of prison staff was one of the issues addressed in defendants' January 23, 1984 Motion For Judgment In Favor Of Defendants On Specified Issues. That motion is granted, consistent with the extent of the Court's findings and conclusions set forth herein.

Additionally, the parties presented numerous witnesses and substantial evidence at trial regarding the programming offerings, or lack thereof, at each of the various correctional institutions which are the subject of this litigation. Plaintiffs' evidence consisted largely of testimony by individual inmates from the various institutions as to their own experiences and observations regarding programming offerings or the lack thereof. Defendants' evidence consisted of corrections officials, including defendants' state-wide Programming Director, Susan Humphrey Barnett, as well as institutional superintendents, and education associates, who explained the particular programming offerings existing at each institution.

With respect to the nature of programs presented, or not presented, plaintiffs adduced considerable testimony at trial, through expert witnesses, regarding the so-called "cognitive deficit" or "cognitive development" theory of rehabilitative programming, as well as the now-discontinued "University Within Walls" ("U.W.W.") college-level programming offerings presented at Alaskan correctional institutions under prior Corrections Director Hatrak.

Defendants likewise presented substantial expert testimony from expert witnesses who had toured most of the Alaskan correctional institutions, and who had examined, among other things, the educational and programming offerings at such institutions. The thrust of defendants' expert evidence was to the effect that numerous "models" or theories of rehabilitative education and programming exist, that no one particular "model" or theory dominates in the literature or field of corrections administration, and that various "models" or theories have been "in vogue" over various periods of time in the history of American correctional administration. Additionally, defendants' experts generally found the quality and quantity of educational and programming opportunities at Alaska's institutions to be high.

### Right To Reformation

To begin with, the Court concludes that under federal constitutional law, no right to rehabilitation or reformation is conferred upon prisoners by the United States Constitution. See French v. Heyne, 547 F.2d 994, 1002 (7th Cir. 1976); see generally Marshall v. United States, 414 U.S. 417, 421-22 (1974). Similarly, the Court concludes that the federal Constitution does not confer a right to educational or vocational programs on prisoners, Rhodes v. Chapman, 452 U.S. 337, 348 (1981), Hoptoit v. Ray, 682 F.2d 1237, 1254-55 (9th Cir. 1982), nor does the failure to provide prison educational or rehabilitative programs or work opportunities constitute unconstitutional punishment. Rhodes v. Chapman, supra, 452 U.S. at 348. Likewise, the Court concludes that the federal Constitution does not confer any right to rehabilitation on pretrial detainees, and that the failure to offer such courses does not amount to unconstitutional "punishment" under the due process clause of the Fifth and Fourteenth Amendments. See generally, Bell v. Wolfish, 441 U.S. 520 (1979). If any right to rehabilitation exists, it must be found under state constitutional or statutory law.

Turning to Article I, §12 of the Alaska Constitution, the second sentence of that provision provides:

Penal administration shall be based upon the principle of reformation and upon the need for protecting the public.

(Emphasis added.)

Defendants argue that this "reformation principle" in Article I, §12 merely states a philosophical goal or objective which is advisory in nature; that common law interpreting the same must be narrowly construed to confer a right to rehabilitative treatment on prisoners demonstrating particular curable medical disabilities; and that in any event, plaintiffs lack standing to raise claims of any right to rehabilitative treatment. Plaintiffs contend that the Alaska constitutional provision confers upon them a generally recognized right to rehabilitation treatment in this jurisdiction, and further

contend that on the record in this case, the only type of rehabilitative programming which would meet such requirement is the so-called "cognitive deficit" theory, programs containing elements of such theory, and/or the prior U.W.W. program.

Initially, the Court notes that the legislative history to the Alaska Constitution regarding the reformation principle of Article I, §12 is not helpful. Equally unhelpful and distinguishable are authorities from other jurisdictions wherein other state supreme courts have considered vaguely similar language and provisions of their respective state constitutions. Nor has the Alaska Supreme Court expressly addressed the particular question of whether Article I, §12 confers a generalized right to rehabilitation or reformation on prisoners. See Rust v. State, 582 P.2d 134, 144 n.35 (Alaska 1978).

Initially, the Court concludes that plaintiffs do have standing to raise the issue of the existence of any right to rehabilitative treatment under Article I, §12 of the Alaska Constitution, and/or under relevant Alaskan statutory authority, such as AS 33.30.020. The Alaska Supreme Court has impliedly recognized such standing in considering the claims of prisoners and holding that individual inmates had the right to receive psychological or psychiatric treatment in particular cases, Rust v. State, supra, as well as treatment with respect to alcohol abuse, Abraham v. State, 585 P.2d 526 (Alaska 1978); see also LaBarbera v. State, 598 P.2d 947, 949 (Alaska 1979).

Turning to the merits of the issue, this Court concludes that Article I, §12 of the Alaska Constitution confers upon prisoners a right to receive, and requires defendant correctional officials to provide, reasonable access to educational, work and rehabilitative or reformatory programming during the course of the prisoner's period of incarceration. In this Court's view, correctional officials must, under the reformation principle of the Alaska Constitution, use good faith efforts to provide prisoners with

some form or forms of rehabilitative programming, adopted on a rational basis, and designed to assist prisoners in reforming their criminal conduct and rehabilitating themselves to become useful, contributing members of our society.

Significantly, the Court is not holding that the Alaska Constitutional provision guarantees or assures that any particular prisoner, or groups of prisoners, will in fact be rehabilitated during their period of incarceration. Nor is the Court concluding, as plaintiffs have apparently urged, that any particular model or theory of rehabilitative programming must be provided to all, or any particular individual or groups of prisoners, during their period of incarceration. The Court is holding that correctional officials may not do nothing; that is, defendants must develop and provide to prisoners reasonable opportunities to engage in work programs, educational programs, counseling sessions and/or other types of activities designed to facilitate such prisoners' reformation or rehabilitation.

The Court reaches the same conclusion under applicable Alaskan statutory law. AS 33.30.020 states this obligation more clearly than Article I, §12, and provides in part:

The Commissioner shall establish programs for the treatment, care, rehabilitation and reformation of prisoners.

(Emphasis added.)

Other statutes also require the defendants to provide adequate medical and mental health care to the prisoners, AS 33.30.050; authorize DOC to "productively employ" prisoners,

AS 33.30.225(a);<sup>24</sup> and authorize DOC's Commissioner to release prisoners for work furloughs, AS 33.30.250(a).<sup>25</sup>

Defendants, however, argue that AS 33.30.260 renders the foregoing statutory and constitutional obligations entirely discretionary, leaving the Commissioner free to provide no such rehabilitative programming. That provision provides, in part:

The Commissioner may authorize the prisoner to participate in educational, training, medical, psychiatric, or other rehabilitation programs approved by the commissioner.

In the Court's view, AS 33.30.260 pertains to "rehabilitation furloughs," not to the overall constitutional or statutory duty to provide rehabilitative or reformatory programming or treatment to prisoners.

#### Evidence Regarding Programming Offered

Having concluded that plaintiffs have a general constitutional and statutory right to receive, and defendants

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<sup>24</sup> AS 33.30.225. Employment of prison inmates. (a) It is the policy of the state that prisoners be productively employed for as many hours each day as feasible, not to exceed 40 hours per week unless overtime has been specifically approved by the commissioner. The term 'productively employed' includes the following kinds of employment:

(1) routine maintenance and support services essential to the operation of a prison facility;

(2) education including both academic and vocational;

(3) industrial, agricultural, and service activities conducted in accordance with AS 33.32;

(4) public conservation projects including but not limited to forest fire prevention and control, forest and watershed enhancement, recreational area development, construction and maintenance of trails and campsites, fish and game enhancement, soil conservation, and forest watershed revegetation; and

(5) other work performed inside or outside of a prison facility if the work has minimal negative impact on an existing private industry or labor force in the state as determined by the commissioner.

<sup>25</sup> AS 33.30.250. Work furlough. (a) When a person is convicted of a crime and is sentenced to a prison facility, or is imprisoned in the prison facility for nonpayment of a fine, for contempt, or as a condition of probation for a criminal offense, the commissioner may, if the commissioner concludes that the person is a fit subject for a work furlough and is not prohibited from it under (g) of this section, direct that the person be permitted to continue in the person's regular employment, if that is compatible with the requirements of (c) of this section, or may authorize the person to secure employment, unless the court at the time of sentencing has ordered that the person not be granted work furloughs.

have a general duty to provide, some rationally-based rehabilitative or reformatinal programming to prisoners, the Court next turns to the state of the record at trial to determine whether defendants have complied with such duty.

At trial, plaintiffs advocated one or two particular "models" or theories of rehabilitative programming, namely the so-called "cognitive deficit" theory, and/or a college-level liberal arts educational approach. Expert witnesses such as Ross, Doguid and others explained the tenets of the "cognitive deficit" theory, which holds that criminal conduct is a function of deficits in the reasoning process of an individual, and which may be corrected through the provision of cognitive development or reasoning or analytically-oriented courses and programs. A more specific description of this theory is set forth in the accompanying findings of fact and conclusions of law. To the same extent, the liberal arts college education approach was explained by plaintiffs' witness Nickerson and Dr. Ackley. This program had been utilized under the prior DOC administration headed by Director Hatrak, but was discontinued as a statewide program under Commissioner Endell.

Defendants' evidence, largely in the form of expert testimony, established that over a period of time, numerous methods, models or theories of rehabilitative training and programming have been utilized, designed, studied and considered by correctional officials, administrators and social scientists. As many as 18 such theories, in varying forms, were discussed by the experts at trial. The theories or models included the "confrontational theory," the "medical model," the "safe environment theory," the "work model," the "basic literacy model," the "G.E.D. model," the "life skills model," the "post-secondary education model," the "vocational education model," the "cognitive deficit theory," the "moral reasoning development theory," the "religious educational theory," the "Just Community concept," "behavior modification models," the "phase theory," the "mere confinement theory," the "unpleasant environment theory,"

and a school of thought held by the noted corrections theorist, Robert Martinson, which concluded that "almost nothing works" to reform criminal offenders.

On the basis of the evidence adduced at trial, this Court finds and concludes that no single programming model or theory, or portion or combination thereof, has been proven to be the most efficacious -- let alone the only efficacious -- means of effecting reform or rehabilitation of the criminal offender. In this Court's view, a number of such models, theories or approaches, as well as a variety of mixes thereof, may well be useful in achieving the desired result of reforming or rehabilitating prisoners. Moreover, the Court finds that some of such models and approaches may be useful for certain types of offenders, while other of such models may be useful for other individuals or groups of prisoners. Additionally, the Court finds, on the basis of the expert testimony adduced at trial, that the state of development and sophistication of approaches to rehabilitative or reformatory programming is dynamic, evolutionary, and inexact. That is, like social science generally, the subject of rehabilitation and reformation does not lend itself to precise analysis or simplistic cause and effect conclusions.

In determining whether defendants have met their Alaskan constitutional and statutory obligations to provide plaintiffs with reasonable rehabilitation programming opportunities at each of the respective institutions, the Court finds and concludes that generally, on a system-wide basis, defendants have met and are adequately meeting, this requirement. Rather than taking a statewide liberal arts/college level education approach, or the cognitive development theory approach, defendants have, instead, stressed basic education, job and life skills training, and to a more limited extent, work programs, as the system wide rehabilitative programming approach. In particular, the evidence at trial indicated that defendants have offered various educational and rehabilitation programming, through

local contracts with private companies, on an institution-by-institution basis. Such programs vary from institution to institution, and generally include adult basic education (ABE) at all institutions; opportunities for General Education Development (G.E.D. - high school diploma equivalency), at all institutions; post-secondary and college courses to a limited extent at certain institutions; vocational training at certain institutions; life skills courses (such as financial management, consumer knowledge, job-seeking skills, etc.) at all institutions; substance abuse programs and sex offender therapy at limited institutions; prison industries at a few institutions; and a limited number of institutional jobs (such as maintenance jobs, library positions, cooks' assistants, module helpers, etc.) at each institution.<sup>26</sup> In addition, limited opportunities for work furloughs, and rehabilitation or educational furloughs, are afforded at various institutions.

#### Idleness

While the foregoing programs have been offered in varying degrees at the various institutions throughout the state, there is, certainly, the opportunity for, and the need for, improvement in the programming offerings in particular areas, as well as at particular institutions. Indeed, nearly all of the experts who testified at trial commented on the substantial problem of "idleness" of the inmates at each institution. Many experts observed, and the Court itself observed during tours of the prison facilities, numerous inmates sitting or lying idly on their bunks or in dayrooms, engaged in no particular activity. Further, expert opinion testimony linked the problem of idleness to increased tensions, conflicts and potential violence in institutions. Experts also found that

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<sup>26</sup> Recreational facilities, equipment and programmings, in the form of gymnasium or exercise opportunities, are also offered at institutions. This subject, however, has been covered in the parties' partial settlement agreement, and was not an issue litigated at trial.

idleness was not conducive to effective rehabilitative programming.

#### Lack Of Evaluation Study

The Court finds that as of the time of trial, no ongoing evaluation of defendants' rehabilitative programming was in effect. That is, no study or scientific effort had been attempted by defendants to follow up inmates who had been released from Alaskan correctional institutions, determine their rate of recidivism or their lack of future criminal behavior, and compare such results with the rehabilitative programming activities which had been offered to such released inmates. Nor was there any attempt to analyze the efficacy of any particular program, or to continue, modify, or abandon defendants' programs or mix thereof on the basis of demonstrated post-release results. Apparently, institutions throughout Canada are now performing just such ongoing evaluative studies of rehabilitative programming offered at such institutions.

During the trial, however, defendants' witnesses indicated that they were in the process of setting up computerized record-keeping systems, which would enable them to create a sufficient data base from which to begin conducting ongoing, follow-up studies of released inmates. Additionally, defendants' witnesses indicated that they contemplated a three-year follow-up study, the first report from which would be available in 1987 (excluding annual partial reports prior to then). In the Court's view, such an evaluation component to rehabilitation programming is essential to provide defendants with at least some relevant information as to the efficacy or inefficacy of the rehabilitative programming being offered to inmates at defendants' institutions. Accordingly, by separate order, the Court has required defendants to implement and maintain such an ongoing evaluation study.

#### Areas Of Concern

Generally, the Court finds that, system-wide, and on the basis of the record at trial, defendants are meeting their

constitutional and statutory requirements to provide inmates with reasonable opportunities to engage in rehabilitative programming offerings, which have been developed on a rational basis.<sup>19</sup> Plainly, defendants' correctional officials must be accorded broad latitude to determine both the type and mix of programming offered, as well as the types of inmates or inmate groups which may be more suitable for particular programming offerings. Also, the Court finds that defendants' present state-wide Programming Director, Ms. Susan Humphrey Barnett, is exceptionally well qualified to manage defendants' statewide programming activities, and has demonstrated both professional ability and sensitivity to inmates' needs in this area and during her work as Superintendent of MCCC. Further, the Court is impressed with recent policy changes implemented by defendants, including the elevation of the programming function to a director-level position within the agency, and the conferring of authority on the Programming Director to prevent the transfer of any inmate from one institution to another when such transfer would seriously disrupt educational or rehabilitative programming activities. Evidence established that Ms. Humphrey Barnett in fact invoked such authority on more than one occasion.

Nevertheless, there are wide variations between minimal levels of constitutional and statutory programming offering, and ideal levels of such offerings. While obviously the provision of programming offerings is a function, to some extent, of available resources, the Court finds that, on this record, improvement in programming offerings are indicated in a number of particular areas.

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<sup>19</sup>On this issue, the Court is entering findings of fact and conclusions of law only on the question of the sufficiency of defendants' programming system-wide. Significantly, the Court is not adjudicating any particular inmate's claim that he or she has been denied a right to treatment for alcohol or drug rehabilitation, or for psychiatric or psychological treatment, or the like.

First, as previously noted, the problem of idleness of inmates exists throughout the entire system. Defendants should continue to attempt to reduce such idleness in as many ways as realistically possible.

Second, the Court finds that the programming offerings available for women prisoners at the Fairbanks Correctional Center are deficient or even non-existent. Some programming offerings to this group of prisoners must be provided.

Third, the Court finds that both programming activities, and programming space, at Third Avenue are deficient as well. Indeed, the limitations of the space and programming offerings at Third Avenue have been noted by several expert witnesses, including defendants' expert, Brodsky. Additional programming should be offered at this institution.

In addition, the Court finds that post-secondary educational offerings are extremely limited throughout most institutions, but in particular, are non-existent at the Ketchikan Correctional Center. To the extent indicated by the prisoners at such institution, post-secondary educational opportunities should be provided.

Finally, the Court finds that programming offerings at Cook Inlet Pretrial Facility are likewise extremely limited.<sup>27</sup> As CIPT's population continues to mushroom in the future, programming will have to be increased.

In the accompanying order, the Court has required defendants to submit a report, within 30 days hereof, indicating how defendants intend to improve the programming offerings in the areas indicated above as being deficient.

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<sup>27</sup> Although the pretrial detainees may not have a "right to rehabilitation" treatment, since, by definition, they have not been convicted of any crimes, and therefore, have not demonstrated a need for rehabilitation, the Court concludes that under relevant statutory authority, defendants are obligated to provide at least minimal treatment, care, educational and work opportunities to such pretrial detainees. That is, the Court is construing the term "prisoners" of applicable statutes, to include pretrial detainees. See AS 33.30.020, .050, .225(a).

### Denial Of Access To Higher Education

Another area of concern to the Court is defendants' policy which has the effect of denying prisoners access to post-secondary educational courses. That is, the Court finds that defendants had, prior to trial, been following a policy of not permitting prisoners to take any college level, post-secondary educational courses unless such prisoners had (1) a high school diploma or a G.E.D. certificate, and (2) scored at least at the 9th grade functioning level on the Iowa Basic Skills Test.

As of about November, 1983, this policy was revised somewhat, to allow prisoners to take one non-credit post-secondary course initially, and upon successful completion thereof and in the discretion of correctional officials, to take additional non-credit post-secondary courses. Prisoners were, however, still required to have a high school diploma or a G.E.D. certificate, and to have taken the Iowa Basic Skills Test and to have achieved a 9th grade or higher functional level thereon, before being allowed to take such courses. Additionally, inmates scoring below the 9th grade level on the Iowa basic test could, on the recommendation of one of defendants' educational associates or institutional instructors, enroll in a post-secondary credit course, and could continue therewith if they had received a grade of C or better.

The Court finds that under defendants' past policy, and even under defendants' current policy, some inmates are being denied access to post-secondary educational opportunities. Inmate testimony at trial established that even inmates with G.E.D.s or high school diplomas were denied opportunities to take college level courses. Inmate testimony also established that at least certain inmates or groups of inmates seem to have facilitated their own rehabilitation in part through the use of

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and .260.

college level programs, such as creative writing courses, poetry classes, literature courses, analytical reasoning courses and the like.

Additionally, in this regard, the Court finds that there is evidence on the record in this case to the effect that the Iowa Basic Skills Test, while "validated" (meaning that the test in fact measures what it purports to measure), is not "normed" or "normalized" for certain minority groups, specifically including Alaska Natives who constitute a significant percentage of Alaska's prison population. The Iowa Basic Skills Test results may well be inappropriate and unreliable, at least as regards Alaska Native prisoners. Further, the Court finds, on the basis of testimony from several witnesses herein, that approximately 60% of the adult male prisoner population of Alaska's prison system have either high school diplomas or G.E.D. certificates.

In this connection, the Court also finds that the Alaska Community Colleges and the University of Alaska have no similar admission requirements of students similar to defendants' high school diploma or G.E.D. and 9th grade testing results policy. The University of Alaska is a land grant university with an open enrollment policy.

The Court also finds that defendants' educational programming expert and consultant, Dr. T. A. Ryan, testified that she felt that post-secondary educational courses should be available to prisoners on the same basis as "free world" persons who could take courses through the University of Alaska system. To the same effect is the recommendation of defendants' own advisory board of college course providers for prisons, i.e., that the G.E.D./high school diploma requirement for admission to post-secondary education courses be abolished.

Finally, the Court finds that defendants' rationale for maintaining this restrictive policy, essentially to the effect that the policy maximized the likelihood of prisoner success and minimized the risk of failure, is not credible.

Accordingly, the Court concludes that the policy of defendants, requiring prisoners to have both a high school diploma or G.E.D. certificate and to have achieved a 9th grade level of functional ability on the Iowa Basic Skills Test, before taking credit or non-credit post-secondary courses, is arbitrary, irrational, and contrary to the policies embodied in the Article I, §12 of the Alaska Constitution, and relevant Alaskan statutes, including AS 33.30.020, and .260.

The Court notes that the utilization of testing or screening instruments by defendants may, nevertheless, continue to be a useful educational device. That is, the Court finds that at or shortly before trial, defendants' began administering an individual needs assessment test to incoming prisoners for the purpose of determining their rehabilitative potential and needs. The Court finds this approach to be desirable and functional, and urges defendants to continue doing so.

The tests used by defendants for this purpose, however, should, as noted above, be both validated and "normed," meaning that they should in fact measure the matters which they purport to measure, and that they should not be inappropriate for or discriminate against any particular groups of test-takers, such as minority groups and particularly Alaska Natives. And, of course, the tests should be administered in a standardized fashion to all inmates. To the extent that the tests currently being utilized by defendants, including the Iowa Basic Skills Test do not meet these requirements, they should be discontinued or "validated" and "normed."

Detailed findings of fact and conclusions of law regarding the subject of programming, have been issued simultaneously with this Memorandum Decision.

G. Inmates' Access To Files

In ¶ XIII(30) and (36) of their Fourth Amended Complaint, plaintiffs challenge defendants' alleged unreasonable and unnecessary prohibition of or restriction on plaintiffs' access to their prison files, contending that such prohibitions

or restrictions violate plaintiffs' constitutional or statutory rights.<sup>28</sup>

Initially, the Court concludes that plaintiffs failed to adduce competent evidence on this claim, and have failed to establish, by a preponderance of the evidence, that defendants or their officials unreasonably and unnecessarily restricted inmates' access to their files. On the other hand, defendants' evidence, particularly the opinion testimony of Dr. Hudson,

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<sup>28</sup> 7AAC 60.095, now 22 AAC 05.095, provides:

22 AAC 05.095. ACCESS TO PRISONER RECORDS. (a) Except as otherwise provided this section, access to prisoner records is available only to personnel of the department and to individual law enforcement agencies. No file containing prisoner records may leave an institution, unless authorized by the commissioner or court order.

(b) In the absence of any state or federal law to the contrary, the prisoner, his attorney, or the attorney's agent, shall be granted access, upon request, to the prisoner's records in order to prepare for any classification, disciplinary, parole, revocation, or judicial hearings, or appeal from any such hearings, subject to the following:

(1) Access to the following records may be denied:

(A) individual voting records of classification or disciplinary committees and of the parole board;

(B) identity of informants or information given in confidence;

(C) maps, diagrams or diagraphs of the physical layout of the institution or descriptions of security procedure;

(D) any reports, memoranda or other documents prepared specifically for transmittal to the Alaska Department of Law or an attorney retained by the State of Alaska in anticipation of or during the course of litigation;

(E) law enforcement investigative reports and criminal history information; and

(F) any other record where a determination is made by the commissioner, that such information would result in a substantial risk of reprisal, endanger the security of the institution, or disclose the department's position in litigation.

(2) Access to evaluations regarding the prisoner may be denied only if it is determined by the commissioner that the evaluations, if known to the prisoner, could lead to a serious disruption of his institutional adjustment or rehabilitative progress. This paragraph includes, but is not necessarily limited to, the following:

indicated that at least with respect to medical files, allowing inmates access to their medical records and to such things as doctors' or psychiatrists' notes, was not a good idea and could be counterproductive to treatment. In short, defendants prevail on this claim as a result of plaintiffs' failure of proof.

To the extent that the plaintiffs challenge the regulation in effect at the time of trial, 7AAC 60.095, on its face on due process grounds, under state or federal constitutional

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- (A) psychiatric or psychological reports;
  - (B) parole or probation reports;
  - (C) presentence reports;
  - (D) staff investigative reports and evaluations;
  - (E) departmental and interagency memoranda;
  - (F) reports concerning personal family life; and
  - (G) medical records or reports.

(3) Access to the following records may not be denied:

(A) a copy of the judgment and commitment or any other document under which authority the prisoner is being held in custody;

(B) any transcript of court proceedings involving the prisoner including, but not limited to, comments made at the time of imposition of sentence;

(C) time accounting records;

(D) admission records;

(E) custody classification records;

(F) disciplinary or incident reports including final disposition;

(G) recordings of parole, classification, disciplinary or revocation hearings, other than with respect to testimony covered under (1) of this subsection;

(H) mail placed in the prisoner's file pursuant to 22 AAC 05.520(c)(3);

(I) any other record, access to which may not be denied under (1) and (2) of this subsection.

(4) If access to information is denied under (1) or (2) of this subsection, the superintendent shall give notice to the prisoner of the denial by stating, in writing, the title, label, form number or origin of the material and briefly set out the reasons for denial.

grounds, the Court concludes that the regulation is not unconstitutional. Defendants' January 23, 1984 motion, in this regard, is granted.

H. Constitutionality Of Regulations

In ¶ XIII(32) of their Fourth Amended Complaint, plaintiffs challenge certain regulations in effect and followed

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(5) Access to prisoner records under this section may be subject to such necessary and reasonable rules as may be prescribed by the commissioner with respect to time, place and manner of inspection. Any examination of the original documents in a file may be conducted under direct supervision; however, the reproduction of documents is not prohibited if done at prisoner expense.

(6) The institution has a reasonable time, from the time of the prisoner's request for access, in which to compile the materials from his file for inspection. However, if the prisoner has not been given notice of a classification or disciplinary hearing, in preparation for which he wishes to review his file, early enough so as to allow a reasonable time for inspection of the records, then the institution must either reschedule the hearing or permit inspection of the materials no later than 24 hours before the hearing.

(7) The prisoner shall address all issues regarding his records through use of the procedures developed by the commissioner for prisoner grievances under 22 AAC 05.185. The prisoner may raise issues of inadequate access or request amendment, addition, or deletion of matter contained in his file on the basis that the information is erroneous, deceptive or unnecessary to the functions of the department. The grievance procedure relating to records need not be designed to work within the time frame contemplated by (6) of this subsection, but should attempt to prevent constant relitigation of issues raised by material in the prisoner's file.

(c) Individuals or agencies involved in a research program may have access to prisoner records with the approval of the commissioner, but only if a research program first demonstrates that threats to confidentiality and individual privacy which might be created by the program

(1) have been minimized by methods and procedures calculated to prevent injury or embarrassment to individuals; and

(2) are clearly outweighed by the prospective advantages accruing to the administration of justice (Eff. 9/10/77, Reg. 63)

Authority: AS 33.30.010  
AS 33.30.020

AS 33.30.030  
AS 33.30.185

by DOC at the time of trial.<sup>29</sup> Each of the challenged regulations will be addressed separately below.

1. Prohibited Conduct (7AAC 60.400(b)(21))

7AAC 60.400(b)(21) defines the following activities as a "major infraction," for which prisoners may be punished:

[E]ngaging in a group or individual demonstration or activity, excluding abusive or obscene language, involving conduct which would potentially disrupt or interfere with the security or orderly administration of the institution, or undermine authority including, but not limited to, refusing to obey a lawful and proper order of any staff member.

Plaintiffs contend that 7AAC 60.400(b)(21) is unconstitutionally vague. The Court agrees.

The concept of vagueness was first explained in Connally v. General Construction Co., 269 U. S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).

[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

Cited in Summers v. Anchorage, 589 P.2d 863, 867 (Alaska 1979).

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<sup>29</sup> In July, 1984, the DOC was given its own AAC Title (Title 22). Therefore, the regulations referred to in the parties' briefs and in this Memorandum Decision have been superseded. The new numbers are as follows:

Work Furlough:	old	7AAC 60.320
	new	22AAC 05.320
Visitation:	old	7AAC 60.325
	new	22AAC 05.325
Prohibited Conduct:	old	7AAC 60.400
	new	22AAC 05.400
Furlough Consideration:	old	7AAC 60.330
	new	22AAC 05.330
Violations of Furlough Conditions:	old	7AAC 60.335
	new	22AAC 05.335

The substance of the regulations and the numbering of subsections, however, remain unchanged.

Three factors must be considered in determining whether an administrative regulation is unconstitutionally vague: (1) whether the regulation is so imprecisely drawn and overbroad that it "chills" the exercise of First Amendment rights,<sup>30</sup> (2) whether the regulation gives inadequate notice of the conduct that is prohibited and (3) whether the imprecise language of the regulation encourages arbitrary enforcement by allowing prison administrators undue discretion to determine the scope of its prohibitions. Id. at 863; see also Storrs v. State, 664 P.2d 547 (Alaska 1983).

Plaintiffs argue that the foregoing regulation is used to punish the exercise of their First Amendment right to freedom of expression;<sup>31</sup> that prisoners have no notice as to what conduct is considered "potentially disruptive" or an interference with prison security or administration; that enforcement is arbitrary because of the amount of discretion left to administrators by the vague regulation. Each contention will be addressed in turn.

First, the regulation in question is specifically focused on "group or individual demonstration or activity." The regulation clearly encompasses the curtailment of the freedom of expression guaranteed by the First Amendment. The contemplated restriction extends beyond setting "time, place, and manner" conditions on expressive conduct, and seemingly extends into the area of substantive restrictions. Heffron v. International Society for Krishna Consciousness, 101 S.Ct. 2559 (1981). This, combined with the vague language in the regulation regarding

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<sup>30</sup>The existence of a statute may "chill" the exercise of First Amendment rights if it may cause others to refrain from constitutionally protected speech or expression. Thus, the Court must consider its possible application to any situation within the scope of the regulation. Broadrick v. Oklahoma, 413 U.S. 601 (1973).

<sup>31</sup>"[P]assing out grievance forms, circulating petitions, or questioning the behavior of officers." (Plaintiffs' Brief, p. 37.)

what expression is punishable, could produce a "chilling effect" on those First Amendment guarantees.<sup>32</sup>

Second, the use of language defining as a "major infraction" "group ... conduct which would potentially disrupt, or interfere with security or orderly administration ... or undermine authority ... .," is plainly void for vagueness. The inadequacy of the regulation is apparent on its face. Clues which would assist a prisoner in determining whether conduct is susceptible to punishment as disruptive or interfering are not present.

Third, in Levshakoff v. State, 565 P.2d 504 (Alaska 1977) the court held that a "statute can be held void for vagueness if, by its imprecision, it confers on judges, jurors, or law enforcement personnel undue discretion in determining what constitutes the crime proscribed by statute." The question is thus, how much discretion rests in administrators and judges to arbitrarily or discriminatorily enforce the regulation.

Courts have recognized that administrative officers should be required "to articulate the standards and principles that govern their discretionary decisions in as much detail as possible." Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971). Where there are, in essence, no standards governing the exercise of discretion granted by the statute, the lack of specific regulation "permits and encourages arbitrary and discriminatory enforcement." Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972).

In the instant case 7AAC 60.400(b)(21) contains general language which fails to specify with particularity what exact conduct is considered disruptive or interfering or undermining regarding security, orderly administration, or authority. The

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<sup>32</sup> If the regulation has a "chilling effect" inhibiting the exercise of constitutionally protected freedom, it is invalid on its face. Thornhill v. Alabama, 310 U.S. 98, 84 L.Ed. 1093, 60 S.Ct. 736 (1940).

regulation lacks detail to guide an administrator in its enforcement or to protect against arbitrariness or discrimination. The use of this regulation for discipline is so vague as to confer undue discretionary power. As such, the potential for unchecked abuse exists.

Because 7AAC 60.400(b)(21) infringes on First Amendment rights, does not provide adequate notice of prohibited conduct, and does not provide a check on potential arbitrary and discriminatory enforcement, the Court concludes that the regulation is unconstitutionally void for vagueness.

2. Work Furlough (7AAC 60.320(a))

7AAC 60.320(a) provides:

Upon the recommendation of the classification committee and the superintendent, the director may grant any sentenced prisoner a work furlough in accordance with AS 33.30.250, Sec. 330 of this chapter, and this section.

Plaintiffs argue that 7AAC 60.320(a) and 7AAC 60.330 are both arbitrary and inconsistent with AS 33.30.250, which provides criteria for work furlough participation. Thus, plaintiffs contend, those regulations are invalid as provided by the Alaska Administrative Procedure Act AS 44.62.030.

Kelly v. Zamarello, 486 P.2d 906 (Alaska 1971) cited the standard of review relevant to regulations adopted pursuant to an administrative agency's quasi-legislative rule-making function. Those factors are: (1) whether the regulation is consistent with and reasonably necessary to carry out the purposes of the statutory provisions conferring rule-making authority on the agency, and (2) whether the regulation is reasonable and not arbitrary.<sup>33</sup>

Generally AS 33.30.250 provides the Commissioner with the power to determine if a prisoner is a "fit subject for a work furlough." However, the Commissioner is specifically

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<sup>33</sup>See also Chevron U.S.A., Inc. v. LeResch, 663 P.2d 973 (Alaska 1983).

prohibited from authorizing work furloughs for prisoners (1) who are identified with large-scale, organized criminal activity, (2) who have serious emotional or personality problems, as determined by the commissioner, and (3) whose presence in the community is likely to evoke adverse public reaction toward the inmates, the institution and the state. AS 33.30.250(g).

The challenged regulations go beyond the statute and impose additional eligibility requirements on prisoners who may be eligible for work furloughs. Specifically, 7AAC 60.330(3) provides that a prisoner is not eligible until the prisoner is within six months of a mandatory or parole release date. This, plaintiffs argue, is an arbitrary requirement which does not bear any relationship to the limitations set out in the statute and which unreasonably limits the number of furloughs granted. The Court agrees.

The regulation goes well beyond the three disqualifying criteria of the statute. Although the statute clearly gives the Commissioner the discretion to determine who is a "fit" subject, the statute defines such fitness, or lack thereof, in terms of risks to the community and the penal institutions -- not in terms of any particular length of time remaining to be served on a prisoner's sentence.

In the Court's view, the six month pre-release requirement is arbitrary and unreasonable, and not rationally related to the objectives of the statute, and inconsistent with AS 33.30.250. Distinguishing between a prisoner, who would, for example, otherwise be suitable for a work furlough but who had seven months remaining on his sentence, and one who was similarly eligible but who had only five months to serve before release, is, in the Court's opinion, simply arbitrary. Accordingly, the regulation is held to be invalid.

### 3. Visitation Furlough (7AAC 60.325)

AS 33.30.150 was enacted to provide a deserving prisoner permission to visit his/her family under certain

circumstances. The regulation, 7AAC 60.325(b) further defines what group is encompassed in the definition of "family":

(b) For the purposes of this section, the prisoner's family is deemed to be his father, mother, sister, brother, spouse, son, daughter, step-relationships of the previously mentioned relatives, or any persons having an immediate family relationship with the prisoner during his formative years.

Plaintiffs argue that this regulation refers to "immediate" relationships and thus denies Alaskan Natives access to their extended families in contravention of the purpose of AS 33.30.150, which states generally that a prisoner may "visit with family at a place other than at the place of confinement ... ."

A simple reading of the regulation in question shows that plaintiffs' argument is clearly without merit. The regulation defines immediate family in such a way as to include most everyone who has had a close family relationship with the prisoner, and with whom the prisoner should conceivably expect to visit. The regulation is not vague, arbitrary or inconsistent with the statute.

4. Furlough Violation (7AAC 60.335)

7AAC 60.335 provides:

If a violation of the conditions of a furlough is alleged, a report must be immediately sent to the director. The director, the superintendent, or the supervising parole/probation officer shall arrange for the immediate return of the prisoner. The prisoner shall appear before the classification committee within seven days for a hearing to determine whether the furlough be continued or terminated.

Plaintiffs argue that 7AAC 60.335, which provides for the immediate return of a prisoner from any type of furlough upon the mere allegation of a violation, is violative of due process because no hearing is held prior to the prisoner's return. Whether a prisoner's claim of due process violation in connection with the return from furlough is cognizable depends on whether the prisoner has a justifiable expectation based on the law or practice which conditioned the return from furlough

upon proof of serious misconduct. If he does have such an expectation, minimum procedures required by the due process clause are necessary to insure that the state-created expectation is not arbitrarily abrogated. Durso v. Rowe, 579 F.2d 1365 (7th Cir. 1978).

The question to be addressed, then, is whether a prisoner has a justifiable expectation to remain in a furlough status program until a hearing is afforded. The program grants furlough status when a prisoner meets certain eligibility criteria and the administration, exercising its discretion, decides that furlough is appropriate. Once furlough is granted, however, the question becomes, does the grantee then have a liberty interest in that furlough?

In Tracy v. Salamack, 440 F.Supp. 930 (S.D.N.Y. 1977) modified, 572 F.2d 393 (2d Cir. 1978) the court analogized removal from a work release program to parole revocation and to loss of conditional release rights which merit due process protection. Morrissey v. Brewer, 408 U.S. 471, 33 L.Ed.2d 484 (1972).<sup>34</sup> The court in Tracy reasoned:

[L]ike parolees, temporary release participants enjoy a form of conditional liberty: they may spend up to fourteen hours a day outside prison, participating in employment or schooling. Indeed, the very purpose of temporary release is to lessen the shock of returning to society by offering much of the freedom of parole. While the temporary release participant, unlike a parolee, must normally return to his work release facility at night, even this distinction is not overwhelming since overnight and weekend furloughs are commonly available. Plaintiffs also compare their loss to impairment of the interest in conditional release, which was held in Zurak v. Regan, supra, 550 F.2d 86, to require due process protection. Zurak and the parole revocation cases, plaintiffs argue, establish that a broad range of interests in conditional liberty are entitled to the safeguards of the Fourteenth Amendment.

440 F.Supp. at 934.

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<sup>34</sup> See also Durso v. Rowe, 579 F.2d 1365, 1371 (7th Cir. 1978).

The court in Tracy also adopted the entitlement test of Meachum v. Fano, 427 U.S. 215, 49 L.Ed.2d 451 (1976). Entitlement must be determined by looking to the reasonable expectation of the inmate based on a variety of factors, including not only the statute and regulations, but also history and prior practice.<sup>35</sup> Where the practice of the state is to revoke furlough status only upon a showing of misbehavior, there is a reasonable expectation, arising from that practice, of a right to continued participation in the program as long as an offense is not committed.<sup>36</sup> Thus, a prisoner cannot be deprived of the entitlement without due process.

Whether a hearing prior to the return from furlough is required by due process is determined by weighing (1) the importance of the individual interest involved, (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of a prior hearing to that risk, and (3) the governmental interest in employing the challenged procedures (*i.e.*, post-return hearing). Matthews v. Eldridge, 424 U.S. 319 (1976).

The first factor is the importance of the prisoner's interest involved. Furlough enables a prisoner to participate in many activities enjoyed by "free" citizens. The prisoner is released from prison based on an evaluation by the Commissioner that he is capable of returning to society as a responsible member. Under certain conditions the prisoner can be employed, visit with family and participate in educational opportunities. Although subject to restrictions, a prisoner has an expectancy interest in continued conditional liberty. Morrissey v. Brewer, 408 U.S. 471, 33 L.Ed.2d 484, 495 (1972). A person's liberty

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<sup>35</sup> See Durso v. Rowe, 579 F.2d 1365 (7th Cir. 1978). Entitlements can also be created solely by the manner in which a program is administered. Zurak v. Regan, 550 F.2d 86 (2d Cir. 1977); Walker v. Hughes, 558 F.2d 1247 (6th Cir. 1977).

<sup>36</sup> See Holmes v. United States Board of Parole, 541 F.2d 1243 (1976).

interest, even the diminished liberty interest allowed a convicted prisoner on furlough, is an important interest which weighs heavily in a due process balance.

The second factor to be weighed is the risk of an erroneous deprivation of the expectation. The regulation provides for a hearing within seven days of return of the prisoner, to determine whether to continue or revoke the furlough. During that period the prisoner's furlough is effectively revoked until the date of the hearing, for a period of not more than seven days. This possible seven day loss of furlough status causes a temporary stop in visitation, work or education rights. The "temporary" loss could easily jeopardize the prisoner's employment and education on a permanent basis. Jobs could be lost due to the sudden departure of the prisoner employee. Exams, assignments and lectures could be missed for the same reason. The risk of erroneous deprivation is substantial. Under the regulation as written, corrections officials have no choice but to recall, however temporarily, any furloughed prisoner about whom a furlough violation is alleged. This is so regardless of whether the alleged violation is serious, minor or administrative, whether it is intentional or unintentional, and regardless of the source of the allegation and the presence of any opposing reports. This risk could be completely eliminated by the use of a pre-revocation hearing procedure.

The risk of erroneous deprivation of an important personal interest must be balanced against the state's interests in applying its current procedures. The state's main interest is the protection of the public. An immediate revocation of liberty status upon a suspicion that the prisoner violated furlough conditions does serve to protect the public.

Initially, the convicted prisoner was found guilty of a crime against society which justified imposing restrictions on his liberty. He was granted furlough in the belief that he would be able to conduct himself as a responsible citizen. Should this belief prove unfounded, the state's interest in

protecting its citizens dictates that the prisoner again be removed from society. The question is, however, whether the state's interests in affording only a post-return hearing outweigh the prisoner's interests in having a pre-return hearing.

The Court concludes that, absent exigent circumstances which implicate the public safety, a prisoner's liberty interest in furlough status must outweigh the state's interest in administrative convenience. Thus, in non-emergency circumstances, a pre-return hearing must be afforded to a prisoner prior to the revocation of his furlough status and his return to institutionalized status. Since the regulation in question deprives prisoners of their liberty interest in situations which do not implicate the public safety, the Court holds that the regulation violates the due process clause of the Alaska Constitution, Article I, §7. In emergency circumstances involving public safety, however, the State may take action without waiting for a hearing. In such cases the public interest necessarily outweighs the individual's interest.

By separate order, the Court has required defendants to submit, within 30 days, drafts of revised regulations conforming to the foregoing conclusions.

#### I. Urinalysis Testing Program

In this action, plaintiffs challenge the reliability of the EMIT-st machine and procedure in question, defendants' past practice of failing to preserve urine samples and/or maintain a chain of custody of such samples, and the imposition of disparate sentences given to different inmates at different institutions as a result of positive urinalysis test results. These claims will be addressed separately below.

The evidence in the record indicated that defendants had administered, at some of the institutions throughout the state, urinalysis tests of inmates. Such tests were administered in an attempt to detect whether inmates had been utilizing prohibited drugs, such as marijuana or alcohol. The device utilized in the testing procedures was a machine known as the

EMIT-st, which used a chemical analysis procedure to test for particular drugs in an inmate's urine.

Inmates whose urine was tested and who were found to have utilized prohibited drugs were subjected to disciplinary hearings. Some received different sanctions, including sanctions in the form of loss of statutory "good time."

The record also established that in the past, and up until shortly before the trial herein began, defendants failed to preserve urine specimens for subsequent testing by inmates, failed to maintain such specimens in sealed or protected containers and areas, and generally failed to maintain any "chain of custody" regarding such specimens. Shortly before trial, however, defendants represented to the Court that they had changed such policy, and that now urine specimens of inmates were being sealed, properly stored and identified, and preserved until the conclusion of disciplinary proceedings, to enable an inmate to conduct an independent test of the specimen.

#### Reliability of EMIT-st Machine And Process

Prior to trial, in December of 1983, the parties cross-moved for summary judgment on certain issues regarding defendants' urinalysis testing equipment, policies and procedures. In its January 3, 1984 Order Regarding Parties' Cross-Motions For Summary Judgment On The Issue Of Defendants' Urinalysis Testing Policies And Procedures, the Court granted defendants' motion and denied plaintiffs' motion regarding the reliability of the EMIT-st machine and process in question. Accordingly, that issue was not litigated at the trial herein.

#### Defendants' Policies And Practices Regarding The Preservation Of Urine Specimens And Chain Of Custody Thereof

With respect to the issue of defendants' past policies and practices concerning the preservation of urine specimens for retesting, the maintenance of a chain of custody and the like, the Court denied the parties' cross motions for summary judgment on that issue prior to trial.

Shortly before trial herein, however, defendants represented to the Court that such policies and practices had been changed, and that now defendants were following a policy and practice of preserving urine specimens for retesting, identifying such specimens, and maintaining such specimens in a secured area until the conclusion of any possible disciplinary proceeding resulting from a positive test result.

As a result of defendants' changed policies and practices, the issues regarding defendants' past procedures, as well as defendants' current policies and procedures, are moot. In the remedial order issued simultaneously herewith, the Court has required defendants to continue its current policies, and to reduce the same to a written policy memorandum and regulation. See Municipality of Anchorage v. Serrano, 649 P.2d 256 (Alaska 1982) (requiring prosecution in drunk driving cases to make reasonable efforts to preserve breath sample or allow defendant to verify results of breathalyzer tests).

#### Disparate Sentences

At trial, inmates Eric Holden of HMCC, and Regina Johnson of MCCC, testified that certain inmates had been given different punishments as a result of positive urinalysis test results. Plaintiffs challenged such disparate sentences on due process and equal protection grounds.

The Court has reviewed the record carefully in this regard, and finds and concludes that each inmate's circumstance was distinguishable, that there existed a rational basis for the sentence issued in each case, and that no constitutional violations occurred through the issuance of such differing sentences. Defendants' January 23, 1984 motion is, in this regard, granted in part and denied in part, as set forth herein.

## VI. Remedies

As set forth above, the Court has found, in a limited number of areas, statutory or constitutional difficulties with certain of defendants' policies, procedures, regulations, housing conditions and practices. In fashioning appropriate remedies for such statutory or constitutional violations, the Court is mindful of the limited role it should play in remedying problems found in prison environments. As the District Court in Dawson v. Kendrick, 527 F.Supp. 1252, 1281-82 (S.D.W.Va. 1981) succinctly put it:

It must be noted that certain unconstitutional conditions and practices by their nature bespeak only one constitutionally permissible response. The fashioning of remedies for such "single-edged" unconstitutional conditions and practices are solely within the province of the judiciary and are not amenable to a hands-off approach in fashioning the appropriate remedy. For purposes of example, compare the failure to afford procedural due process safeguards where required with a failure to provide minimally adequate plumbing and plumbing fixtures. The remedy for the former condition is solely a function of constitutional law whereas the latter brings into question state and local housing codes, expert opinion and standards promulgated by various interest groups. Thus, in Bell v. Wolfish, *supra*, the Court rejected the substitution by the lower courts of their judgment regarding the prison's restrictive policy on the receipt of packages by prisoners, stating that although the trial court's remedy was a reasonable response to the institution's interest in maintaining security, order and sanitation, "[i]t simply [was] not . . . the only constitutionally permissible approach to these problems." 441 U.S. at 554, 99 S.Ct. at 1882. The courts have accordingly abstained from articulating specific remedies to unconstitutional conditions and practices in those instances where a specific remedy is not constitutionally compelled.<sup>n</sup>

n. As previously observed, instances where prison officials have failed to comply with court orders requiring the upgrading of conditions of confinement stand as an exception to this principle. See Hutto v. Finney, 437 U.S. at 687, n.9, 98 S.Ct. at 2572, n.9, see generally Comment, Complex Enforcement: Unconstitutional Prison Conditions, 94 Harv.L.Rev. 262, 645-46 (1981).

Generally, where the Court has found constitutional or statutory violations or problems, as for example, in the areas

of programming deficiencies, overcrowded housing circumstances, or unconstitutional regulations, the Court's approach to remedying such violations is to have defendants submit their proposed solutions to such problems to the Court within a reasonable period of time. In this way, defendants, rather than the Court, will in fact be remedying the areas held to be problems. Except for the limited role of monitoring compliance with the prior settlement agreements and with specific constitutional and statutory remedies ordered herein, this Court has no intention of involving itself in the daily administration or management of Alaska's prisons; that responsibility and authority clearly resides with defendants' correctional administrators and officials.

As a result of the Court's findings and conclusions regarding certain statutory and constitutional problems on this record, however, the Court concludes that certain specific remedies are appropriate. A separate order, specifically detailing such remedies in each particular area, has been issued simultaneously with this Memorandum Decision.

In so concluding, the Court also notes that injunctive relief may be appropriate even where a particular practice or condition has been changed or terminated shortly before or during trial proceeding. That is, for the purpose of fashioning appropriate relief, the issue does not necessarily become moot with the changed or terminated policy or practice. See Vitek v. Jones, 445 U.S. 480 (1980); Alee v. Medrano, 416 U.S. 810 (1974) and U. S. v. W. T. Grant, 345 U.S. 629 (1953). Thus, for example, where defendants changed their prior practice regarding urinalysis sampling and testing just prior to trial, and now maintain a policy of identifying and preserving urinalysis samples with positive test results until an inmate disciplinary proceeding has been concluded, the Court has ordered that defendants' current policy should be continued.

In addition to the specific remedies ordered in the accompanying order, the Court intends to continue to use the

services of a Special Master to assist it in monitoring compliance with prior partial settlement agreements herein as well as with the terms of this Decision and the accompanying order.

Finally, the Court and/or its Special Master may, in the future, require defendants to submit periodic compliance reports and/or to advise the Court through competent evidence of the progress being made in addressing problem areas and/or complying with the Court's remedial order, this Decision, and the prior settlement agreements.

## VII. Attorneys' Fees And Costs

The issuance of the instant Memorandum Decision, Findings Of Fact And Conclusions Of Law, and accompanying order, marks the end of this lengthy, complex litigation. The Court concludes that, on balance, plaintiffs are the prevailing parties in this litigation. In so concluding, the Court has considered the two extensive partial settlement agreements arising out of this litigation; unilateral changes in policies and practices by defendants occurring in the course of, and prompted by, this litigation; and the fact that both sides to this litigation each prevailed on certain of the issues litigated at trial herein. Clearly, this litigation, in all of its complex variations, has had, and will have, a major impact on defendants' policies and practices in administering Alaska's prison system.

Accordingly, the Court hereby orders plaintiffs' counsel to submit his motion for attorneys' fees within 30 days of this decision. The activities and time for which attorneys' fees may be awarded shall exclude all time and activities already compensated by the partial attorneys' fees award previously issued to plaintiffs herein, shall further exclude time spent in 1983 on unsuccessful settlement negotiations subsequent to the approval of the two partial settlement agreements reached by the parties, but shall include all pretrial and trial activities, commencing in the fall of 1983 and continuing through the 1984 trial proceedings. Plaintiffs' motion for attorneys' fees shall be accompanied by a detailed affidavit by plaintiffs' counsel and/or his assistants, setting forth specifically the time spent on pretrial and trial activities, broken down on a specific item-by-item basis, and accompanied, where possible, by billing sheets or time recording sheets.

The Court also directs counsel for both plaintiffs and defendants to meet and review plaintiffs' motion for attorneys' fees, and supporting documents and materials, immediately after such motion is filed, in an attempt to stipulate, as the parties

have previously done, to an appropriate amount of attorneys' fees. Failing to reach a stipulated sum, however, defendants will have an opportunity to oppose plaintiffs' motion, and plaintiff will have an opportunity to reply to defendants' opposition, in accordance with Civil Rule 77.

Plaintiffs' shall also prepare and submit to the Court within 30 days a final judgment form, which shall incorporate by reference therein this Memorandum Decision, accompanying Findings Of Fact And Conclusions Of Law, and shall leave appropriate spaces on such form for the insertion of figures for attorneys' fees and costs.

Finally, in view of the complex nature of this proceeding, the Court will extend from 10 to 30 days the period of time following the entry of judgment herein within which plaintiffs may file their cost bill pursuant to Civil Rule 79, and may apply to the Clerk of the Court for a hearing regarding the taxation of costs in this proceeding.

### VIII. Conclusion

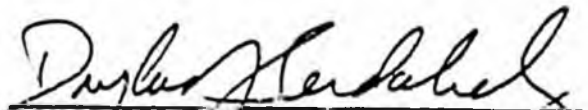
With the issuance of this Memorandum Decision, Findings Of Fact And Conclusions Of Law, and the accompanying remedial order, this four-year-old, complex prisoners' rights litigation, involving 13 Alaskan institutions, the FBOP-housed Alaskan inmates issues addressed in the parties' two partial settlement agreements, classification schemes for sentenced prisoners and pretrial detainees, and the various issues litigated at trial, comes to an end. With the conclusion of this litigation, however, the Court is aware that certain ongoing compliance monitoring activities will have to be performed by the Court and/or its Special Master regarding the partial settlement agreements as well as the remedial order. Nevertheless, the Court is mindful of the limited role which the judiciary can, and should, play in connection with prisoners' rights and prison conditions litigation. The Court wishes to emphasize that both as a legal and practical matter, courts cannot, and should not, become involved in the day-to-day operations or management of prisons. Rather, that function should, and must, necessarily be left to the sound discretion and expertise of competent and responsible correctional administrators and officials.

In this case, the Court has found that generally speaking, defendants' correctional administrators and officials -- particularly defendants' institution superintendents and high level agency management -- are well motivated professionals who are sincerely concerned about addressing the needs and problems of Alaska's correctional system. Moreover, the Court has found defendants to be responsive and cooperative with the Court in the past, and fully expects defendants to continue to be so in the future. It is evident to the Court that in complying with the Court's orders, and particularly in addressing the serious problems presented by burgeoning prison populations in the future, defendants will have to continue to draw upon their own creativity and expertise in fashioning solutions to such serious problems.

Yet, although considerable deference must and should be given to prison administrators in the administration of their institutions, particularly in the absence of constitutional or statutory violations, courts ultimately cannot "abdicate their constitutional responsibility to delineate and protect fundamental liberties." Pell v. Procunier, 417 U.S. 817, 827, 94 S.C. 2800, 2806, 41 L.Ed.2d 494, 504 (1974).

DATED at Anchorage, Alaska, this 15<sup>th</sup> day of

March, 1985.

  
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DOUGLAS J. SERDAHELY  
Judge of the Superior Court