# HB

# 122

NO. ____
Bill Version: HB 122
(H) Publish Date: 2/10/97

# FISCAL NOTE

**STATE OF ALASKA**
**1997 LEGISLATIVE SESSION**

Revision Date:
Title: . . relating to prisoner litigation, post-conviction relief, and sentence appeals . . .amending Alaska Rule of . . .
Sponsor: Rules Committee
Requester: Governor

Dept. Affected: Department of Law
BRU: Criminal Division/Civil Division
Component: Criminal Division/General Legal Services
COMPONENT SERIAL NO. 2085/2087

**Expenditures/Revenues** (Thousands of Dollars)

| OPERATING EXPENDITURES | FY 98 | FY 99 | FY 00 | FY 01 | FY 02 | FY 03 |
|---|---|---|---|---|---|---|
| PERSONAL SERVICES | | | | | | |
| TRAVEL | | | | | | |
| CONTRACTUAL | | | | | | |
| SUPPLIES | | | | | | |
| EQUIPMENT | | | | | | |
| LAND & STRUCTURES | | | | | | |
| GRANTS, CLAIMS | | | | | | |
| MISCELLANEOUS | | | | | | |
| TOTAL OPERATING | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| CAPITAL EXPENDITURES | | | | | | |
| CHANGE IN REVENUES ( ) | | | | | | |

**FUND SOURCE** (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | | | | | | |
| 1005 GF/Program Receipts | | | | | | |
| 1006 GF/MHTIA | | | | | | |
| Other | | | | | | |
| TOTAL | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

**Estimate of any current year (FY97) cost: $** 0.0

**POSITIONS**

| | | | | | | |
|---|---|---|---|---|---|---|
| FULL-TIME | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| PART-TIME | | | | | | |
| TEMPORARY | | | | | | |

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

In 1995, the legislature passed far-reaching legislation aimed at reducing the burgeoning amount of frivolous litigation brought by state prisoners. This bill makes additional changes that are relatively minor, but that will contribute significantly to the further reduction of frivolous prisoner litigation. These refinements include clarifying that filing fees, or exemptions from them, are required in all types of litigation brought by prisoners, and that time limits for filing litigation by prisoners related to conviction or sentence appeals may not be extended by the courts beyond the periods provided in court rules. Additionally, the bill adds a provision to make it easier to collect money owed by a prisoner for attorney fees and costs of litigation.

This bill will have no fiscal impact on the Department of Law. However, it will continue the trend began with ch. 79, SLA 1995, of containing current costs and avoiding continued increases in the state's prisoners' rights and appeals litigation costs. The bill should also increase the amount of fines collected by the Collections and Support Unit of the Civil Division for deposit in the state general fund by an unknown amount.

Prepared by: Joan M. Kasson — Phone: 465-5370
Division: Administrative Services Division — Date: 1/24/97

Approved by Commissioner: Bruce M. Botelho, Attorney General — Date: 1/24/97
Agency: Department of Law

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FISCAL NOTE

NO.
Bill Version: HB 122
(H) Publish Date: 2/10/97

# FISCAL NOTE

**STATE OF ALASKA**
**1997 LEGISLATIVE SESSION**

Revision Date:
Title: Frivolous Litigation
Sponsor: Rules Committee
Requester: Governor

Dept. Affected: Corrections
BRU: ALL
Component: ALL
COMPONENT SERIAL NO. #0694

**Expenditures/Revenues** (Thousands of Dollars)

| OPERATING EXPENDITURES | FY 98 | FY 99 | FY 00 | FY 01 | FY 02 | FY 03 |
|---|---|---|---|---|---|---|
| PERSONAL SERVICES | | | | | | |
| TRAVEL | | | | | | |
| CONTRACTUAL | | | | | | |
| SUPPLIES | | | | | | |
| EQUIPMENT | | | | | | |
| LAND & STRUCTURES | | | | | | |
| GRANTS, CLAIMS | | | | | | |
| MISCELLANEOUS | | | | | | |
| TOTAL OPERATING | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| CAPITAL EXPENDITURES | | | | | | |
| CHANGE IN REVENUES ( ) | | | | | | |

**FUND SOURCE** (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | | | | | | |
| 1005 GF/Program Receipts | | | | | | |
| 1037 GF/Mental Health | | | | | | |
| Other | | | | | | |
| TOTAL | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

Estimate of any current year (FY97) cost: $ 0.0

**POSITIONS**

| | | | | | | |
|---|---|---|---|---|---|---|
| FULL-TIME | | | | | | |
| PART-TIME | | | | | | |
| TEMPORARY | | | | | | |

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

Section 4 of this bill allows for a lien to be placed on a prisoner's account by the state for costs and attorney's fees. This provision will have a minimal fiscal impact on the Department and will be absorbed.

Prepared by: Bruce Richards
Phone: 465-3307
Division: Commissioner's Office
Date: 1/25/97

Approved by Commissioner: Margaret M. Pugh
Margaret M. Pugh
Date: 1/27/97
Agency: Department of Corrections

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# FISCAL NOTE

NO: ____

Bill Version: HB 122

(H) Publish Date: 2/10/97

**STATE OF ALASKA**
**1997 LEGISLATIVE SESSION**

Revision Date: ____

Title: "An Act relating to prisoner litigation..."

Sponsor: Rules Committee

Requestor: Governor

Department Affected: Administration

BRU: Public Defender Agency

Component: Public Defender Agency

COMPONENT SERIAL NO. 1631

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

| OPERATING EXPENDITURES | FY 98 | FY 99 | FY 00 | FY 01 | FY 02 | FY 03 |
|---|---|---|---|---|---|---|
| PERSONAL SERVICES | | | | | | |
| TRAVEL | | | | | | |
| CONTRACTUAL | | | | | | |
| SUPPLIES | | | | | | |
| EQUIPMENT | | | | | | |
| LAND & STRUCTURES | | | | | | |
| GRANTS, CLAIMS | | | | | | |
| MISCELLANEOUS | | | | | | |
| TOTAL OPERATING | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| CAPITAL EXPENDITURES | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| CHANGE IN REVENUES ( ) | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

**FUND SOURCE:** (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | | | | | | |
| 1005 GF/Program Receipts | | | | | | |
| 1037 GF/Mental Health | | | | | | |
| OTHER | | | | | | |
| TOTAL | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

Estimate of any current year (FY 97) cost: $ 0.0

**POSITIONS:**

| | | | | | | |
|---|---|---|---|---|---|---|
| FULL-TIME | | | | | | |
| PART-TIME | | | | | | |
| TEMPORARY | | | | | | |

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

This bill, which changes many of the rules of court when the litigant is a prisoner, is unrelated to the question of whether a case is frivolous. Eliminating a prisoner's ability to obtain discovery, entering arbitrary time deadlines, and making collection of judgments easier, has nothing to do with the merits of the case. These rules simply are punitive and designed to eliminate a class of persons from having the same access to the courts as everyone else. As such, it violates the equal protection of the laws.

There is no fiscal impact on the Public Defender Agency.

Prepared by: Barbara K. Brink, Director

Phone: (907) 264-4414

Division: Public Defender Agency

Date: ____

Approved by Commissioner: Mark Boyer

Agency: Department of Administration

Date: 1/21/97

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Rev: 11/96

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# FISCAL NOTE

Bill Version: HB 122
(H) Publish Date: 2/10/97

STATE OF ALASKA
1997 LEGISLATIVE SESSION

Revision Date:
Title: "An Act relating to Frivolous Litigation..."
Sponsor: Rules Committee
Requestor: Governor

Department Affected: Administration
BRU: Office of Public Advocacy
Component: Office of Public Advocacy
COMPONENT SERIAL NO. 43

EXPENDITURES/REVENUES: (Thousands of Dollars)

| OPERATING EXPENDITURES | FY 98 | FY 99 | FY 00 | FY 01 | FY 02 | FY 03 |
|---|---|---|---|---|---|---|
| PERSONAL SERVICES | | | | | | |
| TRAVEL | | | | | | |
| CONTRACTUAL | | | | | | |
| SUPPLIES | | | | | | |
| EQUIPMENT | | | | | | |
| LAND & STRUCTURES | | | | | | |
| GRANTS, CLAIMS | | | | | | |
| MISCELLANEOUS | | | | | | |
| TOTAL OPERATING | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |
| CAPITAL EXPENDITURES | | | | | | |
| CHANGE IN REVENUES ( ) | | | | | | |

FUND SOURCE: (Thousands of Dollars)

| | | | | | | |
|---|---|---|---|---|---|---|
| 1002 Federal Receipts | | | | | | |
| 1003 GF Match | | | | | | |
| 1004 GF | | | | | | |
| 1005 GF/Program Receipts | | | | | | |
| 1037 GF/Mental Health | | | | | | |
| OTHER | | | | | | |
| TOTAL | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 | 0.0 |

Estimate of any current year (FY 97) cost: $ 0

POSITIONS:

| | | | | | | |
|---|---|---|---|---|---|---|
| FULL-TIME | | | | | | |
| PART-TIME | | | | | | |
| TEMPORARY | | | | | | |

ANALYSIS: (Attach a separate page if necessary.)

There is no fiscal impact to the Department of Administration.

Prepared by: Brant McGee, Director
Division: Office of Public Advocacy
Phone: 274-1684
Date:

Approved by Commissioner: Mark Boyer
Agency: Department of Administration
Date: 1/24/97

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CS for HOUSE BILL 122 (JUD)

Sectional Analysis

CSHB 122 was submitted to make additions and improvements to the comprehensive legislation adopted in 1995 to reduce the volume of frivolous litigation filed by prisoners against the state. That enactment has been very successful in reducing unnecessary lawsuits, while at the same time allowing prisoners to raise legitimate issues and enabling state attorneys to focus attention on those issues.

The 1995 legislation requires a prisoner to pay a filing fee to the court for pursuing a lawsuit, as other litigants are required to do, or to request an exemption from the fee based on need. The law currently requires a prisoner to supply certain information in support of a request for an exemption. **Section 1** of the bill adds the requirement that the prisoner include information about money held in bank accounts outside the prison in the request for a filing fee exemption.

**Section 2** makes a technical correction to the statutes and repairs an omission in the 1995 legislation. Current law provides that the automatic disclosure requirements of Civil Rule 16.1 do not apply to prisoner litigation; however, that rule has been deleted from the Civil Rules. The bill amends the law to reflect the deletion. Additionally, the bill provides that the automatic disclosure requirements of Civil Rule 26 do not apply to prisoner litigation. The rationale for automatic disclosure - reducing the cost and duration of litigation by cooperative discovery - does not readily apply in most cases filed by prisoners.

**Section 3** expands the definition of "litigation against the state" to include all proceedings in the appellate courts. This clarifies that the laws regulating prisoner litigation apply to all litigation, not only to cases filed in the trial courts.

**Sections 4 - 7 and 11** also concern a law enacted in 1995. The legislature enacted a provision that expands the use of DNA profile evidence in criminal prosecutions. In addition, the law requires the Department of Public Safety to establish a DNA identification system to help in the investigation of crimes in Alaska. It requires the department to obtain blood samples, oral samples, or both, from adults convicted of a crime against the person (except custodial interference) and arson, and minors 16 years of age or older adjudicated delinquents based on

similar conduct. Unfortunately, enforcement of the sample requirement is inadequate if a person refuses to cooperate. The bill provides several enforcement options, including making it a class A misdemeanor if a person is required to provide a sample and refuses a lawful request from a health care provider.

**Section 8** clarifies that the Parole Board may revoke mandatory parole before the actual release of a prisoner if the prisoner has violated a court order to participate in the treatment plan of a rehabilitation program.

**Section 9** is a technical amendment to the parole statutes.

**Section 10** limits the time an appellate court may allow extensions of time to file an appeal or request for review of a criminal conviction or sentence to 60 days after the last deadline for filing the appeal or request. This does not limit requests for an extension of time filed before a deadline; rather, it disallows requests filed two months after a deadline has passed, when no request for an extension has been filed.

**Section 12** limits the time a court may relax the deadline for filing a motion to reduce or modify a sentence under Criminal Rule 35(b) in the trial court to 10 days beyond the 180 days in which a defendant may file the motion under the terms of the rule. Criminal Rule 35(b) motions allow a court to reconsider a sentence in the six months following imposition. It is not intended to allow a court to change a sentence after that period. The Parole Board is in a better position to make decisions about the release of a person at this time.

4/15/98

HOUSE JUDICIARY STANDING COMMITTEE

DATE: 4/15/98 ISSUE: HB 122 friendly amend to Amend. 1 Admendment #2

| | YEA | NAY | PRESENT |
|---|---|---|---|
| Vice Chair Bunde | | ✓ | |
| Representative Berkowitz | ✓ | | |
| Representative Croft | | ✓ | |
| Representative James | | | |
| Representative Porter | | ✓ | |
| Representative Rokeberg | | ✓ | |
| Chairman Green | | ✓ | |
| **TOTALS:** | | | |

PASSED _____ FAILED ✓

# In the Court of Appeals of the State of Alaska

Jack A. Ozenna,

Appellant,

v.

State of Alaska,

Appellee.

Court of Appeals No. A-06265

## Order[1]

Date of Order: 7/23/96

Trial Court Case # 3AN-94-11188CI

Before: Bryner, Chief Judge, Coats, and Mannheimer, Judges.
Mannheimer, Judge, concurring.

The state has moved for full-court reconsideration of the single-judge order entered on June 28, 1996, granting Ozenna's motion to accept his late-filed notice of appeal. We grant the state's motion for full-court reconsideration and conclude that the motion to accept Ozenna's late notice of appeal should be granted for the reasons stated in the June 28 single-judge order.

In its motion for reconsideration, the state argues that Appellate Rule 502(b) should be narrowly construed to authorize appellate courts to extend a time period "only within the limits permitted by Appellate Rule 521." The state argues that this narrow interpretation is necessary to reconcile the two rules and give effect to chapter 79, section 21, SLA 1995 -- the statute enacting the current form of Appellate Rule 521.

When Appellate Rule 502(b) was adopted, however, Appellate Rule 521

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OrderSExcpt

specified no time limits governing an appellate court's authority to extend the time for filing a notice of appeal. Accordingly, in originally promulgating Rule 502(b), the Alaska Supreme Court could not have intended to subject the powers granted therein to any time limitation stated in Rule 521.

The state's request for a narrowing interpretation of Rule 502(b) thus seems directed at implementing legislative intent in enacting chapter 79, section 21, SLA 1995, rather than at reflecting the supreme court's intent in adopting Rule 502(b). For this reason, the request is in effect an argument that chapter 79, section 21, SLA 1995 should be construed to have impliedly amended Rule 502(b).

But the Alaska Supreme Court has made it clear that the doctrine of implied repeal or amendment does not apply to legislation affecting procedural rules adopted by the court. Because article IV, section 15 of the Alaska Constitution expressly gives rule-making power to the supreme court rather than the legislature, the supreme court has held that a statute dealing with a procedural matter will not alter a conflicting rule of court unless the statute is enacted with the stated purpose of changing that rule. Nolan v. Sea Airmotive, Inc., 627 P.2d 1035, 1047 (Alaska 1981); Leege v. Martin, 379 P.2d 447, 451 (Alaska 1963). As the court said in Nolan, "we need not look to the legislature's intentions to discern whether it has attempted to prescribe a different procedure than that contained in a court rule, unless the legislature has acted in the requisite manner[.]" 627 P.2d at 1046.

In enacting chapter 79, section 21, SLA 1995, the legislature specifically stated its intent to amend Appellate Rule 521. It did not specifically state a similar intent to amend

or limit Appellate Rule 502. We assume that the legislature's failure to address Rule 502 was an oversight and that it would have intended the provisions of Rule 521 to govern over those of Rule 502.[2] However, Nolan and Leege preclude this court from relying on our perception of probable legislative intent as a basis for construing Rule 502 to have been amended.

For the reasons stated in this court's order of June 28, 1996, we grant the motion to accept Ozenna's late notice of appeal.

Entered by direction of the court.

Clerk of the Appellate Courts

Jan Hansen

MANNHEIMER, Judge, concurring.

The state has moved for full-court reconsideration of the single-judge order entered on June 28, 1996, granting Ozenna's motion to accept his late-filed notice of appeal. I join my colleagues in concluding that Ozenna's motion to accept a late-filed appeal should be granted under the authority of Appellate Rule 502(b).

In chapter 79, section 21, SLA 1995, the legislature amended Appellate Rule

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[2]. For this reason, in ruling on a request to accept a late notice of appeal, we think it highly relevant to consider the restrictions stated in the amended version of Rule 521 and to exercise restraint in light of those restrictions. In the present case, we do not exercise our authority under Rule 502(b) lightly. It appears highly likely to us that Ozenna is entitled to restoration of his appellate rights as a constitutional matter. Because the state has not challenged, or even alleged any desire to challenge, Ozenna's factual assertions on their merits, we see little purpose to be served in requiring him to pursue a costly and time consuming post-conviction relief action to assert his right to appeal.

521 -- the rule allowing any other appellate rule to be relaxed "where a strict adherence to [the rule] will work surprise or injustice". As amended by the legislature, in litigation involving the validity of a criminal judgement or sentence, Rule 521 "does not authorize an appellate court ... to allow [a] notice of appeal [or] a petition for review or petition for hearing to be filed more than 60 days late".

The State contends that the legislature, by enacting this amendment to Rule 521, clearly expressed its intention that no criminal appeal should be filed more than 60 days late. I disagree.

Appellate Rule 502(b) is the provision of the appellate rules that expressly governs extensions of time. Rule 502(b) declares that an appellate court can extend any time limit fixed by the appellate rules, and can validate any act performed outside the established time limits, upon a showing of good cause.

Because Appellate Rule 502(b) and Appellate Rule 521 were enacted simultaneously (by Supreme Court Order 439, effective November 15, 1980), they presumedly are not redundant. Examination of the two rules bears this out; they address different concerns. Rule 502(b) allows time limits to be relaxed when good cause is shown. In cases where there is no good cause (for example, cases of unexcused attorney neglect), Rule 521 nevertheless allows time limits to be relaxed to prevent injustice.

The legislative amendment to Rule 521 does not forbid all extensions of time exceeding 60 days in criminal cases. Rather, chapter 79, section 21 expressly states that "this rule" -- that is, Rule 521 -- does not authorize extensions of more than 60 days in

criminal cases. The legislature was silent regarding Rule 502(b). From this, one can reasonably conclude that the legislature did not intend to forbid all extensions of time exceeding 60 days, but rather intended to forbid an extension of time exceeding 60 days if the moving party failed to demonstrate good cause -- because it is only when there is no good cause for the extension that Rule 521 must be invoked.

Moreover, even assuming that the legislature had clearly expressed its intention to forbid any and all extensions of time exceeding 60 days, the fact remains that the legislature did not alter Appellate Rule 502(b). Rule 502(b) continues to authorize extensions of time without the 60-day limitation.

The State argues that, where legislative intention is clearly expressed, court rules must be harmonized with the legislature's desire. This argument was squarely rejected in Nolan v. Sea Airmotive, Inc., 627 P.2d 1035 (Alaska 1981).

The litigation in Nolan involved a recent legislative revision of the law governing class actions. A new statute, AS 23.10.130(b), clearly provided that the filing of a class action tolled the statute of limitations only with respect to the named plaintiffs, not the entire class. Civil Rule 23, on the other hand, incorporated the rule that the filing of a class action tolled the statute of limitations with respect to all class members, whether or not they were specifically named in the lawsuit. Nolan, 627 P.2d at 1040-42.

When the legislature enacted AS 23.10.130(b), they did not comply with the procedural requirements established in Leege v. Martin, 379 P.2d 447 (Alaska 1963), for altering a court rule. Because the statute failed to meet those procedural requirements, the

supreme court held that the statute had no effect on the rule. Even though the legislature had clearly expressed its intention to adopt a contrary rule regarding the statute of limitations, the supreme court held that the legislature's intention was irrelevant:

> In Alaska, [the supreme court] is given exclusive, initial power to make rules governing practice and procedure[,] and we need not look to the legislature's intentions to discern whether it has attempted to prescribe a different procedure than that contained in a court rule, unless the legislature has acted in the requisite manner to change a rule. Here the legislature plainly intended not to allow the tolling, but [that statute, because it is procedural,] need not be given effect.

Nolan, 627 P.2d at 1046.

Thus, I join the court's decision to allow Ozenna to file a late appeal for two reasons. First, because Appellate Rule 502(b) and Appellate Rule 521 address different concerns, the legislature's decision to restrict the courts' authority under Rule 521 does not indicate a concurrent intention to restrict the courts' authority under Rule 502(b). Second, even if the legislature had plainly expressed its intention to forbid any criminal appeal or petition from being filed more than 60 days late, the legislature took no action to amend Appellate Rule 502(b). Under Leege and Nolan, Rule 502(b) remains unaffected by chapter 79, section 21, SLA 1995.

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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FOURTH JUDICIAL DISTRICT

STATE OF ALASKA,

Plaintiff,

vs.

HAROLD L. STELLY,

Defendant.

4FA-S96-2189 Cr.



## OPINION AND ORDER DENYING DRAWING OF BLOOD SAMPLE

### I. INTRODUCTION

Plaintiff seeks an order from the Court compelling Defendant to comply with a State statute requiring all persons convicted of a felony against another person to submit to the drawing of samples of their body fluids for submission to a statewide DNA database. Defendant protests, arguing that the Court is not vested with the authority to enter such an order, that the relief sought by the State is not a proper component of the Court's general sentencing powers, and that mandatory submission of a blood specimen for the purposes of DNA identification would violate Defendant's constitutional rights to be free from unreasonable searches and seizures, to due process of law, and to privacy.

### II. STATEMENT OF FACTS

On October 23, 1996, Defendant Harold L. Stelly pled no contest to Assault in the Third Degree and Assault in the Fourth Degree after attempting to stab S.N. with a knife and pushing his wife to the ground. At sentencing, the prosecution made an oral

request for a court order compelling Stelly to voluntarily submit to the drawing of his blood in order that it be submitted to the State's deoxyribonucleic acid (DNA) database, pursuant to AS 44.41.035. The State requested that the Court make its order a condition of probation and a separate order of the Court; the violation of which would result in revocation of probation, or a finding of contempt of court, or both.

## III. DISCUSSION

### A. The Statute

Chapter 41 effectively creates the Department of Public Safety and lays out its respective authority, which includes gathering data for a statewide criminal justice information system. Among the data authorized to be gathered are crime statistics[1] and an automated fingerprint system.[2] In 1995, the State Legislature amended Chapter 41 of Title 44, adding AS 44.41.035, which allows the Department of Public Safety to collect for inclusion into the DNA registration system a blood sample, oral sample, or both, from

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[1] Alaska Statute 44.41.020(c) provides that:

> (t)he department shall establish, and may require state and local law enforcement agencies to use, standardized methods of collecting and recording law enforcement and crime statistics. See also AS 44.41.050, Uniform Homicide Reporting, which requires the Department of Public Safety to participate in the Federal Bureau of Investigation, Violent Criminals Apprehension Program. Participation includes submitting Violent Criminals Apprehension Program report which will aid in discovering similarities of crimes and suspects.

[2] Alaska Statute 44.41.025(a) provides that "(t)he Department of Public Safety may maintain an automated fingerprint system."

(1) a person convicted of a crime against a person, and (2) a minor 16 years of age or older, adjudicated as a delinquent for an act that would be a crime against a person if committed by an adult. AS 44.41.035(b) "Crime against a person" means a felony offense, or a felony attempt to commit an offense. AS 44.41.035(j)(1). Throughout the entire statute, the language specifically targets the Department of Public Safety as the governmental agency responsible for the establishment of the DNA identification registration system [AS 44.41.035(a)], the collection of blood and oral samples [AS 44.41.035(b) & (h)(1)], and the dissemination of information derived from those samples whether needed by other law enforcement agencies or for presentation in court [AS 44.41.035(c)(1)-(2)]. The statute further instructs the Department that the DNA registration system is confidential to be used in a limited and tightly controlled fashion. AS 44.41.035(f)(1)-(4). Lastly, the statute mandates that the Department adopt reasonable procedures for the collection, analysis, storage, expungement, and use of the DNA registration system, and to protect the system from unauthorized access and the natural elements. AS 44.41.035(h)(1)-(2).

**B. The responsibility for the collection of deoxyribonucleic acid (DNA) is borne by the Department of Public Safety, not with the Court.**

This is a matter of statutory construction: Does the statute which creates the DNA registration system vest responsibility of sample collection on the court? Of course, by examining the plain meaning of the statutory language, it would

appear that the only agency responsible for implementing the substantive portions of the statute lies directly upon the Department of Public Safety. However, Alaska has rejected the strict "plain meaning" approach to statutory construction. Indeed, the fact that a statute's wording is apparently clear and unambiguous does not end the search for the legislature's intent. Municipality of Anchorage v. Ray, 854 P.2d 740, 745 (Alaska App. 1993), citing Stephan v. State, 810 P.2d 564, 566 (Alaska App. 1991). Yet, the more clear and unambiguous the wording of the disputed statute, the correspondingly greater burden of persuasion borne by a litigant who contends that the statute does not mean what it appears to say. Ray, 854 P.2d at 745, citing University of Alaska v. Geistauts, 666 P.2d 424, 428 n.5 (Alaska 1983).

In this case the State has not offered any argument against the Defendant's assertion that the Court cannot act as an independent authority in conjunction with the Department imposing an order compelling Defendant to participate in the DNA registration system. Nowhere in the statutory language which creates the DNA registration system is there mention of judicial involvement, nor is there any indication of an implied contemplation of such involvement. It is clear and unambiguous that the statute directs the Department to adopt reasonable procedures for the collection of DNA. The Defendant has clearly laid that argument out.

The State, by virtue of the fact that it asserts a different meaning, now bears a "correspondingly heavy burden of

demonstrating contrary legislative intent. University of Alaska v. Geistauts, 666 P.2d at 428 n.5 (Alaska 1983). The State has not met its burden and, after reviewing the legislative history, it cannot.

Legislative history, reflected in the House Judiciary Committee's hearings, indicates that judicial involvement was not considered when considering how to persuade convicted felons to submit to DNA registration. Persuasion would clearly come from the Department of Corrections which could promulgate regulations, including administrative segregation, loss of good time, and other methods to make this statute effective. See generally DNA Testing of Convicted Sex Offenders: Hearings on H.B. 27 Before the House Judiciary Standing Committee, 19th Legis., 1st Sess. (January 25, 1995). The Court therefore concludes that the clear and unambiguous language of AS 44.41.035 involves only the Department of Public Safety and the State's arguments otherwise are unpersuasive.

**C. The Court may not exceed the scope of its sentencing powers elaborated in AS 12.55.015 and therefore may not enter a direct order requiring Defendant to participate in the DNA registration system.**

The provisions set out in AS 12.55.015 definitively establish the scope of the Court's sentencing powers.[3] Nothing in

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[3] **Sec. 12.55.015. Authorized sentences; forfeiture.** (a) Except as limited by AS 12.55.125 — 12.55.175, the court, in imposing sentence on a defendant convicted of an offense, may singly or in combination

(1) impose a

(continued...)

[3](...continued)

(A) fine when authorized by law and as provided in AS 12.55.035; or

(B) day fine when authorized by law and as provided in AS 12.55.036, if the court does not impose a term of periodic or continuous imprisonment or place the defendant on probation;

(2) order the defendant to be placed on probation under conditions specified by the court that may include provision for active supervision;

(3) impose a definite term of periodic imprisonment;

(4) impose a definite term of continuous imprisonment;

(5) order the defendant to make restitution under AS 12.55.045;

(6) order the defendant to carry out a continuous or periodic program of community work under AS 12.55.055;

(7) suspend execution of all or a portion of the sentences imposed under AS 12.55.080;

(8) suspend imposition of sentence under AS 12.55.085;

(9) order the forfeiture to the commissioner of public safety or a municipal law enforcement agency of a deadly weapon that was in the actual possession or used by the defendant during the commission of an offense described in AS 11.41, AS 11.46, AS 11.56, or AS 11.61;

(10) order the defendant, while incarcerated, to participate in or comply with the treatment plan of a rehabilitation program that is related to the defendant's offense or to the defendant's rehabilitation if the program is made available to the defendant by the Department of Corrections;

(11) order the forfeiture to the state of a motor vehicle, weapon, electronic communication device, or money or other valuables, used in or obtained through an offense that was committed for the benefit of, at the direction of, or in association with a criminal street gang.

(b) The court, in exercising sentencing discretion as provided in this chapter, shall impose a sentence involving imprisonment when

(1) the defendant deserves to be imprisoned, considering the seriousness of the present offense and the defendant's prior criminal history, and imprisonment is equitable considering sentences imposed for other offenses and other defendants under similar circumstances;

(2) imprisonment is necessary to protect the public from further harm by the defendant; or

(3) sentences of lesser severity have been repeatedly imposed for substantially similar offenses in the past and have proven ineffective in deterring the defendant from further criminal conduct.

(c) In addition to the penalties authorized by this section, the court may invoke any authority conferred by law to order a

(continued...)

that statute expressly or impliedly confers authority on the sentencing court to require the Defendant to participate in the DNA registration system, except as a condition of probation.

In Benboe v. State, 738 P.2d 356 (Alaska App. 1987), the Court of Appeals concluded that the sentencing court exceeded the scope of its sentencing powers when it separately ordered Benboe, not as a condition of probation but as separate provisions of its oral and written judgments, to participate, while incarcerated, in sexual offender treatment programs offered by the Department of Corrections. (AS 12.55.015 was subsequently amended to provide the authority.) Carefully delineating between a "condition of

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[3](...continued)
forfeiture of property, suspend or revoke a license, remove a person from office, or impose any other civil penalty. When forfeiting property under this subsection, a court may award to a municipal law enforcement agency that participated in the arrest or conviction of the defendant, the seizure of property, or the identification of property for seizure, (1) the property if the property is worth $5,000 or less and is not money or some other thing that is divisible, or (2) up to 75 percent of the property or the value of the property if the property is worth more than $5,000 or is money or some other thing that is divisible. In determining the percentage a municipal law enforcement agency may receive under this subsection, the court shall consider the municipal law enforcement agency may receive under this subsection, the court shall consider the municipal law enforcement agency's total involvement in the case relative to the involvement of the state.

(d) *[Repealed, § 1 ch 188 SLA 1990.]*

(e) If the defendant is ordered to serve a definite term of imprisonment, the court may recommend that the defendant serve all or part of the term in a correctional restitution center.

(f) Notwithstanding (a) of this section, the court shall order the forfeiture to the commissioner of public safety or a municipal law enforcement agency of a deadly weapon that was in the actual possession of or used by the defendant during the commission of a crime involving domestic violence.

(g) In this section "deadly weapon" has the meaning given in AS 11.81.900.

probation" and a "direct order" that becomes a component of the sentence, the Court wrote that it found:

> nothing empowering the court, as a part of a sentence of imprisonment, to enter a direct order requiring the accused to participate in treatment. Nor [were they] aware of any authority for the proposition that the court has inherent power to enter such orders in the absence of legislative authorization.

Benboe, 738 P.2d at 361; see also Skrepich v. State, 740 P.2d 950 (Alaska App.1987) (Superior Court had no authority, statutory or inherent, to order defendant to refrain from engaging in any direct or indirect contact with victim of his offense of sexual abuse of a minor in second degree).

Therefore, the Court concludes that it does not have the authority to impose a direct order mandating that Defendant participate in the DNA registration program, nor may it make such an order a component of Defendant's sentence, absent specific statutory authority.

**D. The Court has broad discretionary powers to establish conditions of probation when suspending all or a portion of a sentence and as long as the conditions of probation serves a three-fold purpose, specifically the conditions of probation must be reasonably related to the rehabilitation of the offender and the protection of the public and must not be unduly restrictive of liberty.**

The State Legislature has conferred broad discretionary powers on the sentencing court to establish conditions of probation when all or a portion of a sentence is to be suspended.[4] Roman v.

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[4] AS 12.55.080 provides:

> **Suspension of sentence and probation.** Upon entering a judgment of conviction of a crime, or at any time within 60 (continued...)

State, 570 P.2d 1235, 1240 (Alaska 1977); see also Benboe v. State, 738 P.2d 356, 360 (Alaska App. 1987); Jones v. State, 727 P.2d 6, 7 (Alaska App. 1986) (condition prohibiting individual from being in a 45 block, high crime area of city for a year was not reasonably related to rehabilitation, not clearly related to his misconduct and was unnecessarily severe and restrictive); Edison v. State, 709 P.2d 510, 511 (Alaska App. 1985) (obtaining court permission before entering town is an improper condition of probation). But see Ovoghok v. Municipality of Anchorage, 641 P.2d 1267 (Alaska App. 1982) (restricting defendant arrested for prostitution from entering four block area where prostitution occurred is a permissible condition of probation); Allain v. State, 810 P.2d 1019 (Alaska App. 1991) (special condition of probation requiring defendant to abstain from consumption of alcohol was reasonably related to goal of rehabilitation despite fact that record disclosed no direct link between defendant's drinking and current offense of sexual abuse of a minor).

Compelling the Defendant to provide a sample of his body fluids does not appear to comport to at least one factor of the test. Placing the Defendant's DNA in a data bank could arguably provide protection of the community by means of deterrence.

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[4](...continued)
days from the date of entry of that judgment of conviction, a court, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution or balance of the sentence or a portion thereof, and place the defendant on probation for a period and upon the terms and conditions as the court considers best.

However, this condition does not reasonably relate to the rehabilitation of this Defendant. Since it fails to satisfy this factor, it cannot be a special condition of probation.

**IV. CONCLUSION**

Given the reasons set forth above, the Court lacks the authority to order Defendant to submit to the drawing of samples of his body fluid for the statewide DNA database. Thus, the Court need not address whether or not the DNA identification would violate the Defendant's constitutional rights to be free from unreasonable searches and seizures, to due process, and privacy.

The State's motion is therefore **DENIED.**

ENTERED at Fairbanks, Alaska, this 12 day of September, 1997.

RALPH R. BEISTLINE
SUPERIOR COURT JUDGE

HB 122

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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 10, 1997

The Honorable Gail Phillips
Speaker of the House
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear Speaker Phillips:

I am transmitting this bill to further enhance the positive effects of a 1995 law aimed at reducing frivolous litigation filed by state prisoners.

The bill clarifies a prisoner must pay filing fees in all types of legal actions against the state, including discretionary appellate review. It also ensures the court will consider all prisoner financial accounts in determining whether an exemption from the filing fee is warranted. This is an extension of the 1995 law (ch. 79, SLA 1995) which requires a prisoner to pay the usual filing fees for bringing a legal action against the state, unless the court finds the prisoner qualifies for an exemption based on financial information. This bill requires the prisoner to submit information about money in accounts outside the prison as well as in-prison accounts.

The law enacted in 1995 provides that automatic disclosure provisions of Alaska Rule of Civil Procedure 16.1 do not apply to litigation filed by prisoners. But a corresponding exemption from a similar provision in a separate court rule (Alaska Rule of Civil Procedure 26) was inadvertently not included in the earlier bill. This bill repairs that omission.

The rationale for automatic disclosure--reducing the cost and duration of litigation by cooperative discovery--does not readily apply in most litigation brought by prisoners. Prisoners are generally not willing or able to participate in discovery and, as a result, the state is obliged to furnish full information while prisoners furnish no information to the state. This is expensive and unnecessary, especially in litigation that is often without merit.

4/15/98

# AMENDMENT

OFFERED IN THE HOUSE BY REPRESENTATIVE

TO: CSHB 122 ( )

Version 0-GH0055\B

Page 5, lines 22 - 26:

Following "court." delete all material and insert:

"**In a matter requesting review of or appealing a criminal conviction or sentence, this rule does not authorize an appellate court, or a superior court acting as an intermediate appellate court, to validate the filing of a notice of appeal, petition for review, or petition for hearing more than 60 days after the expiration of the time specified in the rule or statute, or in the last extension of time previously granted.**"