

**HB**

**9**

STATE OFFICE  
**ALASKA PEACE OFFICERS ASSOCIATION**

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January 17, 1997

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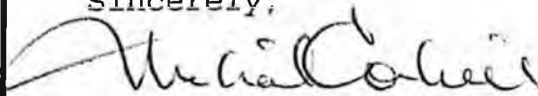
Representative Brian Porter  
Alaska State Legislature  
State Capitol (MS 3100)  
Juneau, Alaska 99801-1182

Dear Representative Porter,

On behalf of the Alaska Peace Officers Association, I would like to thank you for introducing House Bill 9 relating to the right of crime victims and victims of juvenile offenses to be present at court proceedings and amending Rule 615 of the Alaska Rules of Evidence. At a recent meeting of the APOA State Board, we decided to unanimously support this legislation. We believe that this legislation would better communicate to offenders especially juveniles how their illegal activities affect victims. We also believe that this legislation would further tear down the walls of confidentiality that currently protect juvenile offenders. Finally, we feel that victims should have the right to know how their case is being handled by the courts.

We encourage you to call on us when there are hearings on this bill, so that we may testify about the need for this legislation. If you need assistance as you shepherd this bill through the legislative process, please call me at 451-5316, or our business manager, Joseph Young at 277-0515.

Sincerely,



Michael Corkill  
APOA State President

*MSC rec'd 1/23/97*

CS FOR HOUSE BILL NO. 9 (JUD)  
IN THE LEGISLATURE OF THE STATE OF ALASKA  
TWENTIETH LEGISLATURE - FIRST SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Offered:  
Referred:

Sponsor(s): REPRESENTATIVE PORTER

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to the right of crime victims and victims of juvenile offenses  
2 to be present at court proceedings; and amending Rule 615, Alaska Rules of  
3 Evidence."

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

5 \* Section 1. PURPOSE. The purpose of this Act is to clarify that the right of crime  
6 victims "to be present at all criminal or juvenile proceedings where the accused has the right  
7 to be present," which is a right protected under art. I, sec. 24, of the state constitution, may  
8 not be abridged by the sequestration rule applicable to most witnesses.

9 \* Sec. 2. AS 09.20.180 is amended to read:

10 Sec. 09.20.180. Exclusion of witnesses from courtroom. Except as  
11 provided in AS 12.50.200 and AS 47.12.110(b), upon [UPON] the request of either  
12 party the judge may exclude from the courtroom any witness of the adverse party not  
13 under examination at the time so that the witness may not hear the testimony of other  
14 witnesses.

1 \* Sec. 3. AS 12.50 is amended by adding a new section to read:

2 **Article 3. Victim Witnesses.**

3 **Sec. 12.50.200. Victim may not be excluded from courtroom.** A court may  
4 not exclude the victim of an alleged crime from the courtroom during testimony that  
5 occurs when the accused has the right to be present even if the victim is likely to be  
6 called as a subsequent witness. In this section, "victim" has the meaning given in  
7 AS 12.55.185.

8 \* Sec. 4. AS 47.12.110(b) is amended to read:

9 (b) Notwithstanding (a) of this section, the victim of an offense that a minor  
10 is alleged to have committed, or the designee of the victim, has a right to be present  
11 at all hearings held under this section. If the minor is found to have committed the  
12 offense, the victim may at the disposition hearing give sworn testimony or make an  
13 unsworn oral presentation concerning the offense and its effect on the victim. If there  
14 are numerous victims of a minor's offense, the court may limit the number of victims  
15 who may give sworn testimony or make an unsworn oral presentation, but the court  
16 may not limit the right of a victim to attend a hearing even if the victim is likely to  
17 be a witness in a hearing concerning the minor's alleged offense.

18 \* Sec. 5. Rule 615, Alaska Rules of Evidence, is amended to read:

19 **Rule 615. Exclusion of Witnesses.** At the request of a party the court may  
20 order witnesses excluded so that they cannot hear the testimony of other witnesses, and  
21 it may make the order on its own motion. This rule does not authorize exclusion of

22 (1) a party who is a natural person; [, OR]

23 (2) an officer or employee of a party which is not a natural person  
24 designated as its representative by its attorney; [, OR]

25 (3) a person whose presence is shown by a party to be important to the  
26 presentation of the party's [HIS] cause; or

27 (4) the victim of the alleged crime or juvenile offense during  
28 criminal or juvenile proceedings when the accused has the right to be present; in  
29 this paragraph, "victim" has the meaning given in AS 12.55.185.

30 \* Sec. 6. COURT RULE CHANGE. Sections 2 - 5 of this Act have the effect of  
31 amending Rule 615, Alaska Rules of Evidence, by making the witness exclusion rule

1 inapplicable to victims of offenses.

2 \* Sec. 7. APPLICABILITY. This Act applies to a criminal or juvenile hearing held on or  
3 after the effective date of this Act, regardless of when the criminal or juvenile proceeding  
4 commenced.

5 \* Sec. 8. This Act takes effect only if sec. 6 of this Act receives the two-thirds majority  
6 vote of each house required by art. IV, sec. 15, Constitution of the State of Alaska.

# Alaska State Legislature

**Representative Brian S. Porter**

HOUSE MAJORITY LEADER



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**DISTRICT 20**

## SPONSOR STATEMENT

For

### HB 9 RIGHT OF CRIME VICTIMS AND VICTIMS OF JUVENILE OFFENSES TO BE PRESENT AT COURT PROCEEDINGS

The Constitution of the State of Alaska was amended in 1994 by adding to Article 1, a new Section 24, which specifically extended to crime victims "the right to obtain information about and be allowed to be present at all criminal or juvenile proceedings where the accused has the right to be present..."

Currently at least two Superior Court judges are interpreting the Alaska Statutes, and Rule 615, Alaska Rules of Evidence, to exclude victims of crimes and juvenile offenses from being present in the courtroom during a trial of the accused until after the victim has testified.

This bill is then offered to implement the mandate of the 1994 Amendment to the Constitution and to make absolutely clear to the judiciary a crime victim's right to be present at the trial and other proceedings of the accused, including juvenile proceedings, whenever the accused has the right to be present.

# LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES  
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STATE OF ALASKA

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130 Seward Street, Suite 409  
Juneau, Alaska 99801-2105

## MEMORANDUM

January 16, 1997

**SUBJECT:** Sectional Summary of HB 9 (Work Order No. 0-LS0088E)

**TO:** Representative Brian Porter  
Attn: Jim Sourant

**FROM:** Gerald P. Luckhaupt *GLP*  
Legislative Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, please note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill - the bill itself is the best statement of its contents.

**Section 1 of the bill** provides a purpose section.

**Section 2 of the bill** amends AS 09.20.180 to ensure the effectiveness of the substantive changes being made in bill secs. 3 - 4.

**Section 3 of the bill** adds a new section to AS 12.50 providing that a crime victim may not be excluded from the courtroom during proceedings at which the defendant has a right to present, including situations where the victim may be called as a witness.

**Section 4 of the bill** amends AS 47.12.110(b) by providing that a crime victim may not be excluded from juvenile hearings involving the minor alleged to have committed the crime even if the victim may be called as a witness.

**Section 5 of the bill** amends Rule 615, Alaska Rules of Evidence, by providing that that rule does not authorize the exclusion of a crime victim from criminal or juvenile hearings involving the alleged offender.

**Section 6 of the bill** provides notice that bill secs. 2 - 5 are effecting a change to Rule 615, Alaska Rule of Evidence. Court rule changes require a two-thirds vote of each house of the legislature to become effective.

**Section 7 of the bill** is an applicability section.

Representative Brian Porter

January 16, 1997

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Section 8 of the bill provides that the bill, if passed, only takes effect if the court rule changes receive the required two-thirds vote.

GPL:lmb

97-005.lmb

Date: January 15, 1997

To: Representative Joe Green  
Chairman, House Judiciary Committee

From: Representative Brian Porter  
House Majority Leader

Subject: Additional Sectional Analysis of HB 9

In general, at common law it was within the discretion of a trial judge to exclude witnesses from the courtroom during a trial on the theory that a witness who sits through a court proceeding could shape his or her testimony to match the testimony given by other witnesses. Even at common law, however, the exclusion of witnesses applied only to ordinary witnesses, and not to witnesses who were also parties to the litigation. The exemptions from exclusion enjoyed by party witnesses extended to prosecution witnesses in criminal proceedings. So under common law, a judge exercising sound discretion generally refused to exclude crime victims from the trial of an accused.

The reason underlying the common law exception which allowed crime victims to be present throughout a trial is that a crime victim's presence at the prosecutor's table was necessary in most instances because the crime victim was the only person with personal knowledge of what occurred during the criminal activity. Information which the crime victim could furnish to the prosecutor during the course of the trial could not be obtained from anyone else other than the crime victim. Excluding the crime victim would, in almost all cases, place the state at an enormous disadvantage. See *Miller v. State*, 648 N.E. 2d 1208, 1210 (Ind. 1995).

This rationale was implicitly accepted by the Alaska Supreme Court in a decision which predated Alaska's adoption of the Federal Rules of Evidence in 1979. In *Dickens v. State*, 398 P.2d 1008 (Ak. 1965), the court upheld the right of a police officer who was in charge of a criminal investigation to remain in the courtroom, despite the fact that he was to testify during the trial.

With the adoption of the Federal Rules of Evidence by Congress in 1973, the issue of which witnesses should or should not be excluded was finally settled in the federal courts. Federal Evidence Rule 615 mandated that a party witness could not be excluded if the party was a "natural person". By definition, all crime victims are "natural persons". The Federal Evidence Rules applied to both civil and criminal cases. Moreover, under the Federal

Evidence Rule 615, there no longer was discretion to exclude a party witness. It was now mandatory for a judge to refuse to exclude a crime victim from the trial of the accused.

Effective August 1, 1979, Alaska adopted, with few modifications, the Federal Rules of Evidence. Alaska Evidence Rule 615, as adopted, was virtually identical to the Federal Evidence Rule 615. The provisions regarding nonexclusion of party witnesses was identical in both the Federal and Alaska versions of Rule 615.

The Alaska Evidence Rules Commentary to Rule 615 reiterate the consistency of interpretations between Federal and Alaska Evidence Rules 615. In Alaska, natural persons who are parties clearly have the right to be present at criminal trials.

Even though Alaska Evidence Rule 615 on its face expressly makes mandatory the nonexclusion of a party witness, at least two Alaska Superior Court judges have insisted on exercising discretionary powers to exclude crime victims. This is so despite the absence of discretion under the applicable portion of Rule 615. Apparently state and municipal authorities have neither the inclination nor the means to take the issue to the Alaska Supreme Court.

A similar problem may have arisen in New Hampshire, since that state's Evidence Rule 615 now specifically includes "a victim of the crime" provision to the category of party witnesses who are exempt from exclusion. See New Hampshire Evidence Rule 615, attached hereto as exhibit A. This could serve as a model for the very minor changes which will need to be made to Alaska Rule 615. See also *State v. Hamil*, 547 A.2d 223, 224 (N.H. 1988) in which the Supreme Court of New Hampshire affirmed that the trial court was correct in refusing to exclude the crime victim from the court room on the basis of its Evidence Rule 615, which explicitly exempted "a victim of crime" from being excluded during the trial.

**Collateral references.** — Validity, construction, and effect of state laws requiring public officials to protect confidentiality of income tax returns or information. 1 ALR4th 959.

Name appropriation by employer or former employer. 52 ALR4th 156.

False light invasion of privacy — cognizability and elements. 57 ALR4th 22.

Invasion of privacy by a clergyman, church, or religious group. 67 ALR4th 1086.

Nonconsensual treatment of involuntarily committed mentally ill persons with neuroleptic or antipsychotic drugs as violative of state constitutional guarantee. 74 ALR4th 1099.

**Section 23. Resident Preference.** This constitution does not prohibit the State from granting preferences, on the basis of Alaska residence, to residents of the State over nonresidents to the extent permitted by the Constitution of the United States.

**Effective dates.** — This section took effect January 4, 1989 (15th Legislature's CSHJR 18 (1988).)

**Section 24. Rights of Crime Victims.** Crime victims, as defined by law, shall have the following rights as provided by law: the right to be reasonably protected from the accused through the imposition of appropriate bail or conditions of release by the court; the right to confer with the prosecution; the right to be treated with dignity, respect, and fairness during all phases of the criminal and juvenile justice process; the right to timely disposition of the case following the arrest of the accused; the right to obtain information about and be allowed to be present at all criminal or juvenile proceedings where the accused has the right to be present; the right to be allowed to be heard, upon request, at sentencing, before or after conviction or juvenile adjudication, and at any proceeding where the accused's release from custody is considered; the right to restitution from the accused; and the right to be informed, upon request, of the accused's escape or release from custody before or after conviction or juvenile adjudication.

**Effective dates.** — This section took effect December 30, 1994 (18th Legislature's Legislative Resolve No. 58).

## Article II

### The Legislature

**Section 1. Legislative Power; Membership.** The legislative power of the State is vested in a legislature consisting of a senate with a membership of twenty and a house of representatives with a membership of forty.

**Opinions of attorney general.** — Distinction between legislative and executive powers. See July 22, 1976, Op. Att'y Gen.

Vesting authority in the legislative Budget and Audit Committee to approve transfers between appropriation items violates the separation of powers doctrine and is an improper delegation of a legislative function to an interim committee. July 22, 1976 Op. Att'y Gen.

Section 13(3) of the 1976 budget bill, which autho-

rized the Budget and Audit Committee to supervise the governor's execution of the budget act, specifically over that portion of it which permitted him to transfer appropriation items constituted an encroachment on executive power and offended the Alaska Constitution. July 22, 1976 Op. Att'y Gen.

The apparent invalidity of Alaska's apportionment plan does not transform its legislature into an illegal assembly, prohibited from meeting and enacting laws. 1964 Op. Att'y Gen. No. 4.

#### NOTES TO DECISIONS

**Separation of powers doctrine** requires that the blending of governmental powers will not be inferred in the absence of an express constitutional provision. *Bradner v. Hammond*, 553 P.2d 1 (Alaska 1976).

**Confirmation is not a distinct legislative power**, but rather a part of the executive power of appointment which has in turn been delegated in

some specific instances by constitution to the legislative branch of government. *Bradner v. Hammond*, 553 P.2d 1 (Alaska 1976).

**Limitation on legislative checks on governor's power.** — The lack of ambiguity in Alaska Const., art. III, §§ 25 and 26 mandate that the supreme court interpret these express provisions as embodying not only the maximum parameters of the delegation of the

justice *Duncan v. State*, 762 P.2d 301 (Alaska Ct. App. 1989).

**Panel not bound by trial court's evaluation.** — The three-judge panel is not bound by the trial court's evaluation of the facts or determination of the law. *Winther v. State*, 749 P.2d 1356 (Alaska Ct. App. 1988).

**Trial court should not propose a nonstatutory mitigating factor to the three-judge panel where the legislature specifically rejected that factor for inclusion in AS 12.55.155(d).** Where the legislature has expressly addressed a consideration, such as the relationship between a defendant's past conduct and his present offense, and imposed limitations on the trial court's power to consider that relationship in mitigation of sentence, the trial court should not propose the same mitigating factor to the three-judge panel without complying with the limitations; to do so is to suggest a common-law development inconsistent with legislation. *Totemoff v. State*, 739 P.2d 769 (Alaska Ct. App. 1987).

**Applied in** *McManners v. State*, 650 P.2d 414 (Alaska Ct. App. 1982); *Shaw v. State*, 673 P.2d 781 (Alaska Ct. App. 1983); *Degler v. State*, 741 P.2d 659 (Alaska Ct. App. 1987); *Totemoff v. State*, 739 P.2d 769 (Alaska Ct. App. 1987); *Lowe v. State*, 866 P.2d 1320 (Alaska Ct. App. 1994).

**Quoted in** *Kirby v. State*, 748 P.2d 767 (Alaska Ct. App. 1987); *Wiley v. State*, 822 P.2d 940 (Alaska Ct. App. 1991).

**Stated in** *Erhart v. State*, 656 P.2d 1199 (Alaska Ct. App. 1982); *State v. Rastopsoff*, 659 P.2d 630 (Alaska Ct. App. 1983); *Maldonado v. State*, 676 P.2d 1093 (Alaska Ct. App. 1984); *Tulowitzke v. State*, Dep't of Pub. Safety, 743 P.2d 368 (Alaska 1987).

**Cited in** *Juneby v. State*, 641 P.2d 823 (Alaska Ct. App. 1982); *Griffith v. State*, 653 P.2d 1057 (Alaska Ct. App. 1982); *Neakok v. State*, 653 P.2d 658 (Alaska Ct. App. 1982); *Wright v. State*, 656 P.2d 1226 (Alaska Ct. App. 1983); *Langton v. State*, 662 P.2d 954 (Alaska Ct. App. 1983); *State v. LaPorte*, 672 P.2d 466 (Alaska Ct. App. 1983); *Walsh v. State*, 677 P.2d 912 (Alaska Ct. App. 1984); *State v. Brinkley*, 681 P.2d 351 (Alaska Ct. App. 1984); *Flink v. State*, 683 P.2d 725 (Alaska Ct. App. 1984); *Dancer v. State*, 715 P.2d 1174 (Alaska Ct. App. 1993); *Kuvasa v. State*, 717 P.2d 855 (Alaska Ct. App. 1993); *James v. State*, 739 P.2d 1314 (Alaska Ct. App. 1987); *Schnecker v. State*, 739 P.2d 1310 (Alaska Ct. App. 1987); *Comegys v. State*, 747 P.2d 554 (Alaska Ct. App. 1987); *James v. State*, 764 P.2d 1336 (Alaska Ct. App. 1988); *Russell v. State*, 752 P.2d 1022 (Alaska Ct. App. 1988); *Beauvois v. State*, 837 P.2d 1114 (Alaska Ct. App. 1992).

**Sec. 12.55.180. Designation of representative.** If more than one person who qualifies as a victim under AS 12.55.185 desires notice under AS 12.55.088, the prosecuting attorney shall designate one person to represent all victims for purposes of receiving the notice required and exercising the rights granted under this chapter. (§ 6 ch 59 SLA 1989)

**Revisor's notes.** — Formerly AS 12.55.172. Renumbered in 1990.

**Sec. 12.55.185. Definitions.** In this chapter, unless the context requires otherwise,

- (1) "crime against a person" has the meaning given in AS 33.30.901;
- (2) "criminal street gang" has the meaning given in AS 11.81.900(b);
- (3) "dangerous instrument" has the meaning given in AS 11.81.900;
- (4) "domestic violence" has the meaning given in AS 18.66.990;
- (5) "firearm" has the meaning given in AS 11.81.900;
- (6) "first felony conviction" means that the defendant has not been previously convicted of a felony;
- (7) "judicial officer" has the meaning given in AS 11.56.900;
- (8) "most serious felony" means:
  - (A) arson in the first degree, promoting prostitution in the first degree under AS 11.66.110(a)(2), or any unclassified or class A felony prescribed under AS 11.41; or
  - (B) an attempt, or conspiracy to commit, or criminal solicitation under AS 11.31.110 of an unclassified felony prescribed under AS 11.41;
- (9) "paramedic" means a mobile intensive care paramedic licensed under AS 08.64;
- (10) "peace officer" has the meaning given in AS 11.81.900;
- (11) "pecuniary gain" means the amount of money or value of property at the time of commission of the offense derived by the defendant from the commission of the offense, less the amount of money or value of property returned to the victim of the offense or seized by or surrendered to lawful authority before sentence is imposed;
- (12) "second felony conviction" means that the defendant previously has been con-

(14) "third felony conviction" means that the defendant has been at least twice previously convicted of a felony;

(15) "unconditional discharge" means that a defendant is released from all disability arising under a sentence, including probation and parole;

(16) "victim" means

(A) a person against whom an offense has been perpetrated;

(B) one of the following, not the perpetrator, if the person specified in (A) of this paragraph is a minor, incompetent, or incapacitated:

(i) an individual living in a spousal relationship with the person specified in (A) of this paragraph; or

(ii) a parent, adult child, guardian, or custodian of the person;

(C) one of the following, not the perpetrator, if the person specified in (A) of this paragraph is dead:

(i) a person living in a spousal relationship with the deceased before the deceased died;

(ii) an adult child, parent, brother, sister, grandparent, or grandchild of the deceased;

or

(iii) any other interested person, as may be designated by a person having authority in law to do so. (§ 12 ch 166 SLA 1978; am E.O. No. 55, § 9 (1984); am § 3 ch 154 SLA 1984; § 7 ch 59 SLA 1989; am § 6 ch 64 SLA 1991; am § 8 ch 36 SLA 1993; am § 5 ch 6 SLA 1996; am § 13 ch 7 SLA 1996; am § 10 ch 60 SLA 1996; am § 15 ch 64 SLA 1996)

**Revisor's notes.** — Paragraph (3) was enacted as paragraph (12). Renumbered in 1991, at which time former paragraphs (3)-(11) were renumbered as (4)-(12).

Paragraph (7) enacted as (13). Renumbered in 1993, at which time former paragraphs (7)-(12) were renumbered as (8)-(13), respectively.

Paragraphs (2), (8), and (10) were enacted as (14). Renumbered in 1996, at which time former paragraphs (2)-(6) were renumbered as (3)-(7), former paragraph (7) was renumbered as (9), and former paragraphs (8)-(13) were renumbered as (11)-(16).

**Cross references.** — For findings related to the definition of "most serious felony," see § 1, ch. 7, SLA 1996 in the Temporary and Special Acts.

**Effect of amendments.** — The 1991 amendment, effective September 16, 1991, added paragraph (3) (now (4)).

The 1993 amendment, effective August 25, 1993, added paragraph (9).

The first 1996 amendment, effective June 27, 1996, added paragraph (10).

The second 1996 amendment, effective June 27, 1996, added paragraph (8).

The third 1996 amendment, effective September 1, 1996, added paragraph (2).

The fourth 1996 amendment, effective July 1, 1996, rewrote paragraph (4).

**Legislative history reports.** — For House letter of intent relating to the definition of "victim" in this section, as amended by § 7, ch 59, SLA 1989 (CSHB 36(Fin) am), and related letter from the Department of Law, see 1989 House Journal 710 — 712.

## NOTES TO DECISIONS

### Prior convictions for presumptive sentencing.

— Under the plain terms of former AS 12.55.145(a)(3) and 12.55.185(6), (7), and (8) (now see (6), (13), and (14)), one conviction must precede the next before presumptive sentencing can apply. *State v. Rastopsoff*, 659 P.2d 630 (Alaska Ct. App. 1983).

Where defendant's three separate criminal episodes occurred in close proximity and his convictions were entered after all of the offenses had been committed, he cannot be deemed to be a second felony offender under AS 12.55.125 and AS 12.55.185. *State v. Rastopsoff*, 659 P.2d 630 (Alaska Ct. App. 1983).

A person has not been convicted of a felony offense for presumptive sentencing purposes until after he has been sentenced on the first felony offense. *Sawyer v. State*, 663 P.2d 230 (Alaska Ct. App. 1983).

**"Unconditional discharge" construed.** — The definition of "unconditional discharge" in AS 15.60.01(x)(3) is functionally identical to the definition of the same term set out in subsection (12). *Singleton*

The definition of "unconditional discharge" set forth in this section must be interpreted to require the completion of any sentence of imprisonment, discharge from parole or probation, and release from any other restriction directly imposed as part of the judgment of conviction; restoration of collaterally affected rights or privileges, such as to vote and to carry a gun, is not required. *Singleton v. State*, Ct. App. Op. No. 1475 (File No. A-55781, P.2d (1996)).

**"Victim."** — The legislature did not intend the definition of "victim" to be limited to "offenses against the person," because the term appears in statutes defining property crimes that are outside that class. *Municipality of Anchorage v. Sanders*, 902 P.2d 310 (Alaska Ct. App. 1995).

**Applied in** *Fry v. State*, 655 P.2d 789 (Alaska Ct. App. 1983); *Wenolic v. State*, 837 P.2d 130 (Alaska Ct. App. 1992).

**Quoted in** *Wright v. State*, 666 P.2d 1226 (Alaska Ct. App. 1983); *Capwell v. State*, 823 P.2d 1260 (Alaska Ct. App. 1991).

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Citation Rank(R) Page(P) Database Mode  
NH R REV Rule 615 R 1 OF 1 P 1 OF 3 NH-RULES TERM  
New Hampshire Rules of EVIDENCE, RULE 615

WEST'S NEW HAMPSHIRE RULES OF COURT  
NEW HAMPSHIRE RULES OF EVIDENCE  
ARTICLE VI. WITNESSES

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Current with amendments received through 12-15-95

**RULE 615. EXCLUSION OF WITNESSES**

At the request of a party the court shall in criminal cases and may in civil cases order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person or a victim of the crime, or (2) an officer or employee of a party in a civil case which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

Federal Rule: Exclusion of Witnesses.

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

Current New Hampshire Law: New Hampshire law is silent on the subject matter of this Rule.

**Reporter's Notes**

Sequestration of witnesses in criminal trials has long been New Hampshire practice. *State v. Peters*, 90 N.H. 438, 10 A.2d 242 (1939). There does not appear to be any express rule with respect to exclusion of witnesses in civil proceedings. Nor does there appear to be any express clarification of which persons are allowed to remain in attendance, such as exists in the Federal Rule. This Rule appears to be consistent with the considerable discretion allowed trial judges.

Under this Rule requests for sequestration of witnesses in criminal cases must be honored, while such requests in civil proceedings should be within

the discretion of the trial judge.

The Rule is not intended to exclude the police prosecutor in a criminal case.

Exhibit A

duction cost evidence or, concomitantly, in instructing the jury that it might consider such evidence.

would not color his testimony by listening to other witnesses.

Affirmed.

[5] The housing authority also contends that the trial judge improperly suggested to the jury that the property's physical condition made it unique. We find no merit in MHA's contention, first, because it presupposes a uniqueness requirement that we decline to adopt, for the reasons provided above. In addition, however, our consideration of the instruction reveals the trial judge's purpose, in referring to fire damage and deterioration, to explain the unavailability of comparable sales rather than to describe any uniqueness of the property.

Because we now affirm the result reached below, we need not address the issues raised in the cross-appeal.

AFFIRMED.

THAYER, J., did not sit; the others concurred.



The STATE of New Hampshire

v.

Gilbert HAMEL.

No. 87-246.

Supreme Court of New Hampshire.

July 8, 1988.

Defendant was convicted in the Superior Court, Hillsborough County, O'Neil, J., as accomplice to robbery. Defendant appealed. The Supreme Court, Batchelder, J., held that: (1) trial court was not authorized to sequester victim as witness, and (2) trial court did not abuse discretion by failing to order State to present allegedly inebriated victim as first witness so that he

1. Criminal Law  $\S$  665(1)

Trial court must order sequestration of witnesses in criminal cases upon request. Rules of Evid., Rule 615.

2. Criminal Law  $\S$  665(2)

Trial court was not authorized to sequester victim as witness. Rules of Evid., Rule 615.

3. Criminal Law  $\S$  680(1)

Trial court's decision to direct order of witnesses lies within its sound discretion.

4. Criminal Law  $\S$  680(1)

Trial court did not abuse discretion by failing to order State to present victim, who was allegedly inebriated during crime, as first witness so that he would not color his testimony by listening to other witnesses; defendant made only conclusory allegations that police officer's testimony gave victim unfair opportunity to color his testimony.

5. Criminal Law  $\S$  1168(2)

Trial court's failure to require State to present victim, who was allegedly inebriated during crime, as first witness so that he would not color his testimony by hearing other witnesses did not require reversal in prosecution for being accomplice to robbery; record did not indicate that victim colored testimony to conform to that of police officer; and defendant unsuccessfully tried to impeach victim's ability to perceive and relate facts and presented defense witness who gave different account of victim's activities on night of incident. RSA 626:8, 636:1.

Stephen E. Merrill, Atty. Gen. (T. David Plourde, Asst. Atty. Gen., on the brief), for the State.

Joanne Green, Asst. Appellate Defender, Concord, for defendant.

BATCHELDER, Justice.

The defendant was convicted after a jury trial in Superior Court (*O'Neil, J.*) of accomplice to robbery. RSA 626:8; RSA 636:1. He was sentenced to twelve months at the county house of correction, with a twelve-month probation period following incarceration, and ordered to make restitution in the amount of \$100. We affirm.

The testimony in this case reveals that in the early morning of October 9, 1986, the victim, Roland Roy, reported that he had been robbed by a group of five young men outside the Mayflower restaurant in Manchester. Roy testified at trial that, upon leaving the restaurant after an afternoon and evening of heavy drinking, he encountered the group of men and agreed to accompany them to a nearby party. He recognized one of the men as the brother of a former girlfriend. He later identified the man by name as the defendant, but not until after he had overheard Officer Kinney of the Manchester Police Department mention the name to another officer. According to Roy, as the group was en route to the party, he was struck in the face by one of the men and fell to the ground. He testified that the defendant kneeled on his chest and pinned him down while one of the other men took his wallet, which contained approximately \$80. Roy further testified that after he was released he called to the fleeing men, "Hamel, give me back my wallet."

Officer Kinney testified before Roy at trial. He described Roy's disheveled physical appearance, including his apparent drunkenness, and testified that he took a description of the defendant from Roy. He added that Roy identified the defendant by name after Kinney mentioned it. He further testified that he saw a group of several young men in the area at the approximate time of the reported robbery.

Prior to trial, the defendant moved to sequester all of the witnesses, which included the two State's witnesses, Roy and Officer Kinney, to prevent them from hearing each other's testimony. The defendant argued that Roy's drunkenness at the time of the incident rendered his potential testi-

mony suspect, and that he should not be permitted the opportunity to conform his testimony to that of Officer Kinney. The defendant suggested, alternatively, that the trial court could order the State to present Roy's testimony first. The trial court granted the sequestration motion except with respect to Roy.

The defendant pursues the same issue on appeal. He claims that under the circumstances of this case it was an abuse of discretion for the trial court not to have sequestered the victim-witness or, in the alternative, to have directed the State to call the victim as its first witness. The State argues, on the other hand, that Rule 615 of the New Hampshire Rules of Evidence precludes the trial court from sequestering the victim of the crime and that, in any event, the defendant has failed to show any prejudice as a result of the trial court's complete denial of relief.

[1, 2] Rule 615 of the New Hampshire Rules of Evidence provides, in pertinent part:

"At the request of a party the court shall in criminal cases . . . order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) . . . a victim of the crime . . ."

*N.H.R.Ev.* 615. The rule alters our common law to the extent that sequestration of witnesses in criminal cases has traditionally been within the discretion of the trial court. See *State v. Blake*, 113 N.H. 115, 119, 305 A.2d 300, 303 (1973); *State v. Peters*, 90 N.H. 438, 439, 10 A.2d 242, 244 (1939). Under the rule, the trial court must order sequestration in criminal cases upon request. The rule also plainly states that it does not authorize the trial court to exclude the victim of the crime. The trial court here cannot then be said to have committed error with respect to its refusal to sequester Roy.

[3, 4] The defendant's alternative request for the court to direct the order of the State's witnesses requires a different analysis. Authorities have suggested that in certain cases it may be appropriate for a

BEDFORD RESIDENTS v. BEDFORD PLANNING BD. N.H. 225

Cite as 547 A.2d 225 (N.H. 1988)

trial court to direct the order of witnesses so as to achieve the same purpose as that underlying sequestration; i.e., to prevent witnesses from conforming their testimony to that of others. See 6 Wigmore, *Evidence* § 1841, at 476 (Chadbourn *re* 1976) (where party witness not excluded); see also 88 C.J.S. *Trial* § 68 (1955). That decision, however, lies within the sound discretion of the trial court, and it will not be upset on review absent a showing of abuse of discretion. Cf. *McKinney v. Riley*, 105 N.H. 249; 250, 197 A.2d 218, 220 (1964) (order of calling witnesses, at least in civil case, rests in sound discretion of trial court); 6 Wigmore *supra*. Moreover, as the State argues, establishing abuse of discretion necessarily entails a showing of prejudice to the defendant by the trial court's decision. See C. Torcia, *Wharton's Criminal Evidence* § 376, at 502-03 (14th ed. 1986) (denial of motion to sequester not reversible error absent a showing of prejudice); cf. *State v. Hotchkiss*, 129 N.H. 260, 264, 525 A.2d 270, 272 (1987) (admission of evidence must be to prejudice of defendant to constitute abuse of discretion). We are also mindful that the presentation of evidence, which includes the order in which witnesses are called, is a matter of trial strategy for counsel. J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 611[01], at 611-16 (1987).

[5] Here, the defendant has made only conclusory allegations to the effect that permitting Roy to hear the testimony of Officer Kinney gave Roy an unfair opportunity to color his testimony. Upon review of the record, we do not see that Roy gave testimony that so mirrored that of Officer Kinney as to lead to the conclusion that Roy colored his own testimony to conform to that of Officer Kinney. Nor did the defendant describe any instances in his brief where this occurred. Moreover, defense counsel tried several avenues of impeachment, including focusing on Roy's ability to perceive and relate the facts, as limited by his inebriation, and presenting a defense witness who gave a different account of Roy's activities on the evening of the incident. That the jury was not swayed by these efforts is not enough to

prompt us to overturn the conviction and order a new trial. Finally, while the record reveals that Roy was deposed prior to trial, absent from the record is any attempt on the part of defense counsel to impeach Roy through the use of his deposition.

AFFIRMED.

All concurred.



BEDFORD RESIDENTS GROUP

v.

TOWN OF BEDFORD, PLANNING BOARD, Grove Realty Trust & Roland & Diane Auger.

No. 87-396.

Supreme Court of New Hampshire.

July 11, 1988.

Property owners challenged the validity of a town's zoning amendment. The Superior Court, Hillsborough County, O'Neil, J., found that the property owners had been denied notice. Appeal was taken. The Supreme Court, Johnson, J., held that: (1) the notice provided by the town planning board of the proposed zoning amendment did not comply with the statutory requisites for constructive notice; (2) the defective notice was not cured by subsequent publication of a warrant for the town meeting; and (3) the property owners were not required to exhaust their administrative remedies before challenging the adequacy of notice.

Affirmed.

1. Zoning and Planning ⇐194

While property owners need not be afforded actual notice of proposed zoning change, they must be afforded constructive



Telephone: (907) 522-6233  
FAX: (907) 522-6234

Mothers Against Drunk Driving

Anchorage Chapter  
615 East 82nd Avenue, Ste. B 1  
Anchorage, AK 99518-3157

DATE: January 16, 1997  
TO: Representative Brian Porter  
FROM: Marti Greeson, Executive Director  
Mothers Against Drunk Driving *Marti Greeson*  
RE: House Bill No. 9

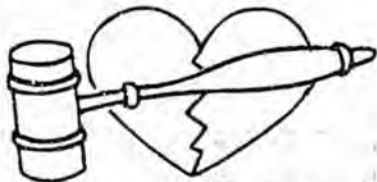
This letter is in support of House Bill No. 9 which will ensure the protection of a victim's right to be present during criminal proceedings including juvenile proceedings.

The rights of victims as stated in the Victims Rights amendment must be protected at least to the extent that defendant's rights are protected. Victims have been excluded from the criminal justice process and left to suffer unanswered questions, trauma and loss, and frequently second and ensuing victimization through that exclusion far too long.

The fact that a perpetrator of a criminal act is a juvenile does not negate nor diminish the impact and affect of the violation or trauma for the victim.

Please feel free to contact me if you have any questions.

**VICTIMS**



**for Justice** 619 East Fifth Avenue • Anchorage, AK 99501  
(907) 278-0977 • Fax: (907) 258-0740

January 15, 1997

The Honorable Brian Porter  
Alaska House of Representatives  
Juneau, AK 99811

Dear Representative Porter:

My name is Janice Lienhart. I am the co-founder of Victims for Justice in Anchorage. Victims for Justice and its Board of Directors have long been champions in Alaska for the rights of crime victims.

I am joining with scores of other crime victims and concerned citizens across Alaska to support HB 9, "the right of crime victims and victims of juvenile offenses to be present at court proceedings; and amending Rule 615, Alaska Rules of Evidence, by making the witness exclusion rule inapplicable to victims of offenses."

To fully understand the need for this amendment, each of us must answer this question: How would I wish to be treated if I or a loved one were a victim of a violent crime? No one expects or deserves to be a victim of a violent crime. And when that happens victims not only suffer crime's consequences, but are victimized by the criminal justice system as well. Despite the passage of the Alaska's Victims' Bill of Rights Amendment to our state constitution in 1994, Alaskan victims of crime are still being re-victimized. *Because the system is perfectly tolerant of the unequal treatment for victims who are daily excluded from courtrooms because they may be called as witnesses.* Defendants may be witnesses in their own trials but they of course have a right nonetheless to remain in the courtroom. If juries can put aside influences by the defendants they certainly can by victims.

Representative Porter

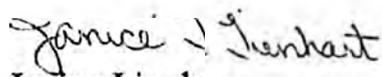
Page 2

*The right to be informed of and given the opportunity to be present at every proceeding in which those rights are extended to the accused or convicted offender* should be intended to expressly overturn all witness exclusion rules that presently result in the expulsion of the victims from the courtroom. It should mandate that the same standard be used for the victim and the defendant; hence it should be intended that the same rules govern the presence of the victim that govern the presence of the defendant.

Only when the rights of victims, *such as the right to be present at trial proceedings*, are given equal weight to the rights of the accused, will they be guaranteed protection under the law.

Passage of HB 9 sends a clear message that *victim justice* must be an integral component of criminal justice in Alaska, as well as setting an unprecedented standard for our nation.

Sincerely,

  
Janice Lienhart  
Executive Director  
Victims for Justice

# FISCAL NOTE

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

**BILL NO: HB 9**

Revision Date: \_\_\_\_\_ Dept. Affected: Public Safety  
 Title: "An Act relating to the rights of crime victims .....to be present at court proceedings" BRU: Statewide Support  
 Sponsor: Representative Porter Component: Commissioner's Office  
 Requestor: House Judiciary Committee COMPONENT SERIAL NO. 0523

**EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)**

OPERATING	FY 98	FY 99	FY 00	FY 01	FY 02	FY 03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	-0-	-0-	-0-	-0-	-0-	-0-
<b>CAPITAL EXPENDITURES</b>	-0-	-0-	-0-	-0-	-0-	-0-
<b>CHANGE IN REVENUES ( )</b>	-0-	-0-	-0-	-0-	-0-	-0-
Revenue Code						

**FUNDING: (Thousands of Dollars)**

1002 Federal Receipts						
1003 GE Match						
1004 GE						
1005 GE/Program Receipts						
1006 GE/MHTIA						
Other						
<b>TOTAL</b>	-0-	-0-	-0-	-0-	-0-	-0-

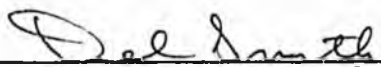
Estimate of current year (FY 97) impact: \$ \_\_\_\_\_ -0- \_\_\_\_\_

**POSITIONS:**

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

ANALYSIS: (Attach a separate page if necessary.)

This bill does not impact the Department of Public Safety

Prepared By: Sandy Perry-Provost, Special Assistant to the Commissioner Phone: 465-4322  
 Division: Commissioner's Office Date: 1/14/97  
 Approved by Commissioner:  Date: 1/14/97  
 Agency: Ronald L. Otte, Dept. of Public Safety

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# FISCAL NOTE

STATE OF ALASKA  
1997 LEGISLATIVE SESSION

BILL NO. HB 9

Revision Date: \_\_\_\_\_ Dept. Affected: Department of Law  
 Title: ... the right of crime victims and victims of juvenile offenses to be present at court ... ; amending Rule 615 ... BRU: Criminal Division/Civil Division  
 Sponsor: Representative Porter Component: Criminal Division/General Legal Services  
 Requester: House Judiciary Committee 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						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

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)

This bill amends AS 09.20.180, AS 12.50.200, AS 47.12.110(b) and Rule 615, Alaska Rules of Evidence to ensure crime victims are granted their right, protected under art. I, sec. 24, of the state constitution, to be present at all criminal or juvenile proceedings where the accused has the right to be present, regardless of the sequestration rule applicable to most witnesses.

This bill will have no fiscal impact on the Department of Law.

Prepared by: Joan M. Kasson *Joan M. Kasson*  
 Division: Administrative Services Division  
 Approved by Commissioner: Bruce M. Botelho *Bruce M. Botelho for*  
 Agency: Department of Law

Phone: 465-5370  
 Date: 1/17/97  
 Date: 1/17/97

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# FISCAL NOTE

STATE OF ALASKA  
1997 LEGISLATIVE SESSION

BILL NO. HB 9

Revision Date: \_\_\_\_\_ Dept. Affected: Alaska Court System  
 Title: Victim's right to be present at trial BRU: Trial Courts  
 Component: \_\_\_\_\_  
 Sponsor: Rep. Porter  
 Requestor: House Judiciary COMPONENT SERIAL NO. 768

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						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ( )						
------------------------	--	--	--	--	--	--

Fund Source (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts						
1937 GF/Mental Health						
Other						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

Estimate of any current year (FY 97) cost: None

Positions

Full-Time						
Part-Time						
Temporary						

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: C. S. Christensen III, Staff Counsel *CSC* Phone: 264-8228  
 Agency: Alaska Court System Date: 01/23/97  
 Approved by: Arthur H. Snowden, II, Administrative Director *AS* Date: 01/23/97  
 Agency: Alaska Court System

PREPARER TO PROVIDE ALL DISTRIBUTION COPIES TO GOVERNOR'S LEGISLATIVE OFFICE

Revision Date: \_\_\_\_\_  
 Title: Rights of Victim's to be present at court proceedings  
 Sponsor: Representative Porter  
 Requestor: House (JUD)

Dept. Affected: Health and Social Services  
 BRU: Family and Youth Services  
 Component: DFYS Central Office  
 COMPONENT SERIAL NO. 259  
 See also (SN#): \_\_\_\_\_

**Expenditures/Revenues:**

(Thousands of Dollars)

OPERATING	FY98	FY99	FY00	FY01	FY02	FY03
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
<b>TOTAL OPERATING</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

<b>CAPITAL EXPENDITURES</b>						
-----------------------------	--	--	--	--	--	--

<b>CHANGES IN REVENUES</b>	( )	( )	( )	( )	( )	( )
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**FUND SOURCE**

(Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (please specify)						
<b>TOTAL</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>	<b>0.0</b>

**POSITIONS:**

FULL-TIME						
PART-TIME						
TEMPORARY						

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

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

There would be no fiscal impact to the Division if this bill were to become law.

*5/23/97*

Prepared by: L. Diane Worley, Director  
 Division: Family & Youth Services

Phone: 465-3191  
 Date: 01/23/97

Approved by Commissioner: Karen Perdue, Commissioner  
 Agency: Department of Health & Social Services

Date: 1/23/97

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To: Lisa  
From: Jan  
1/22/97

Re: Witness list for FBI HQ HANG 1/24/97

A. From Anchorage via telephone:

1. RALPH SAMUELS
2. DAWN SCHERBERT
3. GANNÉL DIXON
4. CAROLE AOTEN
5. KAREN CAMPBELL
6. REBECCA HOLLOWAY
7. JANICE LIEN HART / (Victims for Justice)
8. possibly: - MARTY GREENSON (MADD)

B. Dept of Public Safety (in person)

1. JAYNE ANDREON - Exec. Director of Council for Domestic Violence & Sexual Assault.
2. Dell Smith - Deputy Commissioner, DPS.
3. possibly: CHRIS CHRISTENSEN, the Ct. System, who will take NO POSITION ON IT, but will be AT THE HEARING.