SB 252

26-GS2910\R
Luckhaupt
4/11/10

CS FOR SENATE BILL NO. 252(JUD)

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-SIXTH LEGISLATURE - SECOND SESSION

BY THE SENATE JUDICIARY COMMITTEE

Offered:
Referred:

Sponsor(s): SENATE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

A BILL

FOR AN ACT ENTITLED

"An Act relating to the crime of failure to appear; relating to arrest for violating certain conditions of release; relating to release before trial, before sentence, and pending appeal; relating to material witnesses; relating to temporary release; relating to release on a petition to revoke probation; relating to the first appearance before a judicial officer after arrest; relating to service of process for domestic violence protective orders; making conforming amendments; amending Rules 5 and 41, Alaska Rules of Criminal Procedure, and Rules 206 and 603, Alaska Rules of Appellate Procedure; and providing for an effective date."

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

*** Section 1.** AS 11.56 is amended by adding a new section to read:

Sec. 11.56.730. Failure to appear. (a) A person commits the crime of failure to appear if the person

(1) is released under the provisions of AS 12.30;

(2) knows that the person is required to appear before a court or judicial officer at the time and place of a scheduled hearing; and

(3) with criminal negligence does not appear before the court or judicial officer at the time and place of the scheduled hearing.

(b) In a prosecution for failure to appear under (a) of this section, it is an affirmative defense that unforeseeable circumstances, outside the person's control, prevented the person from appearing before the court or judicial officer at the time and place of the scheduled hearing, and the person contacted the court orally and in writing immediately upon being able to make the contact.

(c) A person who commits failure to appear incurs a forfeiture of any security for any appearance of the person that was given or pledged to the court for the person's release, and is guilty of a

(1) class C felony if the person was released in connection with a charge of a felony, or while awaiting sentence or appeal after conviction of a felony;

(2) class A misdemeanor if the person was released in connection with a

(A) charge of a misdemeanor, or while awaiting sentence or appeal after conviction of a misdemeanor; or

(B) requirement to appear as a material witness in a criminal proceeding.

*** Sec. 2.** AS 12.25.030(b) is amended to read:

(b) In addition to the authority granted by (a) of this section, a peace officer

(1) shall make an arrest under the circumstances described in AS 18.65.530;

(2) without a warrant may arrest a person if the officer has probable cause to believe the person has, either in or outside the presence of the officer,

(A) committed a crime involving domestic violence, whether the crime is a felony or a misdemeanor; in this subparagraph, "crime involving domestic violence" has the meaning given in AS 18.66.990;

(B) committed the crime of violating a protective order in

violation of AS 11.56.740; or

(C) violated a condition of release imposed under **AS 12.30.016(e)** [AS 12.30.025] or 12.30.027;

(3) without a warrant may arrest a person when the peace officer has **probable** [REASONABLE] cause for believing that the person has

(A) committed a crime under or violated conditions imposed as part of the person's release before trial on misdemeanor charges brought under AS 11.41.270;

(B) violated AS 04.16.050 or an ordinance with similar elements; however, unless there is a lawful reason for further detention, a person who is under [THE AGE OF] 18 **years of age** and who has been arrested for violating AS 04.16.050 or an ordinance with similar elements shall be cited for the offense and released to the person's parent, guardian, or legal custodian; or

(C) violated conditions imposed as part of the person's release **under the provisions of AS 12.30** [BEFORE TRIAL ON FELONY CHARGES BROUGHT UNDER AS 11.41.410 - 11.41.458].

* **Sec. 3.** AS 12.30 is amended by adding a new section to read:

Sec. 12.30.006. Release procedures. (a) At the first appearance before a judicial officer, a person charged with an offense shall be released or detained under the provisions of this chapter.

(b) At the first appearance before a judicial officer, a person who is charged with a felony may be detained up to 48 hours for the prosecuting authority to demonstrate that release of the person under AS 12.30.011(a) would not reasonably assure the appearance of the person or will pose a danger to the victim, other persons, or the community.

(c) A person who remains in custody 48 hours after appearing before a judicial officer because of inability to meet the conditions of release shall, upon application, be entitled to have the conditions reviewed by the judicial officer who imposed them. If the judicial officer who imposed the conditions of release is not available, any judicial officer in the judicial district may review the conditions.

(d) If a person remains in custody after review of conditions by a judicial officer under (c) of this section, the person may request a subsequent review of conditions. Unless the prosecuting authority stipulates otherwise or the person has been incarcerated for a period equal to the maximum sentence for the most serious charge for which the person is being held, a judicial officer may not schedule a bail review hearing under this subsection unless

(1) the person provides to the court and the prosecuting authority a written statement that new information not considered at the previous review will be presented at the hearing; the statement must include a description of the information and the reason the information was not presented at a previous hearing; in this paragraph, "new information" does not include the inability to post the required bail;

(2) the prosecuting authority and any surety, if applicable, have at least 48 hours' written notice before the time set for the review requested under this subsection; the defendant shall notify the surety; and

(3) at least seven days have elapsed between the previous review and the time set for the requested review.

(e) A judicial officer may solicit comments by the victim or a parent or guardian of a minor victim who is present at the bail review hearing and wishes to comment. The judicial officer shall consider those comments and any response by the person before making a decision concerning the release of the person.

(f) The judicial officer shall issue written or oral findings that explain the reasons the officer imposed the particular conditions of release or modifications or additions to conditions previously imposed. The judicial officer shall inform the person that a law enforcement officer may arrest the person without a warrant for violation of the court's order establishing conditions of release.

(g) Information offered or introduced at a bail hearing to determine conditions of release need not conform to the rules governing the admissibility of evidence.

*** Sec. 4.** AS 12.30 is amended by adding new sections to read:

Sec. 12.30.011. Release before trial. (a) Except as otherwise provided in this chapter, a judicial officer shall order a person charged with an offense to be released on the person's personal recognizance or upon execution of an unsecured appearance

bond, on the condition that the person

(1) obey all court orders and all federal, state, and local laws;

(2) appear in court when ordered;

(3) if represented, maintain contact with the person's lawyer; and

(4) notify the person's lawyer, who shall notify the prosecuting authority and the court, not more than 24 hours after the person changes residence.

(b) If a judicial officer determines that the release under (a) of this section will not reasonably assure the appearance of the person or will pose a danger to the victim, other persons, or the community, the officer shall impose the least restrictive condition or conditions that will reasonably assure the person's appearance and protect the victim, other persons, and the community. In addition to conditions under (a) of this section, the judicial officer may, singly or in combination,

(1) require the execution of an appearance bond in a specified amount of cash to be deposited into the registry of the court, in a sum not to exceed 10 percent of the amount of the bond;

(2) require the execution of a bail bond with sufficient solvent sureties or the deposit of cash;

(3) require the execution of a performance bond in a specified amount of cash to be deposited in the registry of the court;

(4) place restrictions on the person's travel, association, or residence;

(5) order the person to refrain from possessing a deadly weapon on the person or in the person's vehicle or residence;

(6) require the person to maintain employment, or if unemployed, actively seek employment;

(7) require the person to notify the person's lawyer and the prosecuting authority within two business days after any change in employment;

(8) require the person to avoid all contact with a victim, a potential witness, or a codefendant;

(9) require the person to refrain from the consumption and possession of alcoholic beverages;

(10) require the person to refrain from the use of a controlled substance

as defined by AS 11.71, unless prescribed by a licensed health care provider with prescriptive authority;

(11) require the person to be physically inside the person's residence, or in the residence of the person's third-party custodian, at time periods set by the court;

(12) require the person to keep regular contact with a law enforcement officer or agency;

(13) order the person to refrain from entering or remaining in premises licensed under AS 04;

(14) place the person in the custody of an individual who agrees to serve as a third-party custodian of the person as provided in AS 12.30.021;

(15) if the person is under the treatment of a licensed health care provider, order the person to follow the provider's treatment recommendations;

(16) order the person to take medication that has been prescribed for the person by a licensed health care provider with prescriptive authority;

(17) order the person to comply with any other condition that is reasonably necessary to assure the appearance of the person and to assure the safety of the victim, other persons, and the community.

(c) In determining the conditions of release under this chapter, the court shall consider the following:

(1) the nature and circumstances of the offense charged;

(2) the weight of the evidence against the person;

(3) the nature and extent of the person's family ties and relationships;

(4) the person's employment status and history;

(5) the length and character of the person's past and present residence;

(6) the person's record of convictions;

(7) the person's record of appearance at court proceedings;

(8) assets available to the person to meet monetary conditions of release;

(9) the person's reputation, character, and mental condition;

(10) the effect of the offense on the victim, any threats made to the

victim, and the danger that the person poses to the victim;

(11) any other facts that are relevant to the person's appearance or the person's danger to the victim, other persons, or the community.

(d) In making a finding regarding the release of a person under this chapter,

(1) except as otherwise provided in this chapter, the burden of proof is on the prosecuting authority that a person charged with an offense should be detained or released with conditions described in (b) of this section or AS 12.30.016;

(2) there is a rebuttable presumption that no condition or combination of conditions will reasonably assure the appearance of the person or the safety of the victim, other persons, or the community, if the person is

(A) charged with an unclassified felony, a class A felony, a sexual felony, or a felony under AS 28.35.030 or 28.35.032;

(B) charged with a felony crime against a person under AS 11.41, was previously convicted of a felony crime against a person under AS 11.41 or a similar offense in another jurisdiction, and less than five years have elapsed between the date of the person's unconditional discharge on the immediately preceding offense and the commission of the present offense;

(C) charged with a felony offense committed while the person was on release under this chapter for a charge or conviction of another offense;

(D) charged with a crime involving domestic violence, and has been convicted in the previous five years of a crime involving domestic violence in this state or a similar offense in another jurisdiction;

(E) arrested in connection with an accusation that the person committed a felony outside the state or is a fugitive from justice from another jurisdiction, and the court is considering release under AS 12.70.

Sec. 12.30.016. Release before trial in certain cases. (a) A judicial officer may impose, in addition to those required or authorized under AS 12.30.011, conditions of release for offenses described in this section, if necessary to reasonably assure the person's appearance or the safety of the victim, other persons, or the community.

(b) In a prosecution charging a violation of AS 04.11.010, 04.11.499,

AS 28.35.030, or 28.35.032, a judicial officer may order the person

(1) to refrain from

(A) consuming alcohol beverages; or

(B) possessing on the person, in the person's residence, or in any vehicle or other property over which the person has control, alcoholic beverages;

(2) to submit to a search without a warrant of the person, the person's personal property, the person's residence, or any vehicle or other property over which the person has control, for the presence of alcoholic beverages by a peace officer who has reasonable suspicion that the person is violating the conditions of the person's release by possessing alcoholic beverages;

(3) to submit to a breath test when requested by a law enforcement officer;

(4) to provide a sample for a urinalysis or blood test when requested by a law enforcement officer;

(5) to take a drug or combination of drugs intended to prevent substance abuse;

(6) to follow any treatment plan imposed by the court under AS 28.35.028.

(c) In a prosecution charging a violation of AS 11.71 or AS 11.73, a judicial officer may order the person

(1) to refrain from

(A) consuming a controlled substance; or

(B) possessing on the person, in the person's residence, or in any vehicle or other property over which the person has control, a controlled substance or drug paraphernalia;

(2) to submit to a search without a warrant of the person, the person's personal property, the person's residence, or any vehicle or other property over which the person has control, for the presence of a controlled substance or drug paraphernalia by a peace officer who has reasonable suspicion that the person is violating the terms of the person's release by possessing controlled substances or drug paraphernalia;

(3) to enroll in a random drug testing program, at the person's expense, to detect the presence of a controlled substance, with testing to occur not less than once a week, and with the results being submitted to the court and the prosecuting authority;

(4) to refrain from entering or remaining in a place where a controlled substance is being used, manufactured, grown, or distributed;

(5) to refrain from being physically present, within a two-block area of, or within a designated area near, the location where the alleged offense occurred or at other designated places, unless the person actually resides within that area; or

(6) to refrain from the use or possession of an inhalant.

(d) In a prosecution charging misconduct involving a controlled substance under AS 11.71.020(a)(2) for the manufacture of methamphetamine, or its salts, isomers, or salts of isomers, if the person has been previously convicted in this or another jurisdiction of a crime involving the manufacturing, delivering, or possessing methamphetamine, or its salts, isomers, or salts of isomers, a judicial officer shall require the posting of a minimum of $250,000 cash bond before the person may be released. The judicial officer may reduce this requirement if the person proves to the satisfaction of the officer that the person's only role in the offense was as an aider or abettor and that the person did not stand to benefit financially from the manufacturing.

(e) In a prosecution charging the crime of stalking that is not a crime involving domestic violence, a judicial officer may order the person to

(1) follow the provisions of any protective order to which the person is respondent;

(2) refrain from contacting in any manner, including by telephone or electronic communication, the victim;

(3) engage in counseling; if available in the community, the judicial officer shall require that counseling ordered include counseling about alternatives to aggressive behavior.

(f) In a prosecution charging a crime under AS 11.41.410 - 11.41.458, a judicial officer

(1) may order the person to have no contact with the victim except as

specifically allowed by the court;

(2) may order the person to reside in a place where the person is not likely to come into contact with the victim of the offense;

(3) may order the person to have no contact with any person under 18 years of age except in the normal course of business in a public place;

(4) shall assure that the victim and the parent or guardian of a minor victim have been notified by a law enforcement agency or the prosecuting authority of a hearing where release is being considered, or that a reasonable effort at notification has been made; and

(5) shall solicit comments from the victim or a parent or guardian of the minor victim who is present and wishes to comment, and consider those comments before making a decision concerning the release of the person.

*** Sec. 5.** AS 12.30 is amended by adding a new section to read:

Sec. 12.30.021. Third-party custodians. (a) In addition to other conditions imposed under AS 12.30.011 or 12.30.016, a judicial officer may appoint a third-party custodian if the officer finds that the appointment will, singly or in combination with other conditions, reasonably assure the person's appearance and the safety of the victim, other persons, and the community.

(b) A judicial officer may appoint an individual as a third-party custodian if the proposed custodian

(1) provides information to the judicial officer about the proposed custodian's residence, occupation, ties to the community, and relationship with the person, and provides any other information requested by the judicial officer;

(2) is physically able to perform the duties of custodian of the person;

(3) either personally, by telephone, or by other technology approved by the court, appears in court with the person and acknowledges to the judicial officer orally and in writing that the proposed custodian

(A) understands the duties of custodian and agrees to perform them; the proposed custodian must specifically agree to immediately report in accordance with the terms of the order if the person released has violated a condition of release; and

(B) understands that failure to perform those duties may result in the custodian being held criminally liable under AS 09.50.010 or AS 11.56.758.

(c) A judicial officer may not appoint a person as a third-party custodian if

(1) the proposed custodian is acting as a third-party custodian for another person;

(2) the proposed custodian has been convicted in the previous three years of a crime under AS 11.41 or a similar crime in this or another jurisdiction;

(3) criminal charges are pending in this state or another jurisdiction against the proposed custodian;

(4) the proposed custodian is on probation in this state or another jurisdiction for an offense;

(5) the proposed custodian may be called as a witness in the prosecution of the person;

(6) the proposed custodian resides out of state; however a nonresident may serve as a custodian if the nonresident resides in the state while serving as custodian.

*** Sec. 6.** AS 12.30.027(a) is amended to read:

(a) Before ordering release before or after trial, or pending appeal, of a person charged with or convicted of a crime involving domestic violence, the **judicial officer** [COURT] shall consider the safety of the [ALLEGED] victim or other household member. To protect the [ALLEGED] victim, household member, **other persons,** and the **community** [PUBLIC] and to reasonably assure the person's appearance, the **judicial officer shall impose conditions required under AS 12.30.011, and** [COURT] may impose [BAIL AND] any of the conditions authorized under **AS 12.30.011** [AS 12.30.020], any of the provisions of AS 18.66.100(c)(1) - (7) and (11), and any other condition necessary to protect the [ALLEGED] victim, household member, **other persons,** and the **community** [PUBLIC], and to ensure the appearance of the person in court, including ordering the person to refrain from the consumption of alcohol.

*** Sec. 7.** AS 12.30.027(b) is amended to read:

(b) A **judicial officer** [COURT] may not order or permit a person released under (a) of this section to return to the residence **or place of employment** of the [ALLEGED] victim or the residence **or place of employment** of a petitioner who has a protective order directed to the person and issued or filed under AS 18.66.100 - 18.66.180 **unless**

(1) 20 days have elapsed following the date the person was arrested;

(2) the victim or petitioner consents to the person's return to the residence or place of employment;

(3) the person does not have a prior conviction for an offense under AS 11.41 that is a crime involving domestic violence; and

(4) the court finds by clear and convincing evidence that the return to the residence or place of employment does not pose a danger to the victim or petitioner.

*** Sec. 8.** AS 12.30.030 is repealed and reenacted to read:

Sec. 12.30.030. Appeal from conditions of release. (a) If a person remains in custody after a review provided for in AS 12.30.006(c) or (d), an appeal may be taken to the court having appellate jurisdiction over the court imposing the conditions. The appellate court shall affirm the order unless it finds that the lower court abused its discretion.

(b) If the appellate court finds that the lower court abused its discretion, the appellate court may modify the order, remand the matter for further proceedings, or remand the matter directing entry of the appropriate order, including release under AS 12.30.011(a). The appeal shall be determined promptly.

*** Sec. 9.** AS 12.30 is amended by adding a new section to read:

Sec. 12.30.031. Temporary release. (a) A person either before trial or after conviction who is detained under this chapter may be released temporarily if

(1) the person is being held in connection with a misdemeanor or class B or C felony;

(2) the release is requested because of the

(A) death of an immediate family member of the person;

(B) birth of the person's child if the defendant executes an affidavit of paternity before the release;

(C) person's need for a mental health or substance abuse assessment that the court finds cannot be accommodated in the facility or telephonically; or

(D) person's need for a medical or dental examination required for acceptance into a residential treatment facility; and

(3) the court solicits information from the Department of Corrections regarding the defendant's conduct while incarcerated and considers that information when making a decision under this subsection.

(b) If a court orders temporary release of a person under (a) of this section, the court shall order the person to appear in court during normal business hours at the end of the period of temporary release and before the person is returned to a correctional facility.

* **Sec. 10.** AS 12.30.040 is repealed and reenacted to read:

Sec. 12.30.040. Release before sentence; release after conviction. (a) Except as provided in (b) of this section, a person who has been convicted of an offense and is awaiting sentence or who has filed an appeal may be released under the provisions of this chapter if the person establishes, by clear and convincing evidence, that the person can be released under conditions that will reasonably assure the appearance of the person and the safety of the victim, other persons, and the community.

(b) A person may not be released under (a) of this section if the person has been convicted of an offense that is

(1) an unclassified or class A felony;

(2) a sexual felony;

(3) a class B felony if the person has been convicted within the previous 10 years of a felony committed in this state or a similar offense committed in another jurisdiction; or

(4) a felony in violation of AS 11.41, and the person has been found guilty but mentally ill.

(c) A person who has been convicted of an offense and who has filed an

application for post-conviction relief may not be released under this section until the court enters an order vacating all convictions against the person. A person who has prevailed in an application for post-conviction relief may seek release before trial in accordance with the provisions of this chapter.

*** Sec. 11.** AS 12.30.050 is repealed and reenacted to read:

Sec. 12.30.050. Release of material witnesses. (a) If the prosecution or defense establishes by affidavit or other evidence that the testimony of a person is material in a criminal proceeding, and that it may be impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and consider the release or detention of the person under the provisions of AS 12.30.011.

(b) A material witness may not be detained because of inability to comply with any condition of release if the testimony of the witness can adequately be secured by deposition, unless further detention is necessary to prevent a failure of justice.

(c) Release of a material witness under (a) of this section may be delayed for a reasonable period of time for the deposition of the witness to be taken.

*** Sec. 12.** AS 12.30 is amended by adding a new section to read:

Sec. 12.30.055. Persons appearing on petition to revoke. A person who is in custody in connection with a petition to revoke probation does not have a right to be released under this chapter. A judicial officer may, however, release the person under the provisions of this chapter, if it is established by a preponderance of the evidence that the proposed release conditions will reasonably assure the appearance of the person and the safety of the victim, other persons, and the community.

*** Sec. 13.** AS 12.30.075(a) is amended to read:

(a) Cash or other security posted by a **person** [DEFENDANT] under **AS 12.30.011** [AS 12.30.020] that would otherwise be forfeited shall be held by the court in trust for the benefit of the victim if, within 30 days after an order of the court establishing a failure to appear or a violation of conditions of release, the prosecuting authority gives notice that restitution may be requested as part of the sentence if the **person** [DEFENDANT] is convicted.

*** Sec. 14.** AS 12.30 is amended by adding a new section to read:

Sec. 12.30.078. Conviction occurrence. In this chapter, a conviction occurs at the time the person is found guilty, either by plea or verdict, of the offense.

* **Sec. 15.** AS 12.30.080 is amended by adding new paragraphs to read:

(3) "crime involving domestic violence" has the meaning given in AS 18.66.990;

(4) "knowingly" has the meaning given in AS 11.81.900;

(5) "peace officer" has the meaning given in AS 11.81.900;

(6) "sexual felony" has the meaning given in AS 12.55.185;

(7) "stalking" means a violation of AS 11.41.260 or 11.41.270.

* **Sec. 16.** AS 12.55.155(c)(12) is amended to read:

(12) the defendant was on release under **AS 12.30** [AS 12.30.020 OR 12.30.040] for another felony charge or conviction or for a misdemeanor charge or conviction having assault as a necessary element;

* **Sec. 17.** AS 12.80.060(g)(2) is amended to read:

(2) "offense" means conduct subjecting a person to arrest as an adult offender, or as a juvenile charged as an adult,

(A) due to a violation of a federal or state criminal law, or municipal criminal ordinance;

(B) under AS 12.25.180;

(C) under **AS 11.56.730** [AS 12.30.060]; or

(D) under AS 12.70.

* **Sec. 18.** AS 18.65.530(a) is amended to read:

(a) Except as provided in (b) or (c) of this section, a peace officer, with or without a warrant, shall arrest a person if the officer has probable cause to believe the person has, either in or outside the presence of the officer, within the previous 12 hours,

(1) committed domestic violence, except an offense under AS 11.41.100 - 11.41.130, whether the crime is a felony or a misdemeanor;

(2) committed the crime of violating a protective order in violation of AS 11.56.740;

(3) violated a condition of release imposed under **AS 12.30.016(e) or**

(f) or 12.30.027 [AS 12.30.025, 12.30.027, OR 12.30.029].

*** Sec. 19.** AS 18.66.160(a) is amended to read:

(a) **Unless, on the record in court, the person has already been provided a copy of the court's order, process** [PROCESS] issued under this chapter shall be promptly served and executed. If process is to be served upon a person believed to be present or residing in a municipality, as defined in AS 29.71.800, or in an unincorporated community, process shall be served by a peace officer of that municipality or unincorporated community who has jurisdiction within the area of service. If a peace officer of the municipality or unincorporated community who has jurisdiction is not available, a superior court, district court, or magistrate may designate any other peace officer to serve and execute process. A state peace officer shall serve process in any area that is not within the jurisdiction of a peace officer of a municipality or unincorporated community. A peace officer shall use every reasonable means to serve process issued under this chapter. **A judge may not order a peace officer to serve a petition that has been denied by the court.**

*** Sec. 20.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 5(a)(1), Alaska Rules of Criminal Procedure, is amended to read:

(a) **Appearance Before the Judge or Magistrate.**

(1) Except when the person arrested is issued a citation for a misdemeanor or a violation and immediately thereafter released, the arrested person shall be taken before the nearest available judge or magistrate without unnecessary delay. This appearance may be accomplished by the use of telephonic or television equipment pursuant to Criminal Rules 38.1 and 38.2. **Necessary** [UNNECESSARY] delay within the meaning of this paragraph (a) is defined as a period not to exceed **forty-eight** [TWENTY-FOUR] hours after arrest, including Sundays and holidays.

*** Sec. 21.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 5(a)(2), Alaska Rules of Criminal Procedure, is amended to read:

(2) If

(i) The judge or magistrate commits the arrested person to jail for a purpose other than to serve a sentence, and

(ii). The jail is situated in a different community from the place where the judge or magistrate committed the arrested person to jail, and

(iii) The arrested person is not represented by counsel, and

(iv) The arrested person has not previously had a bail review, and

(v) The arrested person has no date, time and place established for his or her next court appearance, then the arrested person shall be taken before a judge or magistrate in the community where the jail is located within **forty-eight** [TWENTY-FOUR] hours of the person's detention in that jail

(aa) in order for bail to be reviewed, and

(bb) in order to determine if the person is represented by counsel, and

(cc) in order for [THE] counsel to be appointed, if appropriate.

*** Sec. 22.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 41(a), Alaska Rules of Criminal Procedure, is amended to read:

(a) **Admission to Bail.** The defendant in a criminal proceeding is entitled to be admitted to bail pursuant to **AS 12.30.006 - 12.30.080** [AS 12.30.010 -12.30.080].

*** Sec. 23.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 41(b), Alaska Rules of Criminal Procedure, is amended to read:

(b) **Types of Bonds.** The court may require:

(1) the execution of an unsecured appearance bond in an amount specified, under the criteria set forth in **AS 12.30.011** [AS 12.30.010(a)];

(2) the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash [or other security], of a sum not to exceed 10 percent of the amount of the bond;

(3) the execution of a bail bond with sufficient solvent sureties or the deposit of cash; or

(4) the execution of a performance bond in a specified amount and the deposit in the registry of the court of cash [or other security].

*** Sec. 24.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 41(c), Alaska Rules of Criminal Procedure, is amended to read:

(c) **Separate Bonds.** If a performance bond is required, it must be enforced separately from any appearance or bail bond.

(1) Appearance in court may not be a condition of a performance bond. **A court may not order that an appearance bond be concurrent with an appearance bond in a pending case unless the surety who posed the first appearance bond approves.**

(2) The court may not change a performance or appearance bail requirement without agreement by the surety, unless

(A) the surety waives the requirement for agreement in advance and in writing; or

(B) the court, in writing, finds that the change in the condition of bail poses no increase in risk of loss to the surety and the court sets out in writing the reason for finding that there is no increase in the risk of loss to the surety.

*** Sec. 25.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 206(b), Alaska Rules of Appellate Procedure, is amended to read:

(b) **Release Pending Appeal.** When an appeal on the merits is pending, an appeal under **AS 12.30.030** [AS 12.30.030(b)] from an order refusing bail pending

appeal or imposing conditions of release pending appeal shall be in the form of a motion filed in the merit appeal. The motion must be filed with the clerk of the appellate courts within 30 days after the date of the notice of the order from which review is sought. Date of notice is defined in Civil Rule 58.1(c) and Criminal Rule 32.3(c). The motion shall comply with Rule 503, and shall contain specific factual information relevant to **AS 12.30.011(c)** [AS 12.30.020(c)], including but not limited to the following:

(1) The full name of the appellant; the trial court case number; the offenses of which the appellant was convicted, if applicable; the date of sentencing; and the complete terms of the sentence;

(2) That application for release pending appeal has been made to the trial court, the reasons given by the trial court for denying the application in whole or in part, and facts and reasons demonstrating why the action of the trial court on the application was erroneous or an abuse of discretion;

(3) A concise statement of the question or questions to be raised on the appeal with a showing that the question or questions were raised in the trial court;

(4) Family: marital status; length of marriage; children, and their ages; other relatives in the area of residence;

(5) Employment and financial circumstances: name of employer at time of arrest and during pre-trial release; type of work; how long so employed; and offer or promise of employment if released pending appeal; assets of the appellant or of relatives or friends relevant to the ability to post money bail;

(6) Health: history of mental illness, alcoholism, or addiction to drugs, if any;

(7) Residence: length of residence in the city or town in which the appellant resided at the time of arrest;

(8) Criminal history: criminal convictions within ten years prior to the present arrest; if the appellant has ever forfeited bail, or had release, probation, or parole revoked, the date, the name and location of the court, and a brief description of the circumstances; whether the present offense was committed while the appellant was on bail or other release or on probation or parole; any other criminal charges pending

against the appellant at the time [OF] the motion is filed.

*** Sec. 26.** The uncodified law of the State of Alaska is amended by adding a new section to read:

DIRECT COURT RULE AMENDMENT. Rule 603(b), Alaska Rules of Appellate Procedure, is amended to read:

(b) **Criminal Appeals.** If a sentence of imprisonment is imposed, **the court may admit the defendant to bail and stay the sentence as provided by law and by these rules** [ADMISSION TO BAIL WILL BE ALLOWED AND THE SENTENCE STAYED], pending appeal. A sentence to pay a fine or a fine and costs may be stayed, if an appeal is taken, by the district judge or magistrate or by the superior court upon such terms as the court deems proper. During appeal the court may require the defendant to deposit the whole or any part of the fine and costs in the registry of the superior court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make an appropriate order to restrain the defendant from dissipating his or her assets. An order placing the defendant on probation will be stayed if an appeal is taken.

*** Sec. 27.** AS 12.30.010, 12.30.020, 12.30.023, 12.30.025, 12.30.027(g), 12.30.029, and 12.30.060 are repealed.

*** Sec. 28.** The uncodified law of the State of Alaska is amended by adding a new section to read:

APPLICABILITY. (a) AS 11.56.730, enacted in sec. 1 of this Act, applies to acts committed on or after the effective date of this Act.

(b) The amendments to AS 12.25.030(b) made by sec. 2 of this Act apply to arrests for violation of conditions of release occurring on or after the effective date of this Act for offenses occurring before, on, or after the effective date of this Act.

(c) AS 12.30.006 - 12.30.021, enacted in secs. 3 - 5 of this Act; AS 12.30.030, repealed and reenacted in sec. 8 of this Act; AS 12.30.031, enacted in sec. 9 of this Act; AS 12.30.040, repealed and reenacted in sec. 10 of this Act; AS 12.30.055, enacted in sec. 12 of this Act; and AS 12.30.078, enacted in sec. 14 of this Act apply to bail proceedings occurring on and after the effective date of this Act for offenses occurring on or after the effective date of this Act.

(d) AS 12.30.050, repealed and reenacted in sec. 11 of this Act, applies to bail proceedings occurring on or after the effective date of this Act for offenses occurring before, on, or after the effective date of this Act.

(e) The amendments to AS 12.30.027(a) and (b) made by secs. 6 and 7 of this Act; to AS 12.30.075 made by sec. 13 of this Act and to 12.30.080 made by sec. 15 of this Act apply to bail proceedings occurring on or after the effective date of this Act for offenses occurring before, on, or after the effective date of this Act.

(f) The amendments to Rule 5, Alaska Rules of Criminal Procedure, made by secs. 20 and 21 of this Act apply to offenses occurring on or after the effective date of this Act.

(g) The amendment to Rule 41(c), Alaska Rules of Criminal Procedure, made by sec. 24 of this Act applies to bail proceedings occurring on or after the effective date of this Act.

(h) The amendment to Rule 603(b), Alaska Rules of Criminal Procedure, made by sec. 26 of this Act applies to convictions occurring on or after the effective date of this Act.

*** Sec. 29.** This Act takes effect July 1, 2010.

Senator Hollis French

Capitol Room 417
465-3892
465-6595 fax

Pages (including cover sheet): 2

Date: April 2, 2010

To: Jerry Luckhaupt
From: Cindy Smith

RE: Amendment s to SB252

Please draft the following amendments to SB252:

1. **Add criminal negligence mental state to failure to appear section 1 and in any other sections as needed to conform.**

2. **On page 4 at line 18, delete the first sentence in (e).**

3. **On page 7, at line 18, change (B) to be felony crimes against a person – both charged and previously convicted. Change (C) to felony offenses. Add a new section for charged with felony level DUI.**

4. **On page 10 line 29 – we need language in addition to telephone for other technology (for instance, courtrooms are beginning to use Skype).**

5. **In section 12, at line 25 delete the words "the person" and subsititue "it is" established so that the sentence reads "if it is established by…"**

6. **In section 24, change language to the amendment attached.**

(c) **Separate Bonds.** If a performance bond is required, it must be enforced separately from an appearance or bail bond.

(1) Appearance in court may not be a condition of a performance bond. A court may not order an appearance bond be concurrent with an appearance bond in a pending case unless the surety who posted the first appearance bond approves.

(2) The court may not change a performance or appearance bail requirement, without agreement by the surety, unless;

(A) the surety waives the requirement for agreement in advance and in writing or;

(B) the court, in writing, finds that the change in the condition of bail poses no increase in risk of loss to the surety and the court sets forth in writing the reason for finding that there is no increase in the risk of loss to the surety.

pg 4, lines 18 & 19

Hello Cindy. We would still like to see the removal of lines 22 through 25 on page 4. That is the section that requires the defendant to sign a release agreement and file it with the clerk of court before he or she may be released from custody. I have not pushed this with the Department of Law, though they know of our concerns. What I have been trying to ascertain is how often we already do this. We do this in many locations and we apparently do it in all cases with a third party custodian. However, one of our goals is to move away from those practices that require clerks to copy and fax documents. This goes in the opposite direction.

The court system is currently changing our computer system so that clerks enter the conditions of release into the computer (which are then electronically available to law enforcement) and then simply print off the required number of forms (e.g. one for the defendant, one for defense counsel, one for the prosecutor, one for the court file, etc.) Everyone gets a copy off of the printer in the court room and the clerk does not have to make additional copies on the copy machine and does not have to fax copies anywhere. This is the kind of process we want to move to in as many cases as possible. The trouble with the signature requirement is that it keeps us stuck in the copy and fax process.

It is not that we can't do this, it is that it keeps us from streamlining our process. And, the defendant's signature is not required. Defendants are subject to their conditions of release regardless of whether they sign them. I have no reason to believe that a defendant who would otherwise violated those conditions will be less likely to violate had they signed a release agreement promising not to. So, this provision keeps us from improving our in-court practices without creating any corresponding benefit.

We also need to fix the problem with getting surety permission to change conditions of release found in section 24 on page 18 at lines 25-27. I have been working with the Department of Law on this. Our concern is that the current language seems to require the entity posting an appearance bond to agree to any changes to the conditions of release. That is a problem.

Yesterday I spoke with Fred's Bail Bonds (who do the vast majority of all appearance bonds in Alaska) about the provision. They do not care what the conditions of release are. Getting their permission would be a waste of time for them and for the entire system. They do, however, care about the practice of concurrent bail. That is the practice of a judge adding a new charge to an existing bail bond. Section 24 was requested by the Division of Insurance because they believe that the practice of concurrent bail violates contract law and they oversee bail bonding companies. I agree that prohibiting concurrent bail is a good idea. With the help of Judge Steinkruger, I have proposed the following language to fix that problem:

From: Cindy Smith [mailto:Cindy_Smith@legis.state.ak.us]
Sent: Thursday, April 08, 2010 10:47 AM
To: Doug Wooliver
Subject: SB 252 Bail Bill question #3
Importance: High

Which of these concerns have been addressed in the house bill language already? Which are remaining?

From: Doug Wooliver [mailto:dwooliver@courts.state.ak.us]
Sent: Wednesday, March 17, 2010 12:13 PM
To: Cindy Smith
Subject: SB 252 Bail Bill

Cindy Smith

From: Doug Wooliver [dwooliver@courts.state.ak.us]
Sent: Thursday, April 08, 2010 10:23 AM
To: Cindy Smith
Subject: RE: a question

Hello Cindy. In FY 09 there were 566 felony DUI charges filed statewide.

From: Cindy Smith [mailto:Cindy_Smith@legis.state.ak.us]
Sent: Thursday, April 08, 2010 10:20 AM
To: Doug Wooliver
Subject: a question

Senator French is wanting to know approximately how many felony DUI folks the court sees each year - this in reference to the bail bill so a quick and dirty estimate is better than an accurate but late one.

Cindy Smith
Office of Senator Hollis French
(907) 465-3892
www.aksenate.org

Cindy Smith

From: Doug Wooliver [dwooliver@courts.state.ak.us]
Sent: Wednesday, March 17, 2010 7:29 AM
To: Cindy Smith
Subject: SB 252 Bail Bill

Hello Cindy. Here is a description of one of the concerns that the court system has with SB 252. We have gone over this with the Department of Law; they may or may not agree to remove this provision. I will be sending more issues to you later today and tomorrow, but I am getting behind on this and decided not to wait until I have it all written down before I send anything.

Probably the biggest single change we would like to see is the deletion of lines 14 through 16 on page 4. That is the provision that directs the court clerk to issue a report that describes any previous criminal charges against the person and the person's history of compliance with conditions of release that are in the records of the court. There are several reasons why we would like to see this section removed.

1) The information is largely redundant. The parties should have already provided the court with the defendant's criminal history. If not presented at the original bail hearing (and one of the reasons for increasing to 48 hours the time for a defendant's first appearance is to allow the prosecutor to get more information for the first bail hearing), then it certainly would have been presented at the first bail review hearing.
2) If the bill anticipates court clerks searching through volumes of paper records looking for the defendant's history then the proposal is all but unworkable. Many defendants have boxes of case files. I think that the sponsor contemplates a search through our computer reports, which is possible, but still objectionable.
3) To the extent that the bill contemplates a computer records search and those records have some information that are not found in other databases, then, since March of 2009, both the prosecutor and the defense counsel have the same access as the court to those records. If the parties believe that there is information in those reports that are relevant they can search them and bring that information to the court's attention.
4) In an adversarial system it is the responsibility of the parties to bring all relevant information to the court's attention. It is not a proper role for the court to do its own fact-finding research.
5) Finally, there is no connection between gathering this information and the decision to hold a bail review hearing. The court can't hold a hearing until it has the report, but nothing in the report has any bearing on whether to hold the hearing. It is a procedural requirement that serves no procedural purpose.

This work takes time and will affect hundreds of cases. We would very much like to see this removed from the bill.
Thanks, Doug

OK –
fixed

2128

McLean, Susan S (LAW)

From: Doug Wooliver [dwooliver@courts.state.ak.us] **Sent:** Tue 4/6/2010 1:09 PM
To: Carpeneti, R Anne D (LAW); McLean, Susan S (LAW); Svobodny, Richard (LAW)
Cc:
Subject: Surety in bail bill
Attachments:

Hello all. Today I spoke with Annett, who is the office manager from Fred's bail bonds. They are not interested in conditions of release and don't want to have to be involved in issues related to conditions of release. They are, obviously, interested in concurrent bail.

As you know, our concern with the current proposed amendment to Criminal Rule 41(c) is that it is too broad and would require Fred's to consent to any change in conditions of release. So, how about if we try this:

> The court may not order concurrent bail or bond unless the surety who posted the surety is in agreement. Concurrent bail or bond is when the same bail or bond applies to two different cases of the same defendant.
>
> Whenever a performance bond has been posted, any modifications to the conditions of release will result in the remand of the defendant until a new performance bond has been posted. No remand is necessary if, prior to the modification, the surety agrees to the modification.

This prohibits concurrent bail (which is the concern of the Division of Insurance and the appearance bond providers), and it prohibits changes to conditions of release, which addresses the concerns of those who post performance bonds.

Still the performance bond issue seems to be a minor one. Out of 3,303 performance bonds issued in FY 09, a total of 231 were forfeited with 26 of those being reinstated. That works out to about 6% of performance bonds being forfeited. We have no way of knowing how many (if any) were forfeited due to a condition that was added after the bond was posted.

Let me know what you think. Doug

Doug Wooliver

From: Doug Wooliver
Sent: Tuesday, April 06, 2010 1:10 PM
To: Carpeneti, R Anne D (LAW); 'McLean, Susan S (LAW)'; 'Svobodny, Richard (LAW)'
Subject: Surety in bail bill

Hello all. Today I spoke with Annett, who is the office manager from Fred's bail bonds. They are not interested in conditions of release and don't want to have to be involved in issues related to conditions of release. They are, obviously, interested in concurrent bail.

As you know, our concern with the current proposed amendment to Criminal Rule 41(c) is that it is too broad and would require Fred's to consent to any change in conditions of release. So, how about if we try this:

(2) The court may not order concurrent bail or bond unless the surety who posted the surety is in agreement. Concurrent bail or bond is when the same bail or bond applies to two different cases of the same defendant.

Whenever a performance bond has been posted, any modifications to the conditions of release will result in the remand of the defendant until a new performance bond has been posted. No remand is necessary if, prior to the modification, the surety agrees to the modification.

This prohibits concurrent bail (which is the concern of the Division of Insurance and the appearance bond providers), and it prohibits changes to conditions of release, which addresses the concerns of those who post performance bonds.

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Let me know what you think. Doug

Cindy Smith

From: Doug Wooliver [dwooliver@courts.state.ak.us]
Sent: Wednesday, March 17, 2010 12:13 PM
To: Cindy Smith
Subject: SB 252 Bail Bill

Hello Cindy. Lines 10 and 11 on page 2 allows a person charged with failure to appear to offer an affirmative defense if he or she contacted the court or judicial officer orally and in writing prior to the scheduled hearing. We do not want defendants calling judges, either at home or in their offices. We would like to see the removal of "judicial officer" on line 10.

The court would like to see the removal of lines 22 through 25 on page 4. That section requires the defendant to sign a release agreement and file it with the clerk of court before he or she may be released from custody. Although some courts already do this in many cases, it creates real problems when the defendant is not in the courtroom and the hearing is conducted telephonically. It would require more work for clerks and more work for corrections (as conditions of release are faxed to corrections, signed by the defendant and then faxed back to the court) and would come with very little, if any, benefit. The defendants already have their conditions of release explained to them and they are bound by them whether they sign anything or not. It is not clear that a defendant who signs his or her conditions of release is any more likely to abide by them.

Section 5 deals with third party custodians. Lines 8 and 9 on page 11 require a third party custodian to appear in court. Like other provisions in this bill, that does not work for telephonic hearings. Many times the third party is in a village and cannot fly to the courthouse in another community. If this section remains in the bill it will mean that many very good third party custodians will not be able to serve.

We need to do more work on two provisions related to (1) notice to a surety prior to changes in bail conditions and (2) notice to and consent from a surety prior to making a change. Those provisions are found on page 4, line 17 and on page 18, lines 25 – 27 respectively. Although the court understands the problem being addressed in these two sections (the court changing the bail conditions in a way that may impact the surety's decision to remain a surety without telling or getting consent from the surety), as drafted, these two provisions will add considerable time to the bail process. We will continue to work on this issue.

Thanks, Doug

STATE OF ALASKA

DEPARTMENT OF LAW
CRIMINAL DIVISION

SEAN PARNELL, GOVERNOR

Mailing: PO Box 110300
Juneau, AK 99811-0300
Delivery: 123 4th Street, Ste 717
Juneau, AK 99801
Phone: (907) 465-3428
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April 5, 2010

The Honorable Hollis French
Chair, Senate Judiciary Committee
Alaska State Capitol, Room 417
Juneau, Alaska 99801

Re: Senate Bill 252 – Bail Reform

Dear Chairman French:

Thank you for the thoughtful and thorough hearing that you held for SB 252 (sexual assault and abuse) today and for our meeting on other criminal law legislation. I am writing to ask that you consider scheduling Senate Bill 252, the bail reform bill, for a hearing in the Senate Judiciary Committee as soon as practical. I hope you will not think this is presumptuous, but there are good reasons to hear the bail bill: in addition to protection of the public and other victims, victims of sexual abuse and domestic violence will greatly benefit from the passage of the bill. Although bail reform is not directly targeted at sexual abuse or domestic violence in the state, the bill would provide additional protection to victims of these crimes.

The Problems with current law:

Our bail laws date back to 1966. It is clear that when the legislature adopted these statutes, times were not as difficult as present. For example, unless a person has been convicted of an unclassified felony or a class A felony, our bail laws allow a person found guilty of any other crime, either by plea or by verdict, to be released pending the imposition of sentence or during an appeal. The following scenarios are only a few of many examples of the danger that can result from the application of the current law.

> Larry Berryhill, IJU-07-992 CR, was convicted of two counts of Sexual Abuse of a Minor in the Second Degree for having sexual contact with a young boy who worked for him at his lodge in Gustavus. After being found guilty, and over the state's objection, the court released him on an

unsecured signature bond, in lieu of posting bail, in the amount of $25,000. Mr. Berryhill did not appear for his sentencing. Alaska State Troopers and law enforcement agents from other states (Mr. Berryhill had committed similar crimes in other states) found that Mr. Berryhill had fled to Argentina, and was vacationing in New Zealand and Europe when he should have appeared in court for his sentencing. Mr. Berryhill died before the Troopers were able to arrest him. He did not spend a single day in jail for his sexual abuse of that young boy.

Michael Williams, 3AN-10-166 CR, has been convicted of a felony five times, two of the felonies were federal armed bank robbery convictions from the late 1980s. In January, 2008, he was charged with Robbery in the First Degree for a home invasion robbery with multiple victims. The state proceeded with the prosecution under the three strikes law – with a 99 year sentence possible if convicted. This potential sentence is higher than most people convicted of homicide would receive. Over the state's objection, bail was set at $5,000 cash appearance bond and a third party custodian was appointed. The state requested several times that his bail be increased, but was unsuccessful. Mr. Williams skipped out soon after release, and a bench warrant was issued for his arrest. He has not been found.

James Spencer, 3AN-09-2113 CR, was charged with Robbery in the First Degree after confronting a Carr's employee with a handgun. Over the state's objection, his bail was set at $1,000 cash performance bond, and $5,000 cash or corporate appearance bond. Last month, Mr. Spencer was arrested and charged with a new Robbery in the First Degree for an armed robbery at the Burger King (3AN010-2471 CR).

Jack Lee Espinoza, Jr., 3AN-10-2113 CR, was charged with two counts of Robbery in the First Degree. He had been convicted of more than 10 crimes in the past, several of them were felonies. Over the state's objection, Mr. Espinoza had been released on bail of $2,500 cash or corporate appearance bond and ankle monitoring. Within 48 hours of his release, Mr. Espinoza had cut off his ankle monitor, and with another person, committed another armed robbery at a trailer in Anchorage. The victim was shot, allegedly by the other person, during the robbery.

How SB 252 will help avoid these problems

Section 10 of SB 252 (page 13, beginning at line 26) provides that a person found guilty of a sexual felony may not be released pending imposition of sentence or appeal. The legislature has raised the maximum term of imprisonment for a person convicted of a sexual felony to 99 years; with that maximum term the danger of flight is high. Additionally, the danger of sex offenders victimizing others is significant. Mr. Berryhill would not have been released after being found guilty of sexual abuse under SB 252.

SB 252 is similar to federal law in part because it would adopt a presumption, that is rebuttable, that no combination of conditions or monetary bail would ensure the safety of the public and the appearance of the defendant in cases where the person is either charged with an unclassified or a class A felony (similar to current law), or the defendant is a higher risk of flight or danger to the public (new in SB 252). The bill provides that other persons with higher risk include the following:

- persons charged with a felony who have a prior felony conviction and less that five years have elapsed since unconditional release for the prior felony;
- persons charged with a crime committed while the person was on release for another charge or conviction;
- persons charged with a domestic violence crime if the person has a conviction for a domestic violence crime within the previous five years;
- persons arrested in connection with a felony charge or conviction out of state and the person is a fugitive from the other jurisdiction.

The individuals described in the scenarios above (except for Mr. Berryhill) would have the burden of going forward, under SB 252, with suggestions for release conditions. For example, Mr. Williams would have to present information and suggestions for conditions of release that would satisfy a judicial officer that he would not be a danger to the public and he would not be a flight risk. Mr. Williams still has the constitutional right to have bail set for him.

Additionally, SB 252 would adopt standards for third party custodians so that, for example, a person charged with crimes, a person who is on probation, or a person with recent convictions could not act as a third party custodian. SB 252 would require a

judicial officer to do basic screening of a person before appointing the person as a custodian. Defendants have taken advantage of third party custodians in the past. There have been advertisements on Craig's list for third party custodians (see attached).

Misconceptions about SB 252

We have heard several comments about SB 252 that are simply not accurate. For example, the bill changes the deadline for the first appearance before a court of a person arrested from 24 to 48 hours. This change has been described as contrary to the practice of a majority of other states. As can be seen by the attached memorandum and chart, Alaska is one of only three states that require a first appearance within 24 hours. The remaining states have later deadlines. There are many good reasons to change this deadline. It would give all parties a chance to gather information for better informed bail hearings. Even more important is that victims in Alaska have a constitutional right to appear at arraignments and bail hearings. Often we are unable to notify them of a hearing that must be held within 24 hours of arrest; other times the victim is still in the hospital at this time. The change to a 48 hour deadline will help the system make the victim's right to be present much more meaningful. It also allows for a cooling down time in many cases.

We also have heard people say that SB 252 would prohibit certain people from being released on bail. This is not correct. Defendants have a constitutional right to have bail set for their release. SB 252 simply changes certain procedures for the courts to follow in setting bail. In doing so, it would protect the public and discourage bail jumping much better than does current law.

Sincerely,

DANIEL S. SULLIVAN
ATTORNEY GENERAL

By: Richard Svobodny
Richard A. Svobodny
Deputy Attorney General

Enclosures

ALASKA COURT SYSTEM
State of Alaska
Office of the Administrative Director

820 West 4th Avenue
Anchorage, Alaska 99501-2005
(907) 264-8265
FAX (907) 264-8291

Doug Wooliver
Administrative Attorney

April 1, 2010

The Honorable Hollis French
Chair, Senate Judiciary Committee
Alaska State Legislature
State Capitol
Juneau, Alaska 99801-1182

Dear Senator French:

Following the Senate Judiciary Committee hearing on March 19th you asked me to gather statistics on the number of cases each year that would be subject to the provisions found in sections 4 and 12 of SB 252 (the governor's bail bill). Those sections establish a rebuttable presumption that for certain offenders "no condition or combination of conditions will reasonably assure the appearance of the person or the safety of the victim, other persons, or the community."

Section 4 of the bill applies this rebuttable presumption to those charged with certain offenses and those with certain criminal histories. Section 12 applies this presumption to all those who appear in court on a petition to revoke probation. Here is a breakdown of the number of defendants who fell into each of the section 4 categories in FY 09.

(A) Number of people charged with an unclassified felony, a class A felony, or a sexual felony: **602** (See attached for charge specific breakdown.)

(B) Number of people charged with a felony (other than a felony listed in section (A) above) who were convicted of a felony in this state or a similar offense in another jurisdiction, and less than five years have elapsed between the date of the person's unconditional discharge on the immediately preceding offense and the commission of the present offense: **1,403**.

Note, because the court system's computer system tracks only state cases, this number does not include those who would be subject to the presumption because of a prior conviction from another jurisdiction.

(C) Number of people charged with an offense committed while the person was on release under AS 12.30 for a charge or conviction of another offense: **1,505**

(D) Number of people charged with a crime of domestic violence and who have been convicted in the previous five years of a crime involving domestic violence in this state or a similar offense in another jurisdiction: **919**

Note, as with subsection (B) above, this number does not include those who would be subject to the presumption because of a prior conviction from another jurisdiction.

(E) Number of persons arrested in connection with an accusation that the person committed a felony outside the state or is a fugitive from justice from another jurisdiction, and the court is considering release under AS 12.30: **96**

Section 12 applies the rebuttable presumption to all those who appear in court on a petition to revoke probation. In FY 09 there were **between 18,000 and 19,000** such petitions.

It is important to note that there is overlap between the various categories of offenders subject to the rebuttable presumption. For example, a person who commits a felony and who has a prior felony conviction within the stated number of years would also likely be subject to a petition to revoke probation. For this reason we cannot simply add up all the categories to arrive at the number of people subject to the presumption each year. For purposes of the court system's fiscal note, I used the most conservative estimate of 18,000 cases a year, which is the low-end number for the number of people in court on a petition to revoke probation. This necessarily undercounts the number of cases, but assures that the note does not double-count any cases.

I hope that this answers your question. Please let me know if I can provide any additional information.

Sincerely,

Doug Wooliver
Administrative Attorney
Alaska Court System

Alaska Court System

Cases/Charges Filed for Specified Action Codes

CourtView Locations

FY09

Charge Description	# of Cases Charged
AS11.41.100: Murder 1	4
AS11.41.100(a)(1)(A): Murder 1-Intent To Cause Death	26
AS11.41.100(a)(2): Murder 1- Repeat Phys Injury To Child	1
AS11.41.100(att): Attempted Murder 1	10
AS11.41.110: Murder 2	1
AS11.41.110(a)(1): Murder 2-Intend Serious Injury	13
AS11.41.110(a)(2): Murder 2-Extreme Indifference	7
AS11.41.110(a)(3): Murder 2-Felony Murder	8
AS11.41.120: Manslaughter	1
AS11.41.120(a)(1): Manslaughter -Death Not Murder 1 Or 2	7
AS11.41.120(a)(1): Manslaughter	1
AS11.41.160: Manslaughter of Unborn Child	1
AS11.41.200: Assault 1	18
AS11.41.200(a)(1): Assault 1- Serious Injury, Weapon	101
AS11.41.200(a)(2): Assault 1- Serious Injury, Intent	17
AS11.41.200(a)(3): Assault 1- Serious Injury, Extreme Indif	5
AS11.41.200(a)(4): Assault 1- Serious Injury, Weap, Repeat	1
AS11.41.280(a)(2): Assault Unborn Child 1 - w/ intent	1
AS11.41.300(a): Kidnapping	10
AS11.41.300(a)(1)(B): Kidnapping- Use Victim As Shield/Hostage	1
AS11.41.300(a)(1)(C): Kidnapping- Injury Or Sexual Assault	31
AS11.41.300(a)(1)(c): Kidnapping	2
AS11.41.300(a)(1)(E): Kidnapping- To Commit Felony Or Escape	4
AS11.41.300(a)(1)(e): Kidnapping	1
AS11.41.300(a)(2)(B): Kidnapping- Risk Of Serious Injury	4
AS11.41.410: Sexual Assault 1	2
AS11.41.410(a)(1): Sex Assault 1- Penetrate w/o Consent	57
AS11.41.410(a)(2): Sex Assault 1- Att. Penetrate, Injure	1
AS11.41.420: Sexual Assault 2	3
AS11.41.420(a)(1): Sex Assault 2- Contact w/o Consent	48
AS11.41.420(a)(3): Sex Assault 2- Penetrate Incap Victim	26
AS11.41.425: Sexual Assault 3	2
AS11.41.425(a)(1)(A): Sex Assault 3- Contact w/ Ment Incapable	1
AS11.41.425(a)(1)(B): Sex Assault 3- Contact w/ Incapacitated	6
AS11.41.425(a)(1)(C): Sex Assault 3- Contact w/ Unaware Victim	2
AS11.41.434(a)(1): Sex Abuse Minor 1- Penetrate Vic Undr 13	28
AS11.41.434(a)(2): Sex Abuse Minor 1-Penetr Own Chld Undr 18	8
AS11.41.434(a)(3)(A): Sex Abuse Minor 1-Penetr Undr 16, Hshold	4
AS11.41.434(a)(3)(B): Sex Abuse Minor 1-Auth Fig Penetr Undr 16	3
AS11.41.436: Sexual Abuse Of Minor 2	4
AS11.41.436(a)(1): Sex Abuse Minor 2- Penetrate, Vic 13-15	37
AS11.41.436(a)(2): Sex Abuse Minor 2-Contact, Vict Undr 13	29
AS11.41.436(a)(3): Sex Abuse Minor 2- Contact, By Parent	8
AS11.41.436(a)(5)(A): Sex Abuse Minor 2-Contact Undr 16, Hshld	2
AS11.41.436(a)(5)(B): Sex Abuse Minor 2-Auth Fig Cntact Undr 16	1
AS11.41.436(a)(6): Sex Abuse Minor 2-Auth Fig 18 yrs+	2
AS11.41.438: Sexual Abuse of Minor 3	11
AS11.41.450(a)(1): Incest- Penetr Ancestor Or Descendant	3

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Alaska Court System

Cases/Charges Filed for Specified Action Codes

CourtView Locations

FY09

Charge Description	# of Cases Charged
AS11.41.450(a)(1): Incest	2
AS11.41.450(a)(2): Incest- Penetr Brother Or Sister	4
AS11.41.450(a)(3): Incest- Penetr Uncle, Aunt, Neph Or Niece	1
AS11.41.452(d): Online Enticement of a Minor	1
AS11.41.455(a)(7): Exploit Minor-Make Porn, Sado/Masochism	1
AS11.41.455(b): Exploit Minor-Make Porn, Parent Allows	1
AS11.41.458: Indecent Exposure 1	1
AS11.41.458(a)(1): Indecent Exp 1-vic under 16, masturbate	2
AS11.41.500: Robbery 1	9
AS11.41.500(a)(1): Robbery 1- Armed w/ Deadly Weapon	70
AS11.41.500(a)(2): Robbery 1- Use Weapon	9
AS11.41.500(a)(3): Robbery 1- Cause/ Attempt Serious Injury	18
AS11.46.400: Arson 1- Danger Of Serious Injury	8
AS11.56.300: Escape 1	1
AS11.61.190(a)(1): Misc/Weapons 1- Involving Drug Crime	3
AS11.61.190(a)(2): Misc/Weapons 1- From Vehicle	10
AS11.71.010: Misconduct- Controlled Substance 1	1
AS11.71.010(a)(1): Cntrld Substc 1-Deliv 1A To Minor	2
AS11.71.010(a)(2): Cntrld Substc 1-Dliv II/IIIA To Minr, Age Diff 3+	1
AS11.71.020: Misconduct-Controlled Substance 2	20
AS11.71.020(a)(1): Cntrld Substc 2- Manuf/Deliv IA	80
AS11.71.020(a)(2): Cntrld Substc 2- Manuf Meth	1
AS11.71.020(a)(2)(A): MICS 2- Manuf Meth	2
AS11.71.020(a)(3): MICS 2- Poss Precursor, Intnd Make Meth	3
AS11.71.020(a)(4): MICS 2- Poss Chem, Intnd Make Meth	1
AS11.71.020(a)(4)(A): MICS 2- Poss Chem, Intnd Make Meth	2
AS11.71.020(a)(6)(B): Cntrld Substc 2 - Deliver Listed Chem	1

Total number of cases: 610

NOTE: One case could have more then one charge but is only counted once in this total.

Total Number of Charges: 1374

End of Report

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MEMORANDUM

STATE OF ALASKA

Department of Law - Criminal Division

To: Senate Judiciary Committee

Date: March 1, 2010

Thru: Richard Svobodny, Deputy Attorney General
Anne Carpeneti, Assistant Attorney General

From: Susan S. McLean SSMc
Director, Criminal Division

Subject: **Other State Rules - First Appearance After Arrest**

General Considerations

The Fourth Amendment requires that a person must be released from custody after 48 hours if a court has not determined that there is probable cause for the arrest. *County of Riverside v. McLaughlin*, 500 U.S. 44, 57-59, 111 S.Ct. 1661, 1670-1671 (1991). Violation of the rule is but one factor to consider in determining whether to suppress a defendant's in-custody statements.

- Since probable cause (and the amount of bail) must be determined before an arrest warrant issues, a probable cause determination only applies to warrantless arrests.
- Since probable cause may be determined on the basis of affidavits and sworn testimony after a warrantless arrest, the defendant's presence is not required at a probable cause hearing.
- Many states require appearance before a magistrate without unnecessary delay, but most courts have not defined "without unnecessary delay" as a specific amount of time, and determine meaning on a case by case basis.

Only 3 of the 24 states which set specific time limits mandate appearance within 24 actual hours of arrest.

Summary - First Appearance Following Warrantless Arrest, By Total Number of States

3 states - 24 hours, calculated including weekends and holidays (AK, FL, MD)
1 state - 24 hours, weekends and holidays *may* be included or excluded (WA)
6 states - 24 hours, calculated *excluding* weekends and holidays (AZ, CT, DE, ID, MA, NH)

1 state - 36 hours, calculated *excluding* day of arrest, Sundays and holidays (MN)

7 states- 48 hours, including weekends and holidays (AL, AR, GA, HI, MS, NE, TX)
1 state - 48 hours, *excluding* Sunday, holiday, and days when court not in session (CA)
1 state - 48 hours, *excluding* Saturday, Sunday and holidays (ME)
1 state - 48 hours if 1st appearance is combined w/prob. cause hearing (court decision) (WI)

2 states - 72 hours, including weekends and holidays (NJ, WY)
1 state - 72 hours, *excluding* Saturday, Sunday and holidays (LA)
1 state - 72 hours is "without delay", if probable cause w/in 48 hours (court decision) (TN)
21 states - "without unnecessary delay" (CO, IL, IA, KS, KY, MI, MT, NV, NM, NY, NC, ND, OH, OK, OR, PA, RI, SD, UT, VT, WV)

2 states - "forthwith" (SC, VA)

1 state - "promptly" (repealed a 24- hour rule in 1995) (IN)

1 state - person must be released if not "charged" within 20 hours, but no provision for first appearance (MO)

State Time Limits for Initial Appearance Before Magistrate

State	Time Limit	Authority	Statutory language/construction
Alabama	48 hours - Warrantless arrest 72 hours - Arrest w/ warrant	Ala. R. Crim. P. 4.3(a)(1)(iii) Ala. R. Crim. P. 4.3(b)(2)(i)	
Alaska	24 hours, including weekends and holidays	Alaska R. Crim. P. 5(a)(1)	
Arizona	24 hours, excluding Sat., Sun and holidays	Ariz. R. Crim. P. 4.1(b) and Ariz. R. Crim. P. 1.3	*See, State v. Watkins,* 2008 WL 3171651 * 3 (Ariz. App. Aug.5, 2008) (Sat. Sun. and legal holiday excluded from calculation of 24 hrs; citing Rules 4.1(b) and 1.3))
Arkansas	48 hours Case law suggests that exception may exist for weekends and holidays	Ark. R. Crim. P. 4.1(e)	*See, Larson v. Dorney,*__ F.Supp.__, Slip. Op. 2009WL 903392 *4 (W.D. Ark, April 1, 2009)(delay between arrest on Good Friday and appearance on Monday was "as promptly as calendar would allow")
California	48 hours, excluding Sundays and holidays. If 48 hours expires when court is not in session, then next judicial day.	CA Penal Code § 825(a)(1) CA Penal Code § 825(a)(2)	
Colorado	without unnecessary delay	CRSA. § 16-2-112 Colo. R. Crim. P. 5	
Connecticut	24 hours, excluding Sat., Sun. and holidays	CRS 54-1(g) Conn. Practice Book R. 37-1	Statutory language "promptly before the court sitting next regularly" means the next court day, excluding weekends and holidays. *State v. Pirowski,* 11 Conn. App. 238,240, 526 A.2d 562 (1996)
Delaware	24 hours, excluding Sundays and holidays	11 Del. C. § 1909	
Florida	24 hours, including weekends and holidays	Fla. R. Crim. P 3.130	
Georgia	48 hours –warrantless arrest 72 hours – arrest with warrant	Ga. Uniform St. Ct. R. 26.1 Ga. St § 17-4-62; Ga. St § 117-4-26	
Hawaii	48 hours	H.R.S. 803-9(5)	
Idaho	24 hours, excluding Sat., Sun. and holidays	I.C.R, Rule 5(b)	
Illinois	without unnecessary delay	I.L.C.S. § 109-1	*See, People v. Willis,* 831 N.E.2d, 531, 538 (Ill., 2005) Ill Court cites *McLaughlin* as requiring 48 hours, but delay is only one factor to be examined in deciding whether confession is voluntary. Court has not otherwise defined "unnecessary delay".

Indiana	" promptly" 24 hr. rule repealed, 1995 Ct. decision implies that more than 48 hours can pass before initial appearance before magistrate	Ind. Code § 35-33-7-1	*See, State v. Larson*, 776 N.W.2d, 254, 258 (Ind. 2009) – probable cause must be determined with 48 hours, but can be based on hearsay and written testimony. "Arrested person has no right to be physically present at probable cause hearing." Ind. law does not provide for a specific period of time in defining how "promptly" a person is brought before magistrate
Iowa	without unnecessary delay	I.C.A. 804.22	
Kansas	without unnecessary delay	KSA 2003 Supp. 22- 2901	*See, State v. Carrow*, 2006 WL 399251 *4 (Kan. App., Feb. 17, 2006) - cites *McLaughlin* as defining "without unreasonable delay" to mean that period of delay "cannot be longer than 48 hours, excluding weekends and holidays"
Kentucky	without unnecessary delay	Ky. R. Crim. P. 3.02(2)	
Louisiana	72 hours excluding Sat., Sun, holidays 48 hours probable cause hearing, which is not adversarial and conducted without presence of defendant	LSA – C.Cr. P. Art. 230-1(A) LSA –C. Cr. P. Art. 230.2(A)	
Maine	48 hours, excluding Sat., Sun and holidays	Me. R. Crim. P. 5(a)	
Maryland	24 hours, including weekends and holidays	Md. Rule 4-212(e) and (f)	Although statute does not specifically state "including weekends", it is clear from case law. *See, e.g., Odum v. State*, 846 A. 2d 145 (Md. App. 2004)
Massachusetts	24 hours, excluding weekends and holidays (see judicial interpretation re probable cause determination)	Mass. R. Crim. P. 7	"accused shall be brought before court then in session, and, if not at its next session". Language at the court's "next session" suggests that if an accused is arrested on Friday, the next session would be a regular court day. *See, Jenkins v. Chief Justice of Dist. Court Dept.*, 619 N.E.2d 324, 337,339 (Mass, 1993) holding that probable cause must be determined within 24 hours but that the determination may be made ex parte upon written documents.
Michigan	without unnecessary delay	M.C.L.A. § 764.13	
Minnesota	36 hours, excluding day of arrest, Sun. and holidays	49 M.S.A. R. Crim. P. 4.02(5)	

Mississippi	without unnecessary delay, within 48 hours	M.C.A. 99-3-17 Uniform Cnty and Cir R 6.03	
Missouri	None – must be charged within 20 hours, but no requirement of personal appearance	V.Ann.Mo.C. Art. 544.170	All persons who are arrested without warrant shall be released if not charged and held by warrant within 20 hours of arrest
Montana	without unnecessary delay	MCA 46-7-101	*See, St. v. Brown*, 933 P.2d 672, 675-676 (Mont. 1999) acknowledging *McLaughlin* 48 hour time limit for probable cause determination, and holding that to be one factor in deciding voluntariness of confession.
Nebraska	48 hours	Neb. Crim. Rule 5.1(b)(1)	
Nevada	without unnecessary delay -warrantless arrest 72 hours- arrest with warrant	N.R.S. 171-1771 N.R.S. 171-178	*See, Powell v. State*, 930 P.2d 1123 (Nev. 1997), acknowledging that *McLaughlin* requires probable cause hearing within 48 hours
New Hampshire	24 hours, excluding Sat., Sun. and holidays	N.R.S. § 594:20(a)	
New Jersey	72 hours, provided that complaint showing probable cause is filed within 12 hours of arrest	N.J. Crim. Rules 3:4-1 and 3:4-2	
New Mexico	without unnecessary delay	NMSA § 31-1-5	
New York	without unnecessary delay	McKinney's CPL § 140.20 sub1	
North Carolina	without unnecessary delay	N.C.G.S.A. § 15A-511	
North Dakota	without unnecessary delay	N.D.C.C. 2906-25 N.D. Crim. Rule 5(a)	
Ohio	without unnecessary delay	O.R.C. § 29.35.05 Ohio Crim. Rule 4(e)	
Oklahoma	without unnecessary delay	22 Okl. Stat. Ann. § 181	*See, Black v. State, 871 P.2d 35, 39 (Okl.Cr.*1994).Citing *McLaughlin*, court recognized that delay longer than 48 hours in taking defendant to probable cause hearing is unreasonable.
Oregon	without unnecessary delay		
Pennsylvania	without unnecessary delay	Pa.R.Crim.P. 519	
Rhode Island	without unnecessary delay (unless charged w/ offense under RI Gen Law. 12.13.1.1*)	Super. R. Crim. P., Rule 5 Dist. R. Crim. P., Rule 9	*Unless charged w/ offense under RI Gen Laws, 12.13.1.1 (charges carrying life sentence or firearm offenses committed by persons previously convicted of offense carrying life sentence), in which case 48 hrs., excluding Sat., Sun. and holidays
South Carolina	Shall be forthwith carried before a magistrate and a warrant of arrest procured	S.C. Code 1976§ 22-5-200	

South Dakota	without unnecessary delay	SDCL § 23A-4-1	*State v. Larson*, 776 N.W. 2d 254, 258 (S.D., 2009) persons arrested without warrant are constitutionally entitled to probable cause determination within 24 hours.
Tennessee	"without unnecessary delay" – Judicially defined – 72 hours for appearance before magistrate 48 hrs for probable cause, but hearing unnecessary	Tenn. R. Crim. P. 5(a)	Due process is violated if probable cause is not determined within 48 hours, but a full adversarial hearing is not necessary. If an individual is not brought before a magistrate within 72 hours there has been an unnecessary delay within the definition of Tenn. R. Crim. P. 5.1. *State v. Carter*, 16 SW 762, 766 (Tenn. 2000)
Texas	48 hours	V.Ann. Tex. C.C.P. Art 14.06	
Utah	without unnecessary delay- 48 hours probable cause, but arrestee need not be present	U.C.A. 1953 § 77-723 Utah Criminal Rule 7	
Vermont	without unnecessary delay	Vt. R. Crim. P. 3(g)	
Virginia	"forthwith"	Va. Code Ann. § 19.2-82	Accused and officer appear together "forwith" for probable cause hearing. Does not apply to arrests with warrant
Washington	(Warrantless arrest only) 24 hours, including weekends and holidays 48 hours prob. cause, but hearing not required	Wash. Cr.RLJ 3.2.1 (c) Wash. Cr.RLJ 3.2.1(a)	"must be brought before a court of limited jurisdiction as soon as practicable after the detention is commenced, but in any event before the close of business on the next court day." Sat, Sun and holidays may be considered court days
West Virginia	Without unnecessary delay	W.Va. Code Sex. 62-1-5 W.Va. R. Crim. P. 5	
Wisconsin	Within a reasonable time Judicial definition - 48 hours implicitly the reasonable time	W.S.A. § 970.01	If the initial appearance also serves as the *Riverside* probable-cause hearing it must be held within 48 hours barring extraordinary circumstances. In cases where a defendant's *Riverside (v. McLaughlin)* determination was properly made in a proceeding prior to the initial appearance, court looks at the individual circumstances of the case to determine a "reasonable time" from the defendant's arrest *State v. Evans*, 522 N.W. 2d, 554, 563 (Wis. App., 1994) (Held: 4 days over a weekend not unreasonable)
Wyoming	without unnecessary delay and in no event more than 72 hours	W. R Crim P. 5(a)	

Cindy Smith

From: Jeffrey A. Mittman [jmittman@akclu.org]
Sent: Monday, February 22, 2010 1:49 PM
To: Cindy Smith
Subject: Additional Concerns Re: SB 252

Further Concerns Re: SB 252

1. **Petitions for Review of Bail Conditions Are Needlessly Encumbered by This Bill**

Section Three proposes a series of limitations on how and when the accused can challenge the terms of his release. The access of detained individuals to the court to contest the conditions of release and the amount of bail required is hampered by the bill. The constitutional rule is that "[i]n our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987).

The rule proposed by SB 252, Sec. 3, subsection (d), would improperly hamper access to the courts. The bill proposes that, after bail is initially set, the defendant can only have his bail reviewed once as a matter of right. For subsequent review, the court cannot even hear a petition for bail review unless the defendant states in his application that new evidence will be presented, the court receives a report relating to criminal history and bail history for the defendant (a step over which the defendant has no control), the prosecutor gets 48 hours notice of the hearing, and more than seven days have passed since the last bail hearing. These procedures unreasonably encumber a defendant's right to be released before trial.

2. **Section Ten Unlawfully Restricts the Rights of Prisoners Held Awaiting Sentence or Appeal**

Section Ten of the bill proposes to absolutely prohibit the granting of bail to those awaiting sentence or appeal for a class A, class B, unclassified, or sexual felony. The courts have addressed the rights of prisoners awaiting sentence or appeal previously and found that, while these prisoners have diminished interests in liberty, the freedom of these individuals should not be lightly infringed. In *Walker v. State*, the opinion mentions that a defendant convicted of rape and awaiting sentencing had been ruled by the federal district court to be entitled at least to a bail hearing under the principle of Equal Protection. 652 P.2d 88, 90 (Alaska 1982).

Notwithstanding the constitutional issues at stake and the instructions of the courts, the proposed bill would absolutely deny a bail hearing to the defendant in *Walker*, who had been ordered to receive a bail hearing by the federal district court. Completely precluding any hearing for these defendants leaves no room for an exceptional case, even one who has demonstrated his innocence. Were this bill enacted, a judge would have no power to release defendant who had been convicted of a serious felony but for whom subsequent DNA testing had convincingly proved his innocence. A demonstrably innocent defendant who had filed an appeal or application for post-conviction relief would have to sit in jail until the matter is actually heard and decided.

February 15, 2010 .

AMERICAN CIVIL LIBERTIES UNION OF ALASKA
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The Honorable Hollis French
Chair, Senate Judiciary Committee
Alaska State Senate
State Capitol, Room 417
Juneau, AK 99801-1182

Re: Senate Bill 252
Constitutional Issues

Chair French:

Thank you for the opportunity to submit written testimony regarding Senate Bill 252. The American Civil Liberties Union of Alaska ("ACLU) represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. From that perspective, we have several concerns with the proposed legislation.

Section 4 Unconstitutional Restrictions on Pre-Trial Release

Section Four of the Bill proposes a new section AS 12.20.011 with a myriad of constitutional infirmities.

The Alaska Constitution states that "an accused is entitled . . . to be released on bail, except for capital offenses when the proof is evident or the presumption great." Alaska Const., Art. I, Sec. 11. Subsection (d) of Section 4 of the Bill, however, proposes that for a wide group of defendants the court should presume, subject to rebuttal by the defendant, that no amount of bail and no conditions of release will ensure the appearance of the defendant and protect the victim and the public. The language used for the presumption, that "no condition or combination of conditions will reasonably assure" public safety or the defendant's appearance, is a phrase used to describe the

basis by which a judge can deny bail entirely to a defendant. *See, e.g.*, 18 U.S.C.A. § 3142(e)(1); Pa. Const. Art. 1, § 14.

While the proposed new statutory language does not specifically state that those who cannot be safely released shall be held without bail, the language leaves no clear alternative. Thus it proposes to impermissibly negate the dictates of the Alaska Constitution and to deny bail entirely to many defendants, while imposing on them the burden to refute the denial of bail. The categories of defendants to whom this denial would apply includes those arrested for class A or unclassified felonies, any sexual felony, anyone previously convicted of a felony except if the complete term (including any parole or probation term) had terminated more than five years ago, anyone also under charge in another case, anyone arrested for a domestic violence charge who had previously been convicted of a domestic violence charge within the last five years, or anyone arrested "in connection with" an allegation of commission of an offense outside the state or being a fugitive from justice in another state.

The Alaska Supreme Court has clearly and unequivocally held that the outright denial of bail violates the Alaska Constitution. *Martin v. State*, 517 P.2d 1389 (Alaska 1974) (holding that the refusal of bail to a person arrested on a charge of forgery who had three outstanding cases of forgery against him violated both Alaska statutes and Article I, Section 11 of the Alaska Constitution). In fact, the *Martin* court discussed a very similar argument by the Department of Law in these terms:

> "The State urges that these amendments [to the bail statutes] permit the detention of defendants without bail when the judicial officer determines that the defendant 'will pose a danger to other persons and the community.' . . . The legislature could not, of course, infringe upon the constitutional right of bail. . . . *[A] legislative enactment expressly permitting the detention of persons without right to bail would be unconstitutional unless a constitutional amendment were adopted.*" *Martin*, 517 P.2d at 1396-97 (emphasis added).

Should the plain language of Article I, Section 11 be insufficient to inform the State that pretrial bail is a right not subject revocation by the legislature or the courts, the history of the enactment of the bail clauses to the Alaska Constitution should make clear that any and all defendants should receive a bail hearing. Victor Fischer, delegate to the Constitutional Convention, commented during the convention that the phrase "when the proof is evident and the presumption great" had been enacted in Alaska, as in other states, to show that even defendants in capital offenses should generally be eligible for bail: "The actual determination of when a person is released on bail, if charged with a capital offense, is still up to the judge." 2 Proceedings of the Alaska Constitutional Convention 1344-45 (Jan. 6, 1956) *cited in State v. Wassillie*, 606 P.2d 1279, 1282 (Alaska 1980).

If the Constitutional Convention drafted Article I, Section 11 with the intent that even those charged with capital cases should receive a bail hearing, then the Governor's bill that defendants

charged with felonies should be presumed not to be eligible for bail must surely violate the terms of the bail clauses of the Alaska Constitution. The proposed amendments in Section 4 of H.B. 324 do not pass constitutional review, as they contradict both the language of Article I, Section 11, which vests all defendants except those in capital cases with the right to bail, and the Supreme Court's analysis in *Martin*.

Even were a finding that "no condition or combination of conditions" support release somehow constitutional, the burden-shifting provision of the statute is inappropriate in the context of a bail hearing conducted within hours of arrest. These hearings may be conducted in the absence of counsel; even where the defendant obtains counsel within a few hours of arrest, defense counsel will not likely be capable of carrying the burden to show that the defendant is not a danger and not likely to fail to appear. *See Stack v. Boyle*, 342 U.S. 1, 11 (1951) (stating that an initial bail hearing "must be done in haste – the defendant may be taken by surprise, counsel has just been engaged, or for other reasons the bail is fixed without that full inquiry and consideration which the matter deserves," Jackson, J., concurring). Bearing that burden would require witnesses and documentation on the defense side, resources likely impossible for even a privately retained counsel.

The ACLU of Alaska requests that this Committee delete or appropriately revise these clearly unconstitutional provisions in SB 252.

Section 4 Improper Proposed Expansion of Court Authority

The primary purpose of bail is to ensure the appearance of the accused. A judge may consider public safety or the safety of individuals in setting conditions for release. However, beyond specific findings relating to an individual defendant and specific reasons for concern that he may fail to appear or endanger others, a judge does not have more interest in supervising an arrestee, who is presumed innocent, than he does over a member of the general public. *U.S. v. Scott*, 450 F.3d 863, 874 (9th Cir. 2006).

Thus, certain provision in Section Four, subsection (b) of S.B. 252 violate the constitutional protections regarding granting of bail. Subsection (b)(9) permitting a judge to "require the person to maintain employment, or if unemployed, actively seek employment" has no bearing on either the likelihood of the individual to appear in court nor on any danger posed to the victim or the public. Pretrial supervision is not a period of "pre-probation" when the State may broadly supervise an accused. The State's legitimate interests are limited to ensuring public safety and ensuring the appearance of the accused. These kinds of provisions infringe on the right of the defendant to be considered an innocent person. Excessive bail conditions, unjustified by traditional state interests, resemble probationary supervision and thus constitute unconstitutional punishment prior to adjudication.

While other provisions in subsection (b) could have conceivable use in specific individual cases, the long list of bail conditions set forth essentially invites judges to overuse them. Prohibitions

on the use of alcohol and entry to licensed premises, for instance, are currently imposed excessively and frequently without the individualized inquiry required in *Scott*. Overuse of alcohol-related restrictions for Alaska Native defendants has been a basis of criticism for ethnic disparities in the criminal justice system. Instead of minimizing these existing disparities, S.B. 252 would institutionalize them.

Another area of particular concern in the enumerated bail conditions are two provisions relating to health care, subsections (b)(15) and (b)(16) which purport to permit a judge to require a defendant to adhere to courses of psychiatric and medical treatment and to compel a defendant to take prescription medications. The right to bodily privacy is an integral part of the right to privacy under the Alaska Constitution. Allowing the criminal justice system to shortcut the elaborate existing framework by which a person may be committed to psychiatric care would present serious constitutional problems. For instance, in a commitment proceeding, the individual has a right to notice of what treatment specifically has been proposed and then may line up appropriate experts to contest the treatment plan. Under this statute, the defendant has no notice of such a request, no opportunity to bring appropriate experts to court, and thus no way to contest whether the proposed plan of treatment is proper or not. The bill also invites an infringement of the right to privacy in one's medical information and records, since a judge must naturally inquire into the current medical and psychiatric treatment of the accused in order to ensure that the orders are carried out. In order to make sense, the provisions relating to medical care presuppose exposure of the accused's sensitive medical information in open court.

Again, given these important constitutional interests, the ACLU recommends the Committee delete or revise Section 4, subsection (b) of SB 252.

Section One's Proposed Addition of AS Sec. 11.56.730
Offends the Due Process Clause of the Alaska Constitution

Section One of S.B. 252 proposes creation of the offense of "failure to appear," and requires the state to show no mental state other than the knowledge that one should have been in court. Thus, a person could be convicted of a serious felony for inadvertently or accidentally failing to appear.

Generally, the criminal law requires "not only the doing of some act by the person to be held liable, but also the existence of a guilty mind *during the commission of the act." Speidel v. State*, 460 P.2d 77, 80 (Alaska 1969) (emphasis added). The Alaska courts have held that, for major felonies, a mental state requirement is mandatory, while some ***minor*** offenses, such as hunting or public health related offenses may be strict liability offenses without a mental state requirement. *Speidel*, 460 P.2d 77 (holding that the statute declaring the failure to return a car to be a crime, regardless of mental state, violated due process); *see also State v. Guest*, 583 P.2d 836 (Alaska 1978); *State v. Fremgen*, 914 P.2d 1244 (Alaska 1996). In some cases, the courts have avoided declaring a statute unconstitutional by creating a mental state requirement where a statute has no provision for mental state. *Kimoktoak v. State*, 584 P.2d 25 (Alaska 1978); *Alex v. State*, 484

P.2d 677 (Alaska 1971). However, given the explicit statement that no mental state is required in Section One, the courts would not be able to avoid the constitutional conflict and must rule the statute unconstitutional.

On a policy basis, the legislature should consider the impact of S.B. 252 on the prison population of the state. The ACLU of Alaska's recent review of the prison system showed that over the past seven years the population of prisoners in custody for most types of crimes (e.g., property offenses, offenses against the person, sex offenses) has remained largely stable. The expansion of the prison population from 2002 to 2008 was due exclusively to the *tripling* of the number of prisoners incarcerated for two types of offenses: for violations of probation and parole and for public order and administration offenses. Public order and administration offenses include victimless offenses relating to criminal justice administration, and the largest group of these offenders consists of those serving time for failure to appear in court. The state can hardly argue in the face of a tripling of the number of offenders incarcerated on those types of offenses that the judiciary has been too lenient on those who fail to appear. Passing this bill will ensure an even greater expansion in the Alaska prison population as a result of more prosecutions and more convictions for failures to appear.

The legislature should also take note that the equivalent federal rule, as well as many state rules, requires a showing that the defendant "deliberately" or "willfully" missed court. *Hutchison v. State*, 27 P.3d 774, 777-79 (Alaska App. 2001) (noting that the federal bail statute, 18 U.S.C. § 3150, as well as Connecticut, California, and Illinois statutes, require a showing of "willful" failure to appear). Given that the federal court system and several large state court systems do not find themselves facing large numbers of non-appearing defendants, even when only "willful" failures to appear are prosecuted, the current, stricter Alaska standard of "knowing" failure to appear should adequately ensure appearance of defendants.

The legislature should also consider the potential negative effects of this policy on judicial efficiency. As the law stands now, a defendant who misses court through neglect or confusion has a strong interest in appearing in court immediately upon realizing the mistake to have his bench warrant lifted, since that response will tend to show an innocent mental state and a sincere desire to participate in the court process. Under the proposed bill, a defendant who misses court through neglect or confusion will face the same penalty for turning himself in the next day as if he disappears for the next six months. Creating a stiffer penalty and eliminating any meaningful defense will encourage those who do miss court to absent themselves from court indefinitely. No policy or penalty is ever going to prevent neglect, mistake, and confusion. A flexible, and in some cases forgiving, policy will serve judicial efficiency best.

Problematic Extension of Time for Bail Hearing

Section Three proposes to extend the window of detention prior to a bail hearing to 48 hours. Under current Alaska law, a defendant must be brought before a judicial officer within 24 hours.

Under *Gerstein v. Pugh*, a probable cause hearing must be held without unreasonable delay. 420 U.S. 103 (1975).

After a standard of 24 hours was adopted by most states and most circuits, a narrowly divided US Supreme Court stated that the initial appearance must be made only within 48 hours. *Riverside v. McLaughlin*, 500 U.S. 44 (1991). However, *Riverside* does not bind the states in their interpretation of their own constitutions. In one accounting of state responses to *Gerstein*, most states had concluded that 24 hours was the appropriate term under the case, and only seven states explicitly permitted more than 24 hours prior to an initial hearing. *Jenkins v. Chief Justice of Dist. Court Dept.*, 619 N.E.2d 324, 333-34 (Mass. 1993).

Since Alaska has guaranteed a 24-hour window for initial appearances for ***18 years*** since the *Riverside* decision, the state courts may be hard pressed to see why a 48-hour window would not likely permit "unreasonable delay." The Alaska courts have not yet had a chance to rule on the dimensions of the "speedy trial" provision of Article I, section 11 as it relates to initial appearances, since Rule 5 has long guaranteed a 24-hour window of appearance. The Supreme Court could very well decide that the state constitutional provisions relating to speedy trial and due process require a 24-hour window prior to initial appearance, just as the Massachusetts Supreme Court did in *Jenkins*.

Given that the currently existing rules of criminal procedure already provide an exception for defendants arrested far from urban centers and allow the prosecution to request a delay to gather more information where necessary for a bail hearing, the state's success over the last 18 years in providing a hearing within 24 hours strongly suggests that a delay of more than 24 hours would represent unnecessary delay, making the statute unconstitutional.

Unconstitutional Imposition of Warrantless Search

Section Four's proposed addition of A.S. Sex.12.30.016 seeks to allow unconstitutional warrantless searches. Subsections (b)(2). (c)(2). Compared to probationers and parolees, the rights of pretrial defendants against unreasonable search and seizure are strong.

While comparatively little case law exists in Alaska courts, a recent Ninth Circuit case strongly endorsed the rights of pretrial defendants against warrantless searches. In *United States v. Scott*, the defendant had been arrested on drug charges and his release was conditioned on his "consent" to suspicionless search of his home and random drug tests. 450 F.3d 863 (9th Cir. 2006). After a positive urine test for methamphetamine, officers searched his home and found a shotgun. *Id.* at 866. The Ninth Circuit held that his consent was not valid, as he would have been placed in custody if he had declined. *Id.* at 870. Most importantly, the court said: "if a defendant is to be released subject to bail conditions that will help protect the community from the risk of crimes he might commit while on bail, the conditions must be justified by a showing that defendant poses a heightened risk of misbehaving while on bail. The government cannot, as it is

trying to do in this case, short-circuit the process by claiming that the arrest itself is sufficient to establish that the conditions are required." *Id.* at 874.

Creating a blanket rule that a court may impose bail conditions that violate rights against unreasonable search without requiring any kind of individualized finding would violate the rule enunciated in *Scott*. A provision that states that such conditions may only be imposed after a written finding of the reasons particular to the individual defendant as to why such bail conditions are necessary may render this section constitutional.

Overly Broad Imposition of Third Party Custodians

Section 5 of the Bill unconstitutionally proposes to limit a pre-trial defendant's liberty. A pretrial defendant enjoys a right to be considered innocent; he also enjoys a default right to his liberty. *Stack v. Boyle*, 342 U.S. 1. ("This traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning."). No showing of proof, no adversarial proceeding is required for the filing of a complaint. As such, the court should require a showing from the prosecution to impose a condition of bail on the accused. Yet the third-party custodian provision imposes no restraint on the court's authority.

Contrast, for instance, the language from Section 5, "a judicial officer may appoint a third-party custodian if the officer finds that the appointment will, singly or in combination with other conditions, reasonably assure the person's appearance and the safety of the victim, other persons, and the community" to the language from Section 4, "the officer shall impose *the least restrictive condition* or conditions that will reasonably assure the person's appearance." The term "least restrictive," or any sense that a bail condition should be "necessary" rather than simply the court's preference, is missing from Section 5.

Arguably, the imposition of a third party custodian requirement would enhance the likelihood of *any* defendant's appearance in court. However, the courts are not free to impose any quantity of bail they like or to impose any conditions that seem like a good idea. Such conditions may be imposed only when found to be necessary.

The legislature should note that in a recent Alaska Judicial Council survey on the criminal justice system, excessive and arbitrary use of the third-party custodian requirement was one of the most frequent complaints. The original purpose of the third-party requirement – to ensure that impoverished defendants incapable of making cash bail could be released in a manner that assured community safety and court appearance – has been almost totally lost. A third-party custodian is now often imposed as a matter of course, rather than after specific findings, and in addition to, not in lieu of, cash bail. To prevent more abuse, a court should be required to make specific, written findings as to why a third-party custodian is necessary.

Conclusion

We hope that the Judiciary Committee will note these are just some of the constitutional infirmities in Senate Bill 252.

While the ACLU of Alaska supports appropriate revisions to the criminal justice system to address the special circumstances of our State, and evolving needs, this Bill is not well-crafted to vindicate the state's purposes.

The sections we have identified present substantial Constitutional problems and will likely entangle the state in litigation, should S.B. 252 pass as currently written.

Thank you again for the opportunity to share our concerns. And please feel free to contact the undersigned should you require any additional information.
Sincerely,

Jeffrey Mittman
Executive Director
ACLU of Alaska

BAIL

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TITLE 18 > PART II > CHAPTER 207 > § 3142

§ 3142. Release or detention of a defendant pending trial

(a) In General.— Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be—

(1) released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section;

(2) released on a condition or combination of conditions under subsection (c) of this section;

(3) temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or

(4) detained under subsection (e) of this section.

(b) Release on Personal Recognizance or Unsecured Appearance Bond.— The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a), unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

(c) Release on Conditions.—

(1) If the judicial officer determines that the release described in subsection (b) of this section will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such judicial officer shall order the pretrial release of the person—

(A) subject to the condition that the person not commit a Federal, State, or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 (42 U.S.C. 14135a); and

(B) subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person—

(i) remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(ii) maintain employment, or, if unemployed, actively seek employment;

(iii) maintain or commence an educational program;

(iv) abide by specified restrictions on personal associations, place of abode, or travel;

(v) avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(vi) report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(vii) comply with a specified curfew;

(viii) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(ix) refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), without a prescription by a licensed medical practitioner;

(x) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(xi) execute an agreement to forfeit upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to assure the appearance of the person as required, and shall provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances as the judicial office may require;

(xii) execute a bail bond with solvent sureties; who will execute an agreement to forfeit in such amount as is reasonably necessary to assure appearance of the person as required and shall provide the court with information regarding the value of the assets and liabilities of the surety if other than an approved surety and the nature and extent of encumbrances against the surety's property; such surety shall have a net worth which shall have sufficient unencumbered value to pay the amount of the bail bond;

(xiii) return to custody for specified hours following release for employment, schooling, or other limited purposes; and

(xiv) satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

In any case that involves a minor victim under section 1201, 1591, 2241, 2242, 2244 (a)(1), 2245, 2251, 2251A, 2252 (a)(1), 2252 (a)(2), 2252 (a)(3), 2252A (a)(1), 2252A (a)(2), 2252A (a)(3), 2252A (a)(4), 2260, 2421,

2422, 2423, or 2425 of this title, or a failure to register offense under section 2250 of this title, any release order shall contain, at a minimum, a condition of electronic monitoring and each of the conditions specified at subparagraphs (iv), (v), (vi), (vii), and (viii).

(2) The judicial officer may not impose a financial condition that results in the pretrial detention of the person.

(3) The judicial officer may at any time amend the order to impose additional or different conditions of release.

(d) Temporary Detention To Permit Revocation of Conditional Release, Deportation, or Exclusion.— If the judicial officer determines that—

(1) such person—

(A) is, and was at the time the offense was committed, on—

(i) release pending trial for a felony under Federal, State, or local law;

(ii) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or

(iii) probation or parole for any offense under Federal, State, or local law; or

(B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101 (a)(20)); and

(2) such person may flee or pose a danger to any other person or the community;

such judicial officer shall order the detention of such person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or State or local law enforcement official, or the appropriate official of the Immigration and Naturalization Service. If the official fails or declines to take such person into custody during that period, such person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings. If temporary detention is sought under paragraph (1)(B) of this subsection, such person has the burden of proving to the court such person's United States citizenship or lawful admission for permanent residence.

(e) Detention.—

(1) If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.

(2) In a case described in subsection (f)(1) of this section, a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if such judicial officer finds that—

(A) the person has been convicted of a Federal offense that is described in subsection (f)(1) of this section, or of a State or local offense that would have been an offense described in subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed;

(B) the offense described in subparagraph (A) was committed while the person was on release pending trial for a Federal, State, or local offense; and

(C) a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the offense described in subparagraph (A), whichever is later.

(3) Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the judicial officer finds that there is probable cause to believe that the person committed—

(A) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;

(B) an offense under section 924 (c), 956 (a), or 2332b of this title;

(C) an offense listed in section 2332b (g)(5)(B) of title 18, United States Code, for which a maximum term of imprisonment of 10 years or more is prescribed;

(D) an offense under chapter 77 of this title for which a maximum term of imprisonment of 20 years or more is prescribed; or

(E) an offense involving a minor victim under section 1201, 1591, 2241, 2242, 2244 (a)(1), 2245, 2251, 2251A, 2252 (a)(1), 2252 (a)(2), 2252 (a)(3), 2252A (a)(1), 2252A (a)(2), 2252A (a)(3), 2252A (a)(4), 2260, 2421, 2422, 2423, or 2425 of this title.

(f) Detention Hearing.— The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community—

(1) upon motion of the attorney for the Government, in a case that involves—

(A) a crime of violence, a violation of section 1591, or an offense listed in section 2332b (g)(5)(B) for which a maximum term of imprisonment of 10 years or more is prescribed;

(B) an offense for which the maximum sentence is life imprisonment or death;

(C) an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46;

(D) any felony if such person has been convicted of two or more offenses described in subparagraphs (A) through (C) of this paragraph, or two or more State or local offenses that would have been offenses described in

subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such offenses; or

(E) any felony that is not otherwise a crime of violence that involves a minor victim or that involves the possession or use of a firearm or destructive device (as those terms are defined in section 921), or any other dangerous weapon, or involves a failure to register under section 2250 of title 18, United States Code; or

(2) upon motion of the attorney for the Government or upon the judicial officer's own motion in a case, that involves—

(A) a serious risk that such person will flee; or

(B) a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of such person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for the Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday). During a continuance, such person shall be detained, and the judicial officer, on motion of the attorney for the Government or sua sponte, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether such person is an addict. At the hearing, such person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence. The person may be detained pending completion of the hearing. The hearing may be reopened, before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of such person as required and the safety of any other person and the community.

(g) Factors To Be Considered.— The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including—

(A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

(4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release. In considering the conditions of release described in subsection (c)(1)(B)(xi) or (c)(1)(B)(xii) of this section, the judicial officer may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

(h) Contents of Release Order.— In a release order issued under subsection (b) or (c) of this section, the judicial officer shall—

(1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

(2) advise the person of—

(A) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(B) the consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

(C) sections 1503 of this title (relating to intimidation of witnesses, jurors, and officers of the court), 1510 (relating to obstruction of criminal investigations), 1512 (tampering with a witness, victim, or an informant), and 1513 (retaliating against a witness, victim, or an informant).

(i) Contents of Detention Order.— In a detention order issued under subsection (e) of this section, the judicial officer shall—

(1) include written findings of fact and a written statement of the reasons for the detention;

(2) direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;

(3) direct that the person be afforded reasonable opportunity for private consultation with counsel; and

(4) direct that, on order of a court of the United States or on request of an attorney for the Government, the person in charge of the corrections facility in which the person is confined deliver the person to a United States marshal for the purpose of an appearance in connection with a court proceeding.

The judicial officer may, by subsequent order, permit the temporary release of the person, in the custody of a United States marshal or another appropriate person, to the

extent that the judicial officer determines such release to be necessary for preparation of the person's defense or for another compelling reason.

(j) Presumption of Innocence.— Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

Cindy

Martin v. State
517 P.2d 1389
Alaska 1974.
January 02, 1974

Term

517 P.2d 1389, 75 A.L.R.3d 941

Supreme Court of Alaska.
Max Ray MARTIN et al., Appellants,
v.
STATE of Alaska, Appellee.

No. 1785.
Jan. 2, 1974.

Herbert D. Soll, Public Defender, Larry A. Jordan, Asst. Public Defender, anchorage, for appellants.

John E. Havelock, Atty. Gen., Juneau, Seaborn J. Buckalew, Jr., Dist. Atty., Anchorage, Stephen G. Dunning, Asst. Dist. Atty., Anchorage, for appellee.

Before RABINOWITZ, C. J., and CONNOR, ERWIN, BOOCHEVER and FITZGERALD, JJ.

OPINION

FITZGERALD, Justice.

These cases come to us as a consolidated appeal seeking declarations of the rights of the defendant in criminal proceedings to bail under the constitution and laws of Alaska and the constitution of the United states. Although the factual circumstances of each case are somewhat different, all three cases challenge the concept of preventive detention.

On June 7, 1972, appellant Richard Snyder was arraigned in the superior court on a charge of forgery. At the time of this arraignment, Snyder was free on bail following three indictments issued previously on other charges.[FN1]

> FN1. The appellant was charged in a four-count federal indictment for conspiracy, robbery, and possession of firearms by a convicted felon, a one-count Alaska indictment for burglary not in a dwelling, and a nine-count Alaska indictment for burglary not in a dwelling. Both state indictments postdated the alleged date for commission of the

forgery.

At his arraignment and at a later hearing for plea, Snyder requested the court to set bail on the forgery charge. The trial court refused to set bail finding that Snyder was 'a danger to society.' On August 10, 1972, a notice of appeal was filed on the decision denying bail. However, on November 9, 1972, the court on the motion of the prosecutor dismissed the forgery charge against Snyder.[FN2]

FN2. On September 14, 1972, Snyder filed a motion pro se with this court requesting release on his own recognizance. By order dated November 17, 1972, Justice Boochever denied the motion on the basis that the intervening dismissal of charges rendered the question moot.

Appellant Max Martin was arraigned August 3, 1972 in the superior court on a petition to revoke probation. Almost two years earlier, Martin had been convicted of larceny in a building. For that offense he received a five-year sentence, but four years were suspended upon conditions of probation.

At his arraignment and at a hearing four days later, Martin requested the court to set bail for his release pending the revocation hearing. The court refused to set bail, reasoning that there was a high probability of truth in the allegations, and that it was within the court's discretion to deny bail after conviction.

Notice of appeal from the denial of bail was filed on August 10, 1972. On September 18, 1972, Martin's probation was revoked, and he was ordered to serve the remaining four years on his larceny conviction.

Appellant Aloyisus Fabian was arraigned in the superior court on May 18, 1972, on a charge of burglary not in a dwelling. Following arraignment, he was released on his own recognizance to participate in the Salvation Army alcoholic rehabilitation program. On May 25, 1972, the state moved that Fabian's recognizance release be revoked, and that bail be set at $500 because he was no longer participating in the Salvation Army program. Fabian, through his counsel, admitted violating the conditions of his release but requested to be released again on recognizance, contending that his financial status would make any bail amount prohibitive.

Rejecting the suggestion that Fabian reenroll at the Salvation Army, the court offered to release him to the custody of the Anchorage Native Program for Alcoholic and Drug Abuse. Fabian's counsel agreed to attempt to enroll him in the native program, and the appellant was incarcerated in the meantime. Attempts to enroll him in the native program failed. Since his counsel did not reapply for bail, the appellant remained in jail until his trial.

Notice of appeal from the ruling of the superior court was filed August 10, 1972. On October 3, 1972, Fabian appeared in superior court and was convicted upon his plea of guilty and was

sentenced to a term of one year of confinement.

The appellants claim a substantive right to bail arising from the Alaska Bail Reform Act,[FN3] from Article I, sections 11 and 12 of the Alaska Constitution, and from the eighth amendment of the United States Constitution.

FN3. AS 12.30.010 et seq.

We cannot ignore, however, the preliminary procedural difficulties which these cases present. In each case before us, it is argued that the issues arising on appellant's application for bail have been mooted by either a subsequent dismissal, a conviction, or a revocation of probation. An application for review of an order of the trial court denying bail should be promptly filed. The Alaska procedures for review of a denial for bail are designed to ensure speedy consideration at the appellate level. [FN4] Although in this appeal the slower appellate process was utilized, we undertake to consider the substantive claims raised by appellants because they involve important recurring issues of law which may be capable of evading review. [FN5]

FN4. See App.R. 23, 24. The need for rapid re-review of bail orders is also reflected in the Alaska Bail Reform Act of 1966, AS 12.30.030:'(a) A person who remains in custody after a review provided for in s 20 (f) of this chapter may move the court having original jurisdiction over the offense to amend the order. The motion shall be determined promptly.(b) When a court denies a motion under (a) of this section or conditions of release have been imposed by the court having original jurisdiction over the offense, an appeal may be taken to the court having appellate jurisdiction over the court denying the motion or imposing the conditions subject to the rules of the Supreme Court of Alaska, and the District Court Rules of Criminal Procedure. The order of the lower court shall be affirmed unless it is found that the lower court abused its discretion. If it is held that the lower court did abuse its discretion, the appellate court may modify, vacate, set aside, reverse, remand the action for further proceeding, or remand the action directing entry of the appropriate order, which may include ordering the person to be released under s 20(a) of this chapter. The appeal shall be determined promptly.'

FN5. See Doe v. State, 487 P.2d 47 (Alaska 1971).

Appellants would have us interpret the eighth amendment of the federal constitution to create a right to bail.[FN6] The eighth amendment provides in pertinent part: 'Excessive bails shall not be required . . ..' Appellants' argument raises two questions for consideration: 1) whether the fourteenth amendment due process clause[FN7] incorporates[FN8] the excessive bail provision of the eighth amendment; 2) whether the excessive bail provision includes the unqualified right to bail.

FN6. U.S.Const. amend. VIII.

FN7. U.S.Const. amend. XIV, s 1.

FN8. For literature on the application of the federal bill of rights to the states through the fourteenth amendment see Emerson, Haber & Dorsen, Political and Civil Rights In The United States 1379-80 (3d ed. 1967). See also Countryman, The Role of a Bill of Rights in a Modern State Constitution, Why a State Bill of Rights?, 45 Wash.L.Rev. 453, 454-474 (1970).

As to the first question, the United States Supreme Court has not ruled on whether the eighth amendment bail provision applies to the states through the fourteenth amendment.[FN9] The most recent discussion on this subject by the Supreme Court occurred in Schilb v. Kuebel, 404 U.S. 357, 92 S.Ct. 479, 30 L.Ed.2d 502, reh. denied, 405 U.S. 948, 92 S.Ct. 930, 30 L.Ed.2d 818 (1971). In Schilb the issue before the Supreme Court related to the constitutionality of Illinois' bail statutes which permitted a defendant in some instances to post 10% of the bail directly to the court, of which the state retained 10% of the posted security as administrative 'bail bond costs.' Justice Blackmun, in the course of defining the issue before the court, stated:

FN9. In Robinson v. California, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), the Supreme Court held that a California statute, which made addiction to the use of narcotics a criminal offense, inflicted a cruel and unusual punishment in violation of the eighth and fourteenth amendments. The court has yet to rule whether the provision against excessive bail is similarly incorporated by the due process clause of the fourteenth amendment.

'Bail, of course, is basic to our system of law . . . and the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment. . . . But we are not at all concerned here with any fundamental right to bail or with any Eighth Amendment-Fourteenth Amendment question of bail excessiveness.' 404 U.S. at 365, 92 S.Ct. at 484, 30 L.Ed.2d at 511 (citations omitted).

The question of incorporation by the fourteenth amendment would seem to await a more definitive answer in future adjudication.

There remains a substantial controversy over the eighth amendment's inclusion of an unqualified right to bail.[FN10] Much of the discussion on the issues appears prompted by the District of Columbia Court Reform and Criminal Procedure Act of 1970. The Act allows courts of the District to detain a defendant without bail for up to 60 days prior to trial if the court concludes

that the defendant's release would constitute a danger to the community. D.C.Code Ann. ss 23-1321 to 23-1332 (1973).

FN10. For a discussion of this controversy see Foote, The Coming Constitutional Crisis in Bail (pts. 1-2), 113 U.Pa.L.Rev. 959, 1125 (1965); Meyer, Constitutionality of Pretrial Detention, 60 Geo.L.J. 1140 (1972); Mitchell, Bail Reform and the Constitutionality of Pretrial Detention, 55 Va.L.Rev. 1223 (1969); Tribe, an Ounce of Detention: Preventive Justice in the World of John Mitchell, 56 Va.L.Rev. 371 (1970).

Perhaps the most widely cited case for supporting a right to bail under the eighth amendment is Stack v. Boyle, 342 U.S. 1, 72 S.Ct. 1, 96 L.Ed. 3 (1951). [FN11] Stack, however, is not convincing authority for supporting an unconditional eighth amendment right to bail. Although the opinion speaks to the right of release before trial, this discussion relates to federal statutes providing a right to bail following arrest for a noncapital offense. [FN12] Once this statutory right to bail is recognized, then the eighth amendment excessive bail provision assures a reasonable bail.

FN11. In Stack, twelve petitioners were charged with violating the Smith Act, 18 U.S.C. ss 371, 385 (1970). Bail was first set for each defendant in varying amounts ranging from $2,500 to $100,000. Subsequently, bail was uniformly fixed at $50,000. In an effort to reduce bail, petitioners presented uncontroverted evidence concerning financial resources, family relationships, prior criminal records and other information. The government, on the other hand, presented evidence showing that four persons previously convicted under the Smith Act had forfeited bail. In vacating the lower court order denying petitioners' writs of habeas corpus, the Supreme Court held that the lower court had not followed proper criteria delineated in the Federal Rules of Criminal Procedure in fixing a reasonable bail.

FN12. It is clear from the opinion that this right to bail referred to the Federal Judiciary Act of 1789, 1 Stat. 73, 91 and Federal Rules of Criminal Procedure, Rule 46(a)(1), not the eighth amendment.

In Carlson v. Landon, 342 U.S. 524, 72 S.Ct. 525, 96 L.Ed. 547 (1952) the Supreme Court in a case involving the deportation of certain aliens classified as dangerous held that in such circumstances, the eighth amendment did not require the petitioners to be released on bail.

'The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in All cases, but merely to provide that bail shall not be excessive in those cases where it is proper to

grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept.' 342 U.S. at 545, 72 S.Ct. at 536, 96 L.Ed. at 563 (footnotes omitted).

Carlson, however, is a special case involving the Internal Security Act of 1950, 8 U.S.C. s 137 (1970).

It is, however, not necessary in this appeal to decide whether appellants were entitled to bail under the eighth amendment to the United States Constitution.

Article I, s 11 of the Alaska Constitution provides:

'In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve, except that the legislature may provide for a jury of not more than twelve nor less than six in courts not of record. The accused is entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption great; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.' (emphasis supplied)

Article I, section 11 was originally introduced as section 12 of Committee Proposal No. 7, offered by the Committee on the Preamble and Bill of Rights to the Alaska Constitutional Convention in December, 1955.[FN13] Section 12 of the committee proposal read in part:

FN13. 6 Alaska Constitutional Convention, Minutes, Appendix V. at 65 (1963) (hereinafter cited as Minutes).

'The accused is also entitled to be informed of the nature and cause of the accusation; to be released on bail, except for capital offenses . . ..'

The commentary attached to the proposal indicated that section 12 was intended to give defendants 'the opportunity to be released on bail except in capital offenses.'[FN14] When the committee's proposal was discussed on the Floor of the convention, Delegate Victor Fischer introduced an amendment to qualify the right to bail in cases involving capital offenses by adding the words 'when the proof is evident or the presumption great.'[FN15] The delegate's comments on this amendment clearly indicate the guarantee of a right to bail:

FN14. Minutes, supra, Appendix V, at 72.

FN15. 2 Minutes, supra, at 1344.

'The language in the Federal Constitution reads generally to the effect that excessive bail shall not be required. A number of states have changed that language to provide more or less the language we have, that the accused may be released on bail

except for capital offenses. But in practically every case where this new language is used, the words, 'when proof is evident and the presumption great' and that is a necessary protection for the accused and we shall follow the majority of the states in this case. It has proven a desirable practice. The actual determination of when a person is released on bail, if charged with a capital offense, is still up to the judge.'[FN16]

FN16. 2 Minutes, supra, at 1344-345. See American Law Institute, Code of Criminal Procedure 338-41 (1930) which indicates that 40 States had similar constitutional provisions providing for the right to bail except in capital offenses. See also Application of Corbo, 54 N.J.Super. 575, 149 A.2d 828, 833 (1959).

Our study of Article I, section 11 thus compels a conclusion that the Alaska Constitution without doubt guarantees to every accused person the right to be released on bail except for capital offenses[FN17] where the proof is evident or the presumption great.[FN18] Some jurisdictions with similar bail provisions [FN19] have created an implied limitation on this constitutional right. But in Alaska such an implied limitation would necessarily contravene both the plain language of this constitutional provision and its intended purpose as stated at the constitutional convention.

FN17. Sections 66-16-43 and 66-16-44, ACLA 1949, which provided for the death penalty were repealed by the territorial legislature in 1957. Ch. 132, SLA 1957. Repeal, of course, does not preclude the legislature from ever establishing capital offenses, but since there are no capital offenses in Alaska at this time, every criminal offense carries the right to bail.

FN18. 'The early common law did not permit bail in felony cases; later on bail was permitted before trial, but not during trial. When bail was permitted, it was a matter of discretion with the court, not a matter of right. . . .Most states have limited the judicial discretion of the common law by guaranteeing, by constitutional or statutory provision, that all persons shall be bailable by sufficient sureties except in certain cases.' 8 Am.Jur.2d Bail and Recognizance ss 22, 23, at 796-797 (1963) (footnotes omitted).

FN19. See, e. g., State v. Johnson, 61 N.J. 351, 294 A.2d 245, 250 (1972). New Jersey has a similar constitutional bail provision to that of Alaska. There the court said in part:'Expressed in pragmatic terms this right to bail means that the accused has the right to pretrial liberty on such bond in such amount as in the judgment of the trial court under the circumstances of the case will insure his appearance at the trial. If, however, the court is satisfied from the evidence presented on the application for bail that regardless of the amount of bail fixed, the accused if released will probably flee to avoid trial, bail may be

denied.'

In Reeves v. State, 411 P.2d 212 (Alaska 1966), we held that indigent defendants did not have an absolute right to be released on personal recognizance prior to trial. In Reeves, the defendant was charged in a four count indictment of serious offenses, including first degree murder, burglary and robbery. The trial court first set bail at $50,000, which was later reduced to $10,000. On appeal, the issue was limited to a claim that all indigent defendants were entitled to pretrial release as a matter of right. We rejected this contention as unsound and approved the rationale of Pilkinton v. Circuit Court, 324 F.2d 45 (8th Cir. 1963).[FN20] Reeves, however, as was pointed out in Doe v. State, 487 P.2d 47 (Alaska 1971), should not be taken as denying the right to bail provided under Article I, section 11.

FN20. Pilkinton provided that a state may require bail in some amount and that the eighth amendment excessive bail provision does not provide a right of pretrial release if the defendant is unable to post bail.

Doe v. State was a delinquency proceeding involving a child. His attorney requested a continuance on a hearing. The court continued the case briefly but ordered the child detained during the interim. In considering the child's right to remain free pending an adjudication, this court discussed the right to bail as it is expressly provided in the Alaska Constitution:

'Under the Alaska Constitution, all persons accused of a criminal offense are entitled to be released on bail except for capital offenses where the proof is evident or the presumption great.' 487 P.2d at 51 (footnote omitted).

Apart from Article I, section 11, one additional provision of the Alaska Constitution has to do with bail. Article I, section 12 of the Alaska Constitution provides in part:

'Excessive bail shall not be required, not excessive fines imposed, nor cruel and unusual punishments inflicted.'

This section was originally section 9 of Committee Proposal No. 7 introduced by the Committee on the Preamble and Bill of Rights to the Alaska Constitutional Convention in December, 1955. [FN21]

FN21. The commentary to the proposal indicated that section 9 was identical with the excessive bail provision of the eighth amendment to the United States Constitution. 6 Minutes, supra, Appendix V, at 72.

It is not necessary to determine whether or not Article I, section 12 of the Alaska Constitution guarantees a right to bail and, indeed, such an interpretation would be superfluous in view of the right to bail provision found in Article I, section 11. It is enough to say that the excessive bail provision insures the fixing of a reasonable bail and is to be considered in conjunction with

the right to bail provision of Article I, section 11.

We note that California's constitutional provisions for bail are substantially identical with those of Alaska. The Supreme Court of California, applying that state's constitutional provisions, recently rejected the so-called 'public safety' exception for bail:

'Our constitutional language expressly providing that all persons shall be bailable except for a capital offense was consciously added to the 'no excessive bail' language adopted from the Eighth Amendment in order to make clear that, unlike the federal rule, all except the one class of defendants were to be bailable. As pertinent statutory provisions may not be read to impose greater limits on the right to bail as guaranteed by the California Constitution, there is no validity in the argument that there is an implied 'public safety' exception in statutory or other provisions guaranteeing the right to bail and we hold that such an exception does not exist in view of the clear direction of article I, section 6. 'If the constitutional guaranties are wrong, let the people change them-not judges or legislators."

In re Underwood, 9 Cal.3d 345, 508 P.2d 721 (1973).[FN22]

FN22. In his dissent Justice Burke suggests that since the Constitution of California recognizes the inalienable right of all men 'to enjoy and defend their life and liberty, and to protect their property, and to pursue and obtain safety and happiness', the courts should exercise an inherent power to achieve a suitable balance between society's rights and the defendant's right to bail. This suggestion rests wholly on the questionable assumption that man's inalienable rights are incompatible with the constitutional right of an accused to bail.An additional argument for the 'public safety' exception advocated by the dissent is that courts may accomplish the same result when the judge fixes an amount of bail which the particular defendant is unable to furnish. According to Justice Burke, this merely evades the issue and does indirectly what may not be done directly, and moreover violates the prohibition against excessive bail. Such an argument furnishes little support for the central thesis in Justice Burke's contentions. To the extent it suggests that difficulty in application of a constitutional principle provides justification for its rejection, the argument itself evades the issue.

In addition to the constitutional guarantee of bail, a right to bail is found in the Alaska statutes. AS 12.30.010 provides that

The defendant in a criminal proceeding is entitled to be admitted to bail before conviction as a matter of right.

This section was part of the original Alaska Bail Reform Act [FN23] and has remained unchanged. In 1966 AS 12.30.020(a) and (b), read as follows:

FN23. SLA 1966, Ch. 20, s 1.

'(a) A person charged with an offense shall, at his first appearance before a judicial officer, be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the judicial officer unless the officer determines that the release of the person will not reasonably assure the appearance of the person as required.

(b) If a judicial officer determined under (a) of this section that the release of a person will not reasonably assure the appearance of the person, the judicial officer may

(1) place the person in the custody of a designated person or organization agreeing to supervise him;

(2) place restrictions on the travel, association, or place of abode of the person during the period of release;

(3) require the person to return to custody after daylight hours on designated conditions;

(4) require the execution of an appearance bond in a specified amount and the deposit in the registry of the court, in cash or other security, a sum not to exceed 10 per cent of the amount of the bond; the deposit to be returned upon the performance of the condition of release;

(5) require the execution of a bail bond with sufficient solvent sureties or the deposit of cash; or

(6) impose any other condition considered reasonably necessary to assure the defendant's appearance as required.' (emphasis added)

Since both sections, AS 12.30.010 and AS 12.30.020, were part of the Alaska Bail Reform Act Section 12.30.020 must be taken to recognize and to implement the right to bail afforded by AS 12.30.010.

Subsection (a) of AS 12.30.020 requires a defendant to be released on his personal recognizance or upon the execution of an unsecured appearance bond 'unless the officer determines that the release of the person will not reasonably assure the appearance of the person as required.' The 'unless' clause relates only to denial of personal recognizance or an unsecured appearance bond and not to the right of bail. Subsection (b) provides that in the event the judicial officer should determine that a personal recognizance release or an unsecured appearance bond would not reasonably assure the appearance of a defendant, the judicial officer could impose other requirements to assure the presence of the defendant. Section (b)(6) authorizes a judicial officer to impose any other reasonable conditions to assure the defendant's appearance. But this may not be interpreted so as to empower a judicial officer to absolutely deny the right to bail. Such a construction would not only be inconsistent with the basic purpose of the Bail Reform Act but would be unconstitutional under Article I, section 11 of the Alaska Constitution.

In 1967 the Alaska legislature amended AS 12.30.020 by Ch. 112, SLA 1967. The 'unless' clause of subsection (a) was amended to read 'unless the officer determines that the release of the person will not reasonably assure the appearance of the person as required, or will pose a danger to other persons and the community.' Subsection (b)(6) was amended as follows:

'If a judicial officer determines under (a) of this section that the release of a person will not reasonably assure the appearance of the person, or will pose a danger to other persons and the community, the judicial officer may . . .

(6) Impose any other condition considered reasonably necessary to assure the defendant's appearance as required and the safety of other persons and the community.'

The State urges that these amendments permit the detention of defendants without bail when the judicial officer determines that the defendant 'will pose a danger to other persons and the community.' To support this argument the State refers to the Judiciary Committee Report on House Bill No. 166:

'This bill provides that a judge in determining the amount of bail to be posted for release of an individual accused but not yet tried may consider the amount necessary to guarantee his appearance for trial and also the safety of other persons and the community. The concept of the safety of other persons and the community is a new matter. This reason may be used to set higher bail or even to refuse bail.' 1967 Alaska H.R. Jour. 339.

The Committee's intent seemingly was to permit a judicial officer to consider 'danger to the community' as a factor in setting bail. The legislature could not, of course, infringe upon the constitutional right of bail.

Thus the amendment to subsection (a) of AS 12.30.020 operates to add another factor to be considered in determining whether an accused person is entitled to be released on personal recognizance or on an unsecured appearance bond. This amendment does not amount to a repeal of the right to bail found in AS 12.30.010. In like manner, the amendment to paragraph (b)(6) of AS 12.30.020 added another factor to consider in determining whether additional conditions should be imposed on a defendant. Neither provision may be read as empowering a judicial officer to deny bail. In reaching this construction, we consider it significant that the legislature did not undertake to amend AS 12.30.010 which we have noted remains as in the original Alaska Bail Reform Act and expressly provides for right to bail. Although the trial court may not deny bail to an accused, the trial judge can consider danger to the community as a factor in assessing the amount of bail or fixing the terms of a conditional release. [FN24] We hold therefore that the 1967 amendments, Ch. 112, SLA 1967, to the Bail Reform Act do not permit the detention of persons without bail. Moreover, a legislative enactment expressly permitting the detention of persons without right to bail would be unconstitutional unless a constitutional amendment were adopted.[FN25]

FN24. Other factors to take under consideration are enumerated in AS 12.30.020(c).'In determining the conditions of release under (b) of this section the judicial officer shall take into account(1) the nature and circumstances of the offense charged,(2) the weight of the evidence against the person,(3) the person's family ties,(4) the person's employment,(5) the person's financial resources,(6) the person's character and mental condition,(7) the length of the person's residence in the community,(8) the person's record of convictions,(9) the person's record of appearance at court proceedings,(10) the flight of the accused to avoid prosecution or his failure to appear at court proceedings.

FN25. Note, Preventive Detention, 79 Harv.L.Rev. 1489, 1500 (1966). 'In those states (which guarantee the right to bail in noncapital cases), denial of bail in a noncapital case for preventive purposes, no matter how great the dangers posed by release, would be permissible only by constitutional amendment.' (footnote omitted)

It follows that the trial court erred in refusing to grant the right to bail to appellant Richard Snyder afforded by Article I, section 11 of the Alaska Constitution any by the Alaska Bail Reform Act.

It is true unfortunately that crimes including those involving assaults, robbery and the theft of property are all too commonplace. Public safety has become a matter of the most serious concern to all law-abiding citizens. But alternatives other than preventive detention of an accused must be examined in the efforts to achieve reasonable and adequate public safety. [FN26]

FN26. Criminal Rule 45 requires a trial within four months from the 'date the defendant is arrested, initially arraigned, or from the date the charge (complaint, indictment, or information) is served upon the defendant, whichever is first.' This rule is intended to make effective the right of the accused to a speedy trial as well as bringing about a prompt disposition permitting incarceration of a dangerous offender hopefully for rehabilitation. In recognition of this policy, trial courts should grant continuances of criminal trial sparingly and only when necessary.

In the case of appellant Aloyisus Fabian, the trial judge offered to release the defendant to the custody of the Anchorage Native Program for Alcoholic and Drug Abuse. However, efforts to enroll Fabian in the program failed. He remained in jail because his counsel, for reasons unexplained, failed to reapply for bail. In this instance the trial judge afforded an opportunity for defendant to be released. Under these circumstances, the trial court did not deny Fabian his right to bail.

The case of Max Ray Martin presents different considerations. Article I, section 11, as we have said, guarantees the accused in a criminal prosecution the right to bail. However, a probation revocation hearing is not a criminal prosecution looking toward an adjudication of guilt or innocence.[FN27] Although this court in Hoffman v. State, 404 P.2d 644 (Alaska 1965), required the appointment of counsel to indigent probationers in a revocation hearing, that decision rested on a statutory interpretation of AS 12.55.110[FN28] consistent with the equal protection clauses of both the Federal and Alaska Constitutions. Hoffman does not hold that probation revocation hearings are to be equated to a criminal prosecution.[FN29]

FN27. Trumbly v. State, Opinion No. 957, 515 P.2d 707 (1973). Gagnon v. Scarpelli, 411 U.S. 778, 414, 93 S.Ct. 1756, 1759, 36 L.Ed.2d 656, 651-662 (1973) (Probation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty.' (footnote omitted)). Cf., Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

FN28. AS 12.55.110 governs revocation of probation proceedings.

FN29. Efforts to broadly interpret Hoffman as eliminating the technical classifications between administrative and criminal proceedings for purposes of the double jeopardy clause, were rejected by this court in Alex v. State, 484 P.2d 677 (Alaska 1971). We rejected this argument by noting that Hoffman only involved an equal protection analysis, not the expansion of any substantive rights as claimed by the defendant.

We do not interpret Article I, section 11 of the Alaska Constitution to extend the right of bail to probation revocation proceedings. While the Alaska Constitution and statutes insure to the accused in all criminal prosecutions a right to bail, Martin was not the accused in a criminal prosecution at the time he requested bail from the trial court.[FN30]

FN30. Cf. In re Law, 10 Cal.3d 21, 109 Cal.Rptr. 573, 513 P.2d 621 (1973) (where the California Supreme Court denied a parolee's right to bail pending a hearing investigating alleged violations of parole).

Nor do we find that appellant was entitled to bail under the Alaska Bail Act. His reliance on AS 12.30.010 is misplaced, because the right to bail under this statute is guaranteed prior to conviction. When a defendant reaches the status of a probationer, he can no longer claim the right to bail protected by AS 12.30.010. Nor can he claim bail under the probation statutes,[FN31] since they fail to mention bail, and AS 12.30.040, which provides for release after trial is limited in application to convicted persons awaiting sentence or whose

appeal is pending.

FN31. AS 12.55.080 and AS 12.55.110.

While we hold that appellant Max Ray Martin was neither entitled to bail under the Alaska Constitution nor the Alaska Bail Act, we suggest bail should be withheld pending revocation proceedings only in unusual cases. Trial judges have wide latitude in imposing suitable conditions for prehearing release, other than the denial of bail. The denial of bail may constitute a needless disruption of the probation process negating the program's objectives of rehabilitation and eventual integration into society. Furthermore, the recent expansion in the area of probationer's rights by the United States Supreme Court in Gagnon v. Scarpelli, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973) suggests the granting of bail. In Gagnon, the Court, inter alia, required as a matter of due process that a probationer be afforded a prompt preliminary hearing to determine whether probable cause exists to believe a violation of probation has occurred. Following this preliminary hearing, a final hearing must be allowed prior to an ultimate determination concerning the revocation of probation.

The Gagnon due process requirements were adopted by this court in Trumbly v. State, Opinion No. 957, 515 P.2d 707 (1973). Both Trumbly and Gagnon evinced a concern for considering the rehabilitative treatment afforded by probation as a factor in determining whether probationary status should be revoked. As this court stated in Trumbly,

'The requirement that probation revocation follow after a showing of 'good cause' requires the trial judge to find that continuation of probationary status would be at odds with the need to protect society and society's interest in the probationer's rehabilitation. Revocation should follow violation of a condition of probation when that violation indicates that the corrective aims of probation cannot be achieved.' Trumbly v. State, Opinion No. 957, 515 P.2d 707 (1973) (footnotes omitted).

In Martin's case, there has been no showing that there was abuse of the trial judge's discretion in refusing to allow Martin's release on bail pending a revocation hearing.[FN32]

FN32. We note that federal probationers are by court rule provided with an opportunity for release pending a hearing. Federal Rule of Criminal Procedure 32(f).

We conclude that appellant Richard Snyder was entitled to bail. The appeals of Aloyisus Stephan Fabian and Max Ray Martin are dismissed.

Alaska 1974.
Martin v. State,
517 P.2d 1389, 75 A.L.R.3d 941

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SENATE BILL 252
Sectional Analysis

Section 1 of the bill moves the crime of failure to appear at a court appearance from Title 12 to Title 11. The proposed law is similar to current law with one exception -- it provides that if a person knows that he or she is required to appear, the prosecution does not have to prove an additional culpable mental state regarding the conduct of not appearing. It also provides an affirmative defense that the defendant, due to unforeseeable circumstances outside his or her control, was prevented from appearing at the hearing, and that the defendant notified the court orally and in writing immediately upon being able to make the contact.

The penalties are the same as under current law, except that the bill adopts a violation for failure to appear in connection with a violation.

Section 2 includes a conforming amendment to AS 12.25.030(b). It changes the standard for a law enforcement officer to make an arrest without a warrant in certain cases from "reasonable cause" to "probable cause". The standard in AS 12.25.030(b) would then be the same as in AS 12.25.030(a). Reasonable cause and probable cause are similar.

Section 2 also allows a law enforcement officer to arrest a person for violation of conditions of release if the officer has probable cause to believe the person has violated conditions in connection with release under AS 12.30. Law enforcement supports this change because it avoids, for example, an officer having to get an arrest warrant for a person if the person is ordered not to drink alcohol and is found intoxicated.

Section 3 adopts a new section, AS 12.20.006, that describes release procedures for a person charged with a crime. Although the procedures are similar to those provided under various sections of existing law, there are a few differences, which include:

- Before the third and subsequent bail hearings, current law and the bill require that certain prerequisites are met – such as seven days elapsing between bail hearings unless certain other factors are present. Current law requires 48 hours notice to the prosecuting authority, and the bill requires the same notice, but it also requires 48 hours notice to any surety involved so that the surety has an opportunity to attend the hearing.

- The bill specifically requires the person being released to sign a release agreement that describes the terms of the release and includes the person's promise to abide by the terms.

- The bill eliminates a provision in current law that allows a judicial officer to change, add to, or eliminate conditions of release at any time. The law already provides a process for asking the court to change conditions, and allowing a change at any time,

without following the required procedures, has the potential of being unfair to the defendant, the prosecuting authority, or to the victim.

Section 4 revises the law addressing release before trial of a person charged with a crime. Proposed AS 12.30.011 adopts standards and conditions for release in general, and AS 12.30.016 adopts standards and conditions for release for specific crimes.

Proposed **AS 12.30.011** first adopts conditions that must he imposed on all persons released pending trial. They are very general – including a requirement that the person obey all laws, appear in court when ordered, and keep in contact with the person's attorney.

- Subsection (b) provides conditions that a court may impose on a person charged with a crime if, in the court's discretion the condition will reasonably assure the person's appearance and the safety of the victim, other persons, and the community. Many of these conditions are in current law. Others are included in federal bail law. Several were suggested by a retired judge who is doing contract work for the court system. There is also a general authorization for additional reasonable conditions.

- Subsection (c) describes the various circumstances that the court should consider in deciding what conditions are reasonable to impose on the person. These are similar to current law.

- Subsection (d) provides the evidentiary burdens that a court must apply in making a decision about the release of a person. Generally, the burden of proof is on the prosecuting authority to establish that particular conditions are reasonable to assure the defendant's appearance and the safety of the victim and others. However, the bill proposes a rebuttable presumption, that may be overcome by a preponderance of evidence, that no condition or combination of conditions will assure the defendant's appearance or the safety of the victim or others if (1) the defendant is charged with an unclassified felony, a class A felony, or a sexual felony; (2) the person is charged with a felony, has a previous conviction for felony, and less that five years have elapsed since his or her unconditional release for the prior conviction; (3) the offense was committed while the defendant was on release for another offense; or (4) the charge is for a crime involving domestic violence, and the defendant has been convicted within the previous five years of a crime involving domestic violence.

Proposed **AS 12.30.016** adopts conditions that may be imposed in particular cases. These conditions are in addition to the general conditions authorized under AS 12.30.011(a) and (b). Most of these additional conditions are found in current law.

- Subsection (b) provides additional conditions that may be imposed on persons charged with Title 04 violations such as selling alcohol without a license or bootlegging, and with drunk driving and refusal to submit to a breath test. These conditions include, for

example, a judicial officer ordering a person to submit to a breath test when requested to do so by a law enforcement officer.

- Subsection (c) provides additional conditions that may be imposed on a person charged with violation of the drug laws, and include, for example, prohibiting the person from entering or remaining in a place where a controlled substance is being used, manufactured, grown, or distributed.

- Subsection (d) is a provision that was enacted in 2006, that adopts a mandatory requirement of $250,000 cash bond for a person charged with manufacturing methamphetamine, unless the defendant proves to the court that his or her role was only as an aider or abettor and that the defendant did not stand to gain financially from the offense.

- Subsection (e) adopts specific conditions for a person charged with stalking that is not a crime involving domestic violence. The conditions are similar to those in current law.

- Subsection (f) adopts specific conditions that a court may impose on a person charged with a sex offense. The conditions are similar to current law, except that it adds a condition that the court may order the defendant to have no contact with person under 18 years of age, except for contact made during the normal course of business in a public place. It requires the court, as does current law, to assure that the victim has been notified of the hearing or reasonable efforts to do so have been made, and to consider the victim's comments in making a release decision.

Section 5 adopts standards for the appointment of a third-party custodian for a person released before trial. It requires a court to obtain information about the proposed custodian including the person's ties to the community and his or her relationship with the defendant. It also sets minimum standards for custodians such as requiring the person to be physically able to perform the duties of custodian, and requires the person to agree to report immediately if the defendant has violated conditions. The bill also prohibits a person from acting as third-party custodian under certain circumstances, such as if the person may be called as a witness in the case, or the person has recent charges or a conviction for violating the law.

Section 6 amends the statute addressing the general release conditions of a person charged with a crime involving domestic violence by conforming it to the language used in the newly adopted sections of the bill. It does not include a substantive change.

Section 7 amends the law that prohibits a court from allowing a person charged with a crime involving domestic violence from returning to the residence of the victim or to the residence of a person who has a protective order directed at the defendant. This prohibition was found to violate equal protection of the law in *Williams v. State*, 151 P.3d 460 (Alaska App. 2006). This se0ction is in response to *Williams*, and would overturn it to the extent that it would prohibit a person from returning to the residence of the victim unless certain conditions were

met. These include requiring that 20 days have elapsed since the arrest, the victim or petitioner consents to the return, the defendant does not have a prior conviction for a domestic violence crime against a person, and the defendant establish by clear and convincing evidence that the return to the residence does not pose a danger to the victim or petitioner.

Section 8 rewrites the provision addressing appeal from conditions of release. Current law and the bill provide specific procedures for requesting the court to change conditions of release. The bill does not reenact the provision in current law that allows the court from hearing at any time a motion to amend the release order. Rather, the bill requires the person to follow the procedures adopted for asking the court to amend conditions.

The appeal procedure from the trial court's bail decision is similar in the bill to current law. The standard for review is the same as current law – the appellate court shall affirm the lower court unless it finds that the lower court abused its discretion. The bill allows the appellate court to modify the order, remand the case for further proceedings, or to direct the entry of an appropriate release order. This is also similar to current law.

Section 9 adds a new section addressing the temporary release of a person for an emergency such as the death of a family member. It is similar to current law under AS 12.30.010(a).

Section 10 addresses the release of persons who have been found guilty but not yet sentenced or whose conviction is being appealed. It allows release under the general provisions of AS 12.30, but it requires the person seeking release to establish by clear and convincing evidence that the release sought will reasonably assure the person's appearance and the safety of the victim, other persons, and the community.

Under current law certain defendants may not be released after being found guilty, including a person convicted of an unclassified or class A felony. The current statute also prohibits release of persons convicted of class B or C felonies if they have a previous conviction for certain serious felonies. This later category was found by the court of appeals to violate the constitutional guarantee of equal protection of law. *Bourdon v. State*, 28 P. 3d 319 (Alaska App. 2001). The bill would prohibit release of a person found guilty of all sexual felonies, and a person found guilty of a class B or C felony who has been convicted of a felony in the prior 10 years. It avoids the problem in *Bourdon* by applying the prohibition to all persons convicted of class B or C felonies who have a prior conviction of a felony in the previous 10 years.

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Section 12 specifies that a person who is in custody in connection with a petition to revoke probation does not have a right to release under AS 12.30. This is the same as current law. *Burt v. State*, 823 P.2d 14 (Alaska App. 1991). However, a probationer may request release under AS 12.30. The bill provides that the probationer must establish by clear and convincing evidence that conditions on his or her release will reasonably assure the appearance of the probationer and the safety of the victim, other persons, and the community.

Section 13 is a conforming amendment to current law.

Section 14 provides that for purposes of the bail statutes, a conviction occurs at the time a person is found guilty, either by verdict of by plea.

Section 15 adds definitions to in the bill.

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Section 19 provides that service of domestic violence protective orders on respondents need not by made by law enforcement officers if the respondent has already been served with the protective order on the record in court.

Sections 20 and 21 amend Rule 5, Alaska Rules of Criminal Procedure. Current law requires a person who has been arrested to be brought before a judicial officer within 24 hours of being arrested. The bill changes this from 24 hours to 48 hours. Although the preferred procedure is to have persons arrested be brought as soon as possible before a judicial officer, the change in the deadline will give prosecutors and the police more time to gather information to provide the court in making a release decision, and allow more time to locate and inform the victim of the right to be present at release procedures.

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Sections 27 – 29 include the repealers, the applicability sections, and the effective date provision.

RELEASE BEFORE TRIAL AND AFTER CONVICTION
Sectional Analysis of Proposed Legislation

- **Section 1** of the bill moves the crime of failure to appear at a court appearance from Title 12 to Title 11. The proposed law is similar to current law with one exception -- it provides that if a person knows that he or she is required to appear, the prosecution does not have to prove an additional culpable mental state regarding the conduct of not appearing. It also provides an affirmative defense that the defendant, due to unforeseeable circumstances outside his or her control, was prevented from appearing at the hearing, and that the defendant notified the court orally and in writing immediately upon being able to make the contact.

  The penalties are the same as under current law, except that the bill adopts a violation for failure to appear in connection with a violation.

- **Section 2** includes a conforming amendment to AS 12.25.030(b). It also changes the standard for a law enforcement officer to make an arrest without a warrant in certain cases from "reasonable cause" to "probable cause". The standard in AS 12.25.030(b) would then be the same as in subsection AS 12.25.030(a). Reasonable cause and probable cause are similar.

  Section 2 also allows a law enforcement officer to arrest a person for violation of conditions of release if the officer has probable cause to believe the person has violated conditions in connection with release under AS 12.30. Law enforcement supports this change because it avoids, for example, an officer having to get an arrest warrant for a person if the person's custodian reports that the person has violated his or her release conditions.

- **Section 3** adopts a new section that describes release procedures for a person charged with a crime. Although the procedures are similar to those provided under various sections of existing law, there are a few differences, which include:

  - Before the third and subsequent bail hearings, current law and the bill require that certain prerequisites are met – such as seven days elapsing between bail hearings unless certain other factors are present. Current law requires 48 hours notice to the prosecuting authority, and the bill requires the same notice, but it also requires 48 hours notice to any surety involved so that the surety has an opportunity to attend the hearing.

  - The bill specifically requires the person being released to sign a release agreement that describes the terms of the release and includes the person's promise to abide by the terms.

- The bill eliminates a provision in current law that allows a judicial officer to change, add to, or eliminate conditions of release at any time. The law already provides a process for asking the court to change conditions, and allowing a change at any time, without following the required procedures, has the potential of being unfair to the defendant, the prosecuting authority, or to the victim.

- **Section 4** rewrites the law addressing release before trial of a person charged with a crime. Proposed AS 12.30.011 adopts standards and conditions for release in general, and AS 12.30.016 adopts standards and conditions for release for specific crimes.

  - Proposed **AS 12.30.011** first adopts conditions that must he imposed on all persons released pending trial. They are very general – including a requirement that the person obey all laws, appear in court when ordered, and keep in contact with the person's attorney.

    1. Subsection (b) provides conditions that a court may impose on a person charged with a crime if, in the court's discretion the condition will reasonably assure the person's appearance and the safety of the victim, other persons, and the community. Many of these conditions are in current law. Others are included in federal bail law. Several were suggested by a retired judge who is doing contract work for the court system. There is also a general authorization for additional reasonable conditions.

    2. Subsection (c) describes the various circumstances that the court should consider in deciding what conditions are reasonable to impose on the person. These are similar to current law.

    3. Subsection (d) provides the evidentiary burdens that a court must apply in making a decision about the release of a person. Generally, the burden of proof is on the prosecuting authority to establish that particular conditions are reasonable to assure the defendant's appearance and the safety of the victim and others. However, the bill proposes a rebuttable presumption, that may be overcome by a preponderance of evidence, that no condition or combination of conditions will assure the defendant's appearance or the safety of the victim or others if (1) the defendant is charged with an unclassified felony, a class A felony, or a sexual felony; (2) the person is charged with a felony, has a previous conviction for felony, and less that five years have elapsed since his or her unconditional release for

the prior conviction; (3) the offense was committed while the defendant was on release for another offense; or (4) the charge is for a crime involving domestic violence, and the defendant has been convicted within the previous five years of a crime involving domestic violence.

- Proposed **AS 12.30.016** adopts conditions that may be imposed in particular cases. These conditions are in addition to the general conditions authorized under AS 12.30.011(a) and (b). Most of these additional conditions are found in current law.

  1. Subsection (b) provides additional conditions that may be imposed on persons charged with Title 04 violations such as selling alcohol without a license or bootlegging, and with drunk driving and refusal to submit to a breath test. These conditions include, for example, a judicial officer ordering a person to submit to a breath test when requested to do so by a law enforcement officer.

  2. Subsection (c) provides additional conditions that may be imposed on a person charged with violation of the drug laws, and include, for example, prohibiting the person from entering or remaining in a place where a controlled substance is being used, manufactured, grown, or distributed.

  3. Subsection (d) is a provision that was enacted in 2006, that adopts a mandatory requirement of $250,000 cash bond for a person charged with manufacturing methamphetamine, unless the defendant proves to the court that his or her role was only as an aider or abettor and that the defendant did not stand to gain financially from the offense.

  4. Subsection (e) adopts specific conditions for a person charged with stalking that is not a crime involving domestic violence. The conditions are similar to those in current law.

  5. Subsection (f) adopts specific conditions that a court may impose on a person charged with a sex offense. The conditions are similar to current law, except that it adds a condition that the court may order the defendant to have no contact with person under 18 years of age, except for contact made during the normal course of business in a public place. It requires the court, as does current law, to assure that the victims has been notified of the hearing or reasonable efforts to do so have been

made, and to consider the victim's comments in making a release decision.

- **Section 5** adopts standards for the appointment of a third-party custodian for a person released before trial. It requires a court to obtain information about the proposed custodian including the person's ties to the community and his or her relationship with the defendant. It also sets minimum standards for custodians such as requiring the person to be physically able to perform the duties of custodian, and requires the person to agree to report immediately if the defendant has violated conditions. The bill also prohibits a person from acting as third-party custodian under certain circumstances, such as if the person may be called as a witness in the case, or the person has recent charges or a conviction for violating the law.

- **Section 6** amends the statute addressing the general release conditions of a person charged with a crime involving domestic violence by conforming it to the language used in the newly adopted sections of the bill. It does not include a substantive change.

- **Section 7** amends the law that prohibits a court from allowing a person charged with a crime involving domestic violence from returning to the residence of the victim or to the residence of a person who has a protective order directed at the defendant. This prohibition was found to violate equal protection of the law in *Williams v. State*, 151 P.3d 460 (Alaska App. 2006). This section is in response to *Williams*, and would overturn it to the extent that it would prohibit a person from returning to the residence of the victim unless certain conditions were met. These include requiring that 20 days have elapsed since the arrest, the victim or petitioner consents to the return, the defendant does not have a prior conviction for a domestic violence crime against a person, and the defendant establish by clear and convincing evidence that the return to the residence does not pose a danger to the victim or petitioner.

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February 3, 2010

Senator Hollis French
Chair, Senate Judiciary Committee
Alaska State Capitol, Room 417
Juneau, Alaska 99801

Re: Senate Bill 252 – Bail Reform

Dear Senator French:

I am writing to respectfully request that you schedule Senate Bill 252 for a hearing in the Senate Judiciary Committee at your earliest convenience. SB 252 is one of several bills that the Governor has introduced to confront and help reduce the alarming and discouraging rate of sex offenses and crimes involving domestic violence in our state. This bill specifically relates to bail including bail in sex and domestic violence offenses.

This bill makes several important changes in Alaska's law relating to bail. In 1966 the Alaska Legislature enacted the Alaska Bail Act modeled after SB 1357, 89 Congress First Session. There have been only piecemeal revisions to this nearly 50 year old law. In 1984, the Federal government revised their bail statutes. This bill requires a person charged with a serious sex offense to prove that release conditions before trial will protect the victim and the public. It adopts standards for persons who may be appointed as third party custodians for the person released on bail. The bail prohibits a person found guilty of a serious sex offense from being released before sentencing or during an appeal of a conviction. It protects victims of domestic violence by setting standards that the court must find before allowing a perpetrator of domestic violence to return to the victims' residence. Additionally, it allows more time between a defendant's arrest and first appearance in court so that the police can investigate more fully, so that the prosecutor can make informed charging decision, present of better information and bail arguments in court and more time to contact the victim so he or she can appear at the bail hearing.

A sectional analysis is attached that describes each provision of the bill.

Thank you for your consideration of this request.

Sincerely,

Daniel S. Sullivan
Attorney General

DSS:ADC: sf

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