HB

296

<TARGET><BILL>HB 296</BILL><SUBJECT>HB
296</SUBJECT><COMM>SJUD27</COMM></TARGET>

ALASKA STATE LEGISLATURE
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HOUSE BILL 296 ~ Sponsor Statement
House Judiciary Committee

"An Act relating to service of process on prisoners; relating to the crime of escape; relating to the definition of 'correctional facility'; amending Rule 4, Alaska Rules of Civil Procedure; and providing for an effective date."

HB 296, addresses ambiguities that have risen from recent court cases involving prisoner issues. It clarifies the permissible method of personally serving process on incarcerated prisoners. It also clarifies the second and fourth degree escape statutes. The bill does three things;

1. For the purpose of service of process on state prisoners HB296 references the definition of "correctional facility" in AS 33.30.901 to clarify the manner in which incarcerated prisoners can be served civilly while incarcerated. The bill also makes it clear that the statute setting for the procedure for personally serving incarcerated persons, AS 09.05.030, is an indirect amendment to Alaska Civil 4. These changes will ensure there is a standardized legal process for serving process on prisoners. It will cure the problem in Hertz v. Carothers 225 P.3d 571 (Alaska 2010), that caused the Alaska Supreme Court to hold that prison officials were not peace officers who could serve legal summons and complaints on incarcerated prisoners.

2. This bill also defines what constitutes the crime of escape in the second degree. The result in Bridge v. State 258 P.3d 923 (Alaska 2011) was suggested for Legislative review from the Legal Services Annual Report (Dec. 2011). Bridge, was charged with driving with a suspended license, a class A misdemeanor. He could not post bail and was therefore held in jail. He was then transferred to a halfway house. He left the facility without permission and was caught. As a result of the escape he was charged with escape in the second degree, a class B felony. The Alaska Court of Appeals found that although Bridge was in the custody of the Department of Corrections, he was not "confined", because the halfway house did not have staff whose duty it was to prevent prisoners from leaving. This bill defines escape in the second degree as being from a "secure correctional facility" while under detention for a misdemeanor. Further, a "secure correctional facility" is defined as using construction or security fixtures or officers or other persons that are authorized to prevent persons under detention from departing such facilities without unlawful authorization. Other escapes by misdemeanants are fourth degree escapes, a class A misdemeanor. This bill will

codify the holding in Bridge and will avoid future questions as to what constitutes escape in the second degree.

3. This bill deletes the repeal of provisions passed by the legislature in 2007, AS 12.55.100(f) and AS 33.16.150(g), requiring electronic monitoring as a special condition of probation or parole for offenders whose offense was related to a criminal street gang. Repealing the December 31, 2012 sunset date will continue to provide the court system and the Department of Corrections an important tool to keep neighborhoods safe from gang related crime.

This bill provides clearer guidelines for civil service of process of persons under the custody of the Department of Corrections removing question raised in Hertz v. Carothers 225 P.3d 571 (Alaska 2010). The bill refines escape in the second degree answering questions from Bridge v. State 258 P.3d 923 (Alaska 2011). This bill is necessary to avoid future litigation that may arise involving these issues.

Please contact Rep. Gruenberg's legislative aides, Miles Brookes or Ted Madsen, at 465-4940 with any questions.

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HB 296 - Crime of Escape & Definition of Correctional Facility

Sectional Analysis for CS for HB296 (27-LS1199\E)

Section 1[1] adds a new subsection that defines a correctional facility for the purpose of AS 09.05.050 as a "prison, jail, camp farm, halfway house, group home, or other placement designated by the commissioner for the custody, care and discipline of prisoners (AS 33.30.901(4).

Section 2[2] defines that escape from a "secure correctional facility" while under official detention for a misdemeanor is escape in the second degree, a class B felony.

Section 3[3] adds a new subsection to AS 11.56.310 defining a secure correctional facility.

Section 4[4] repeals Section 3, ch.27, SLA 2007

Section 5[5]amends Rule 4, Alaska Rules of Civil Procedure to reflect changes indirectly made in section 1 of this act.

Section 6[6]states that changes to sections 2 and 3 apply to offenses on or after the effective date of this act.

Section 7[7]provides for an immediate effective date.

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[1] Page 1, Lines 5-7
[2] Page 1, Lines 8-14 through Page 2, Lines 1-9
[3] Page 2, Lines 10-18
[4] Page 2, Lines 19-23
[5] Page 2, Lines 24-29
[6] Page 2, Lines 30-31 through Page 3, Lines 1-5
[7] Page 3, Line 6

225 P.3d 571
Supreme Court of Alaska.

Sidney HERTZ, Appellant,
v.
Dan CAROTHERS, Appellee.

No. S-13245. | Feb. 12, 2010. |
Rehearing Denied March 10, 2010.

Synopsis

Background: Prisoner's civil rights action against State was dismissed and Superior Court awarded attorney's fees to the State. State attempted to execute judgment against prisoner trust account. Prisoner objected. The Superior Court, First Judicial District, Juneau, Patricia A. Collins, J., held that prisoner was properly served, trust account was subject to execution, and that State's attorney should not be sanctioned. Prisoner appealed.

Holdings: The Supreme Court, Christen, J., held that:
1 State did not comply with notice requirements, but prisoner was not prejudiced;
2 statutes governing prisoner trust accounts did not conflict with one another;
3 statute allowing disbursement of prisoner trust accounts in order to satisfy judgments was not an ex post facto law;
4 statute did not violate contract clause; and
5 attorney's failure to comply with notice requirements did not warrant sanctions.

Affirmed in part, reversed in part.

West Headnotes (13)

1 **Appeal and Error**
Cases Triable in Appellate Court

Supreme Court reviews issues of statutory interpretation, as well as questions about the constitutionality of statutes, de novo.

2 **Appeal and Error**
Costs and Allowances

Decisions whether to sanction attorneys are reviewed for abuse of discretion.

3 **Appeal and Error**
Proceedings Preliminary to Trial

A judge's refusal to recuse him- or herself is reviewed under the abuse of discretion standard.

4 **Execution**
Notice of levy

State did not comply with notice requirements in rule governing permissible methods for serving a summons in State's action seeking to execute judgment against prisoner trust account, but failure did not prejudice prisoner; prison guard who delivered documents to prisoner was not a peace officer or person specially appointed to serve process with the meaning of the rule, but prisoner had actual notice. Rules Civ.Proc., Rule 4.

5 **Execution**
Property in custody of agent or depositary

Prisons
Money and finances; inmate accounts

Prisons
Wages or earnings

Statutes
Nature and subject-matter of statute

Statute providing for prisoners to be compensated for their work in prison and wages to be placed in trust account did not conflict with statute allowing for disbursement of prisoner trust account to satisfy a judgment; statutes were not criminal statutes, as prisoner asserted, and therefore did not have to be strictly construed against the State. AS 09.38.030(f)(5), 33.30.201(d).

6 **Constitutional Law**
Sentencing and Imprisonment

Execution
Property in custody of agent or depositary

Statute allowing disbursement of prisoner trust accounts in order to satisfy judgments was not an ex post facto law, where statute did not criminalize behavior that was previously not

criminal and it had no bearing on the defense of any crime. U.S.C.A. Const. Art. 1, § 10, cl. 1; AS 09.38.030(f)(5).

7 **Constitutional Law**
Punishment in general
Constitutional Law
Criminal Proceedings

Any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with a crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto. U.S.C.A. Const. Art. 1, § 10, cl. 1.

8 **Constitutional Law**
Contracts with states in general
Execution
Property in custody of agent or depositary

Statute allowing disbursement of prisoner trust accounts in order to satisfy judgments did not violate contract clause; statute did not impair prisoners' ability to seek enforcement of the *Cleary* consent decree which set minimum standards for conditions of prisoner confinement and procedures for prisoners to file grievances for non-compliance with decree. U.S.C.A. Const. Art. 1, § 10, cl. 1; Const. Art. 1, § 15; AS 09.38.030(f)(5).

9 **Judgment**
Construction and operation of judgment

The *Cleary* consent decree sets minimum standards for conditions of prisoner confinement including food, medical care, and dental care and provides procedures for prisoners to file grievances for non-compliance with the decree.

10 **Prisons**
Access to Courts and Public Officials

An inmate's right to be free of state interference with his right of access to the court system is not absolute.

11 **Constitutional Law**
Prisoners and pretrial detainees

A statute is constitutional if it does not impermissibly interfere with, or burden, an inmate's right of access to the court and is sufficiently related to a legitimate government interest.

12 **Attorney and Client**
Liability for costs; sanctions

State's counsel's failure to comply with notice requirements in State's action to execute judgment against prisoner trust account did not warrant sanctions against counsel under civil rule of procedure or rules of professional conduct; there was no evidence that State's counsel intended to deprive prisoner of his right to notice. Rules Civ.Proc., Rules 4, 95(b).

13 **Appeal and Error**
Disqualification of judge

Prisoner waived for appellate review his argument that trial judge should have recused herself in State's action to execute a judgment against prisoner trust account, where prisoner failed to move for disqualification in the superior court.

Attorneys and Law Firms

***572** Sidney R. Hertz, pro se, Seward.
Marilyn J. Kamm, Assistant Attorney General, Richard A. Svobodny, Acting Attorney General, Juneau, for Appellee.

Before: EASTAUGH, WINFREE and CHRISTEN, Justices.

Opinion

OPINION

CHRISTEN, Justice.

I. INTRODUCTION

This is the second time we have addressed Sidney Hertz's objections to the State's attempt to execute a judgment against his prisoner trust account. In *Hertz v. Carothers* [1] (*Hertz I*), Hertz challenged the State's right to execute on his prisoner trust account to satisfy a judgment for Alaska Civil Rule 82 attorney's fees entered after Hertz lost a prisoner civil rights lawsuit against the State. There, we affirmed the validity of AS 09.38.030(f) which excludes prisoners from an exemption for low wage earners. Following *Hertz I,* the State again levied on Hertz's trust account to satisfy the remainder of its judgment. Hertz now challenges the levy on the grounds that (1) he was not served properly; (2) "ambiguities" between AS 09.38.030(f) and AS 33.30.201(d) should be resolved in his favor; (3) AS 09.38.030(f)(5) is an *ex post facto* law; and (4) AS 09.38.030(f)(5) violates the contract clauses of the Alaska and United States Constitutions. We reverse the court's ruling that Hertz was properly served but affirm the court's rulings that Hertz's prisoner trust account is subject to execution and that the State's attorney should not be sanctioned. We also hold that AS 09.38.030(f) is not an *ex post facto* law and that it does not violate the contract clause of the Alaska Constitution or the contract clause of the United States Constitution.

II. FACTS AND PROCEEDINGS

Hertz is an inmate at Spring Creek Correctional Center ("SCCC"). In July 2004 he sued the Alaska Department of Corrections ***573** and several of its employees for alleged civil rights violations. [2] The superior court dismissed Hertz's civil rights suit and awarded Rule 82 attorney's fees of $3,225 to the State. [3] The fee award was later reduced to a judgment. [4] When the State attempted to execute against Hertz's prisoner trust account to satisfy the judgment, Hertz claimed exemptions under AS 09.38.030(a) and (b). [5] Specifically, he argued that his wages were exempt from execution because they fell below the statutory minimum in AS 09.38.030. [6] Alternatively, he argued that the statute was invalid under several different theories. [7] In our January 2008 decision, *Hertz I,* we affirmed the superior court's order rejecting Hertz's claims of exemption. [8] We also affirmed the validity of AS 09.38.030(f). [9]

On March 14, 2008, the State again sought to execute against Hertz's prisoner account to satisfy the remaining portion of its judgment. The State's service instructions directed the Alaska State Troopers (Judicial Services) to serve the writ of execution and creditor's affidavit on Superintendent Turnbull at SCCC. The service instruction form contained a separate section entitled "Instructions for Serving Notices on the Debtor," which directed that a copy of the State's creditor's affidavit, notice of levy and sale of property, notice of right to exemptions, claim of exemptions form, and judgment debtor booklet be served on Hertz. On June 12, 2008, a trooper served the writ of execution on Superintendent Turnbull. The trooper did not serve any documents on Hertz.

It is undisputed that Hertz had actual knowledge of the State's attempt to execute against his prisoner trust account by June 17, 2008, when he sent a letter to the superior court challenging the State's "theft" of his money based in part on lack of notice. When the State's counsel realized that Hertz had not been served, she faxed the documents that should have been served on Hertz to SCCC. A prison guard personally delivered them to Hertz on June 19, 2008.

Hertz responded to the faxed documents by filing several claims of exemption in which he argued that (1) improper service voids the levy; (2) "ambiguities" between AS 33.30.201(d)-which provides that the "primary purpose" of the prisoner trust account is to make funds available for prisoners' use at the time of release-and AS 09.38.030(f)(5)-which allows the execution of judgments against prisoner accounts-must be construed against the government; and (3) $185 in his trust account was not subject to execution because he had received it in the form of gifts from family and friends and the money should have been retained by the commissioner pursuant to AS 33.30.201(d).

On August 5, 2008, the superior court denied Hertz's claims of exemption, citing *Hertz I.* The superior court reasoned that our court "has ruled that a prisoner's trust account may be subject to execution," and noted that there is no exception in the statutory scheme for money acquired by gift. Finally, the court rejected Hertz's argument that the errors in the State's service should negate the writ because "there is no prejudice by [the] delayed service and no showing of a knowing violation of the statute." The superior court rejected Hertz's motion for reconsideration.

Hertz appeals.

III. STANDARDS OF REVIEW

1 2 3 We review issues of statutory interpretation, as well as questions about the constitutionality of statutes, de novo.[10] "Decisions whether to sanction attorneys are reviewed *574 for abuse of discretion."[11] "A judge's refusal to recuse him- or herself is reviewed under the abuse of discretion standard."[12]

IV. DISCUSSION

A. The Execution on Hertz's Prisoner Trust Account Was Invalid Because the State Failed To Properly Serve Him.

4 The State argues that it was in technical compliance with AS 09.38.085(a)(1) because it served Hertz with a notice of levy, a claim of exemptions form, a creditor's affidavit, and a judgment debtor's handbook. But the State misses the crux of Hertz's argument. Hertz's challenge is not to the sufficiency of the documents served; he challenges the State's method of service.

Several statutes and rules describe the notice the State was required to provide Hertz before levying on his trust account. Alaska Statute 09.38.080(c) requires that "[b]efore, at the time of, or within three days after the levy, the creditor shall serve on the individual [debtor] a notice under AS 09.38.085." Alaska Statute 09.38.085 describes the content of the required notices, and AS 09.38.500, the definitions section of the Alaska Exemptions Act, specifies the method for serving the notices. The term "serve notice" in AS 09.38.080(c) means "to give the person to be served a written personal notice in the same manner a summons in a civil action is served, or to mail the notice to the person's last known address by first-class mail and by using a form of mail requiring a signed receipt."[13] Hertz was served personally, not by mail, so we turn to the civil rules.

Civil Rule 4 identifies the permissible methods for serving a summons in a civil action. It requires service to "be made by a peace officer, by a person specially appointed by the Commissioner of Public Safety for that purpose or, where a rule so provides, by registered or certified mail." The rule defines "peace officer" as "any officer of the state police, members of the police of any incorporated city, village or borough, United States Marshals and their deputies, other officers whose duty it is to enforce and preserve the public peace, and ... persons specially appointed." Special appointments "shall only be made by the Commissioner of Public Safety after a thorough investigation of each applicant."[14]

After the State's counsel learned that the trooper had failed to serve Hertz as instructed, she faxed the documents to SCCC. A prison guard delivered them to Hertz on June 19, 2008. But the State did not argue, and the record does not show, that the prison guard who served Hertz was a "peace officer" or a person "specially appointed to serve process" within the meaning of Civil Rule 4. We agree with the superior court that the delay in service was not prejudicial to Hertz, but the State was still required to use an authorized method of service. The record does not show that the State complied with Civil Rule 4.[15]

We are mindful that our ruling regarding service may appear to elevate form over substance because Hertz had actual knowledge of the levy by June 16, 2008. But we are loathe to carve out exceptions to the important rules for service of process. These rules enable courts to verify that service has actually been made; they are vital to ensuring that litigants receive the due process to which they are entitled, and they are broadly applicable. Creating an exception merely to avoid requiring the State to properly serve Hertz is fraught with precedential danger. Such an exception, though seemingly narrow, could be applied in future cases to relax the notice requirements for litigants *575 who might not have received the actual notice Hertz enjoyed. This danger would be especially acute in cases involving requests for entry of default judgment. Given the serious consequences of execution, i.e., the involuntary confiscation of a debtor's property, we must insist on strict compliance with the legislature's statutory scheme and the service requirements of Civil Rule 4.[16]

B. Alaska Statutes 33.30.201(d) and 09.38.030(f)(5) Do Not Conflict and Are Not Ambiguous.

5 Alaska Statute 33.30.201(d) provides for prisoners to be compensated for their work in prison and for their wages to be placed in a trust account for the "primary purpose" of being available to them at the time of release. But AS 09.38.030(f) provides that "[a]ll money in an incarcerated person's account at a correctional facility is available for disbursement under a notice of levy under this subsection ... (5) to satisfy other judgments entered against a prisoner in litigation against the state." Hertz argues that the "primary purpose" language of

AS 33.30.201(d) conflicts with the disbursement scheme in AS 09.38.030(f). Citing this "ambiguity" Hertz argues that "[a]mbiguities in criminal statutes must be narrowly read and construe[d] strictly against the government."

In *Hertz I,* we upheld the state's ability to execute on prisoner accounts despite an exemption for low-wage earners and those who are paid semi-monthly.[17] We noted that AS 09.38.030(f)(5) specifically eliminates the low-wages exemption when low wages are paid to prisoners.[18]

Hertz's present challenge to AS 09.38.030(f)(5) is technically barred by the doctrine of res judicata;[19] he was required to raise all of his challenges to the statute in *Hertz I.*[20] But Hertz's argument is unavailing even on the merits. Alaska Statute 33.30.201 states that prisoner wages shall be disbursed pursuant to a specified order of priority and that remaining funds are to be given to the prisoner when he or she is released, subject to exceptions. After all disbursements are paid in the statutorily required order of priority, subsection .201(f) states that remaining funds are subject to lien, attachment, garnishment, execution, or similar procedures to encumber money or property. This provision does not conflict with AS 09.38.030(f)(5). Alaska Statutes 33.30.201(c) and (f) identify the priorities for which a prisoner's trust account can be invaded, and AS 09.38.030(f) explains that prisoners do not enjoy the benefit of the exemption for earnings and liquid assets enunciated in AS 09.38.030 generally. Both statutes contemplate and accommodate the execution and garnishment of prisoner trust accounts.

To the extent that Hertz argues that these statutes must be construed against the State because they are "criminal statutes," he is mistaken. The fact that these statutes govern the administration of prisoner trust accounts does not make them "criminal statutes." Hertz has cited no authority and we have found none supporting his assertion that statutes should be strictly construed against the State merely because they apply to convicted felons. Alaska Statutes 09.38.030 and 33.30.201 are civil statutes, they are not ambiguous, and they do not conflict. After all disbursements are made from a prisoner's trust account pursuant to the statute's order of priority, all remaining funds are subject to execution.

***576 C. Alaska Statute 09.38.030(f)(5) Is Not an *Ex Post Facto* Law.**

6 Hertz asserts that AS 09.38.030(f)(5) is an *ex post facto* law. The basis for this argument is that this statute was passed in 1995, after the State entered into a consent decree to resolve litigation challenging the conditions of confinement for Alaska prisoners.[21] Hertz argues that the adoption of AS 09.38.030(f)(5) in the wake of the *Cleary* consent decree creates the appearance that AS 09.38.030(f)(5) "was enacted solely for the purpose of circumventing the *Cleary* [Final Settlement Agreement and Order]."

7 We have adopted the United States Supreme Court's view that:

> any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission; or which deprives one charged with a crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto.*[22]

Alaska Statute 09.38.030(f)(5) does not criminalize behavior that was previously not criminal and it has no bearing on the defense of any crime; it is not an *ex post facto* law.

D. Alaska Statute 09.38.030(f)(5) Does Not Violate the Contract Clause.

8 Hertz argues that AS 09.38.030(f)(5) violates the contract clause of the United States Constitution and the contract clause of the Alaska Constitution by "substantial[ly] impair[ing]" his contractual right to allege noncompliance with the *Cleary* consent decree. He supports this argument by pointing out that "this Court has admitted that AS 09.38.030(f)(5) was to discourage prisoner litigation." Our court has explained:

> Article I, section 15 of the Alaska Constitution provides: "No law impairing the obligation of contracts ... shall be passed." Because the language of the contract clause of the Alaska Constitution is nearly identical to that of the federal Contract Clause, we apply the same two-part analysis to alleged violations of the Alaska and federal contract clauses. We first ask "whether the change in state law has operated as a substantial impairment of a contractual relationship." If there is a substantial impairment, we then examine "whether the impairment is reasonable and necessary to serve an important public purpose."
>
> ....
>
> Under the first prong of the contract clause test, we consider: (1) whether there is a contractual relationship, (2)

whether the law impairs the contractual relationship, and (3) whether the impairment is substantial.[[23]]

9 The *Cleary* consent decree sets minimum standards for conditions of prisoner confinement including food, medical care, and dental care. It also provides procedures for prisoners to file grievances for non-compliance with the decree.[24] After exhausting the "administrative grievance procedure," an inmate may file suit in superior court. In this case, the State does not challenge Hertz's assertion that the *Cleary* consent decree established a contractual relationship between the State and inmates in the custody of the State of Alaska,[25] arguing instead that even if such a contractual relationship exists, AS 09.38.030(f) does not impair it. We agree; AS 09.38.030(f) does not impair prisoners' ability to seek enforcement of the *Cleary* consent decree. We do not need to decide ***577** whether the *Cleary* consent decree constitutes a binding contract.

10 11 Civil Rule 82 provides for the award of attorney's fees to the prevailing party of a civil lawsuit. Civil Rule 82 was in effect when the *Cleary* consent decree was entered, November 1, 1990. The consent decree addresses certain conditions of confinement; it does not immunize prisoners from attorney's fee awards or exempt inmate trust accounts from execution to satisfy fee awards. Alaska Statute 09.38.030(f)(5) allocates some of the State's cost of defending lawsuits to the non-prevailing prisoner, thereby discouraging frivolous claims.[26] "An inmate's right to be free of state interference with his right of access to the court system is not absolute."[27] A statute is constitutional if it "does not impermissibly interfere with, or burden, an inmate's right of access to the court and is sufficiently related to a legitimate government interest."[28] Alaska Statute 09.38.030(f)(5) does not prevent or stifle a prisoner's ability to pursue legitimate claims against the government.

The specter of Rule 82 fees tempers the litigiousness of most civil litigants; we see no reason to make a special exception for inmates. Alaska Statute 09.38.030(f)(5) merely reflects the State's interest in discouraging frivolous prisoner litigation, a legitimate goal we have repeatedly upheld.[29] We are not convinced that permitting the State to collect judgments from prisoner trust accounts impairs the right of prisoners to seek enforcement of the *Cleary* consent decree,[30] and we hold that AS 09.38.030(f)(5) does not violate the Alaska or federal prohibition against impairment of contracts.

E. There Was No Misconduct by the State's Attorney.

12 Hertz asserts that the superior court erred by failing to sanction the State's counsel under Professional Conduct Rule 95(b) for (1) failing to have him served by a peace officer; and (2) for lying because she "never intended to serve Hertz with the Writ."

The superior court correctly decided that Hertz's claims of attorney misconduct are meritless. There is no evidence that the State's counsel acted inappropriately during the course of her efforts to collect the State's judgment. At most, there is evidence that a mistake was made at the time of service. Ironically, Hertz's allegation of misconduct arises from counsel's rush to arrange for personal delivery of the documents that would notify Hertz of his right to claim exemptions; the State's attorney likely faxed the documents to SCCC for immediate delivery in order to comply with AS 09.38.080(c), which requires the debtor to receive notice "[b]efore, at the time of, or within three days after the levy."

Even though the State failed to comply with Civil Rule 4, there is no evidence that the State's counsel intended to deprive Hertz of his right to notice. Hertz admits that he received the relevant documents by fax just days after he learned of the levy and apparently shortly after the State's attorney discovered the mistake. The superior court appropriately declined to sanction the State's attorney.

F. Hertz Waived His Argument that Judge Collins Should Have Recused Herself Because of Apparent Bias Against Prisoners.

13 Hertz argues that the superior court judge created an appearance of impropriety by ruling on his claim of exemptions before receiving his response to the State's objections. ***578** [31] We see no evidence of any bias in the record. And Hertz waived the issue in any event by failing to move for disqualification in the superior court.[32]

IV. CONCLUSION

We REVERSE the court's ruling that Hertz was adequately served, but hold that AS 33.30.201(d) and AS 09.38.030(f)(5) do not conflict and are not ambiguous, that AS 09.38.030(f)(5) is not an *ex post facto* law, and that AS 09.38.030(f)(5) does not violate the contract clause of the Alaska Constitution or United States Constitution. We AFFIRM the superior court's rulings that Hertz's trust account is subject to execution and that the State's attorney should not be sanctioned.

CARPENETI, Chief Justice and FABE, Justice, not participating.

Footnotes

1 174 P.3d 243 (Alaska 2008).

2 *Id.* at 245.

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Hertz v. Carothers,* 174 P.3d 243, 245 (Alaska 2008).

8 *Id.*

9 *Id.* at 244.

10 *C.J. v. State, Dep't of Corr.,* 151 P.3d 373, 377 (Alaska 2006) (citing *State v. Alaska Civil Liberties Union,* 978 P.2d 597, 603 (Alaska 1999); *Boone v. Gipson,* 920 P.2d 746, 748 (Alaska 1996)).

11 *Hertz,* 174 P.3d at 245 (citing *In re Schmidt,* 114 P.3d 816, 819 (Alaska 2005)).

12 *Mustafoski v. State,* 867 P.2d 824, 832 (Alaska App.1994) (citing *Blake v. Gilbert,* 702 P.2d 631, 640 (Alaska 1985); *Perotti v. State,* 806 P.2d 325, 327 (Alaska App.1991)).

13 AS 09.38.500(14).

14 Alaska R. Civ. P. 4(c)(3).

15 The State's reliance on the substantial compliance provision in AS 09.38.085(c) is misplaced. That provision excuses errors in the notices themselves, not errors in the physical delivery of the forms.

16 *See Beery v. Browning,* 717 P.2d 365, 367 n. 8 (Alaska 1986).

17 *Hertz v. Carothers,* 174 P.3d 243, 246 (Alaska 2008).

18 *Id.*

19 *See Plumber v. Univ. of Alaska Anchorage,* 936 P.2d 163, 166 (Alaska 1997) ("The doctrine of *res judicata* as adopted in Alaska provides that a final judgment in a prior action bars a subsequent action if the prior judgment was (1) a final judgment on the merits, (2) from a court of competent jurisdiction, [and] (3) in a dispute between the same parties ... about the same cause of action.").

20 *Calhoun v. Greening,* 636 P.2d 69, 72 (Alaska 1981) ("[A] fundamental tenet of the res judicata doctrine is that it precludes relitigation between the same parties not only of claims that were raised in the initial proceeding, but also of those relevant claims that could have been raised then.").

21 *Cleary v. Smith,* No. 3AN-81-5274 Ci., Final Settlement Agreement and Order (Alaska Super., September 21, 1990).

22 *State v. Anthony,* 816 P.2d 1377, 1378 (Alaska 1991) (quoting *Dobbert v. Florida,* 432 U.S. 282, 292, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977)).

23 *Hageland Aviation Serv., Inc. v. Harms,* 210 P.3d 444, 451-52 (Alaska 2009) (internal footnotes and citations omitted).

24 *Cleary v. Smith,* No. 3AN-81-5274 Ci., Final Settlement Agreement and Order (Alaska Super., September 21, 1990).

25 *See Hertz v. State, Dep't of Corr.,* --- P.3d ----, Op. No. 12842 at n. 33, 2010 WL 53112 (Alaska, January 8, 2010) (noting dicta in *Rathke v. Corr. Corp. of Am.,* 153 P.3d 303, 311 (Alaska 2007) that "the FSA 'is an enforceable contract between Alaska inmates and the state.' ")

26 *Hertz v. Carothers,* 174 P.3d 243, 247 (Alaska 2008).

27 *Brandon v. Corr. Corp. of Am.,* 28 P.3d 269, 277 (Alaska 2001) (quoting *Mathis v. Sauser,* 942 P.2d 1117, 1121 (Alaska 1997)).

28 *Id.*

29 *See Hertz,* 174 P.3d at 248; *Brandon,* 28 P.3d at 277 (affirming the validity of a statute requiring prisoners to pay a portion of filing fees based on ability to pay).

30 *Cf. Hageland Aviation Serv., Inc. v. Harms,* 210 P.3d 444, 453 ("Chapter 19 substantially impaired the overtime compensation provision of the parties' employment agreement when Chapter 19 'totally eliminated' the pilots' claims for unpaid overtime wages.").

31 Judge Collins corrected herself by granting Hertz's motion for reconsideration and reviewing Hertz's response to the State's objections.

32 *See Brandon v. Corr. Corp. of Am.,* 28 P.3d 269, 280 (Alaska 2001) ("A party may not raise an issue for the first time on appeal."). Our court uses "independent judgment when determining whether an issue has been waived below due to inadequate briefing."

Lauth v. State, 12 P.3d 181, 184 (Alaska 2000) (citing *Wilkerson v. State, Dep't of Health & Soc. Servs., Div. of Family & Youth Servs.,* 993 P.2d 1018, 1021 (Alaska 1999)).

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258 P.3d 923
Court of Appeals of Alaska.

Wendell D. BRIDGE, Appellant,
v.
STATE of Alaska, Appellee.

No. A–10176. | Aug. 5, 2011.

Synopsis

Background: Defendant, who left halfway house without permission while awaiting trial on misdemeanor charge, was convicted in the Superior Court, Fourth Judicial District, Fairbanks, Michael A. MacDonald, Randy M. Olsen, JJ., of second-degree felony escape. He appealed.

Holdings: The Court of Appeals, Mannheimer, J., held that:
1 jury instruction defining term "correctional facility" was improper, and
2 retrial of defendant would not violate double jeopardy.

Reversed.

Bolger, J., filed dissenting opinion.

West Headnotes (2)

1 **Escape**
Nature and elements of offenses in general

For purposes of interpreting the second-degree escape statute, the term "correctional facility," which is statutorily defined as "premises used for the confinement of persons under official detention," applies only to situations where staff at the facility have a duty to physically prevent inmates from leaving without permission, and not to situations where the facility simply houses defendants who were placed there by the Department of Corrections pending their trial or sentencing. AS 11.56.310, 11.81.900(b)(9).

2 **Double Jeopardy**
Particular grounds for relief

Retrial of defendant on charge of second-degree escape would not violate double jeopardy based on trial court's failure to properly instruct jury on term "correctional facility," as required to properly convict defendant of second-degree escape; if on retrial, the State were to believe that it would be unable to establish that halfway house defendant left without permission qualified as a "correctional facility," then the State could ask the trial court to enter judgment against defendant on lesser offense of fourth-degree escape under statute which prohibited any act of "remov[ing] oneself from official detention for a misdemeanor." U.S.C.A. Const.Amend. 5; AS 11.56.310, 11.56.330(a)(1).

Attorneys and Law Firms

***924** Michael Schwaiger, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant.
Anne D. Carpeneti, Assistant Attorney General, Criminal Division Central Office, Juneau (brief), Timothy W. Terrell, Assistant Attorney General, Office of Special Prosecutions and Appeals, Anchorage (oral argument), and Daniel S. Sullivan, Attorney General, Juneau, for the Appellee.

Before: COATS, Chief Judge, and MANNHEIMER and BOLGER, Judges.

Opinion

OPINION

MANNHEIMER, Judge.

This appeal requires us to clarify the meaning of the term "correctional facility" for purposes of the second-degree escape statute, AS 11.56.310. Under subsection (a)(1)(A) of this statute, a person commits the felony of second-degree escape if they unlawfully remove themselves "from a correctional facility" while they are under official detention for any crime, even a misdemeanor.

The term "correctional facility" is defined in AS 11.81.900(b)(9) as "premises ... used for the confinement of persons under official detention". The question posed in this appeal is whether the word "confinement" is equivalent to "residence" or "placement"—so that the term "correctional facility" would encompass *any* facility or residence where a prisoner has been ordered to remain by the Department of Corrections. Bridge argues that "confinement" has a narrower meaning

—that it applies only when a prisoner's mandated residence at a particular facility is physically enforced by guards and restraints.

For the reasons explained in this opinion, we agree with Bridge that, at least for purposes of interpreting the second-degree escape statute, the phrase "premises used for the confinement of persons under official detention" must be given a narrower meaning than "residence" or "placement"—that it applies only to situations where a prisoner's residence is physically enforced.

Underlying facts

The defendant in this case, Wendell D. Bridge, was charged with a misdemeanor (driving with a suspended license). Because Bridge was unable to make bail, he was remanded to the custody of the Department of Corrections pending his trial.

***925** Bridge was initially confined at the Fairbanks Correctional Center. However, when the Department of Corrections conducted their prisoner classification of Bridge, they concluded that he was eligible for placement at the Northstar Center, a halfway house operated by a private corporation in Fairbanks. The Northstar Center has a contract with the Department of Corrections for housing low-security misdemeanor defendants who are awaiting trial or sentencing. Pursuant to this contract, and pursuant to the Department of Corrections' classification decision, Bridge was placed at the Northstar Center.

Because Bridge was charged with a crime, was unable to make bail, and was in the legal custody of the Department of Corrections, he was under "official detention"—and he remained under official detention even after he was transferred to the Northstar Center. [1]

On New Year's Day 2005, Bridge left the Northstar Center without permission. The Northstar staff notified the police, and the district court later issued a warrant for Bridge's arrest. He was arrested some fifteen months later and charged with second-degree escape.

In the superior court, Bridge argued that the Northstar Center was not a "correctional facility", and thus his act of walking away from the Center did not constitute second-degree escape. To help resolve this controversy, the superior court held a hearing at which the parties presented evidence concerning Bridge's status at the Northstar Center and the types of security measures employed at the Center. Based on the evidence presented at this hearing, the superior court concluded that the Northstar Center would qualify as a "correctional facility" for purposes of the escape statute (assuming the jury viewed the evidence in the light most favorable to the State).

Later, at Bridge's trial, in keeping with this pre-trial ruling, the superior court instructed the jury that "a halfway house under contract with the Department of Corrections ... is a correctional facility for ... individuals placed there by [the Department] for purposes of confinement [awaiting trial or sentencing]." Because it was undisputed that Bridge walked away from the Northstar Center without permission and without justification, the jury convicted Bridge of second-degree escape.

In this appeal, Bridge renews his argument that the Northstar Center did not qualify as a "correctional facility" for purposes of the escape statute. If Bridge is correct, then his act of leaving the Northstar Center without permission did not constitute second-degree escape; instead, his action constituted the lesser offense of fourth-degree escape under AS 11.56.330(a)(1). (This statute prohibits *any* act of "remov[ing] oneself from official detention for a misdemeanor".)

This Court's decision in State v. Crosby

This Court's decision in *State v. Crosby,* 770 P.2d 1154 (Alaska App.1989), is the primary appellate court decision construing the term "correctional facility" for purposes of Alaska's second-degree escape statute. Both Bridge and the State discuss *Crosby* at length in their briefs. Accordingly, to meaningfully address the arguments in the parties' briefs, we must examine the *Crosby* decision in some detail.

The defendant in *Crosby* was a sentenced prisoner who was released from prison on furlough to a residential drug treatment program, Akeela House. [2] Shortly after Crosby arrived at this residential facility, he walked away. [3] The State charged Crosby with second-degree escape, alleging (in the words of the statute) that he removed himself "from a correctional facility while under official detention." [4] The superior court ruled that Akeela House was *not* a "correctional facility" ***926** for purposes of the escape statute, and the State then appealed. [5]

The term "correctional facility" is defined in AS 11.81.900(b); it means "[any] premises ... used for the confinement of persons under official detention". [6] In

Crosby, the State took the position that, under this definition, the term "correctional facility" applied to *any* facility utilized by the Department of Corrections to house prisoners.[7] But this Court rejected the State's reading of the statutory definition.

This Court's explanation of why we rejected the State's interpretation of the statute is lengthy and somewhat difficult to follow, but the salient point of our analysis was that the statutory definition of "correctional facility" does not encompass any and all premises used for the *placement* or *custody* of persons under official detention. Rather, the statute defines "correctional facility" as premises used for the *confinement* of persons under official detention. *Crosby,* 770 P.2d at 1155.

Because our criminal code contained no definition of "confinement", we engaged in a lengthy analysis of the potential meanings of this word in the context of an escape statute. We concluded that the concept of "confinement" seemed to focus "not so much [on] the extent to which [a person's] freedom is restrained[, but rather on] *the specific manner* in which the restraints are imposed and enforced". *Id.* at 1157 (emphasis added).

We then offered two different explanations of why Crosby's placement at the Akeela House residential treatment center did not constitute "confinement"—and, thus, why Akeela House was not a "correctional facility" for purposes of the second-degree escape statute. Our decision to offer two different explanations appears to stem from the fact that the trial court record did not offer a clear answer as to whether Akeela House employed security guards or utilized physical restraints or barriers to keep residents from leaving the premises without permission.

This Court's first explanation of why Crosby was not in "confinement" at Akeela House was that, even though the conditions of Crosby's furlough from prison required him to remain at Akeela House, this restraint on his liberty was not "imposed or enforced in ways that amount to actual confinement". *Ibid.* We noted that "there [was] no indication" Akeela House had armed guards, physical restraints or barriers, or other security measures to physically prevent Crosby from leaving. *Ibid.*

This Court's second explanation of why Crosby was not in "confinement" at Akeela House appears to be based on the alternate possibility that Akeela House did, in fact, use guards or physical restraints to prevent residents from leaving without permission. We declared that "[any such] restrictions that Akeela House [placed] on its residents" were imposed for the purpose of furthering its treatment plan, and not because Akeela House was the agent of the Department of Corrections for the purpose of "maintaining security over its prisoners". *Ibid.* "Thus," we concluded, "to the extent that Akeela House relies on restrictive measures amounting to actual confinement, [this] confinement is clearly not confinement by the state." *Ibid.*

This second rationale appears to be squarely predicated on the fact that Crosby was a *furloughed* prisoner—*i.e.,* someone who had been granted "an authorized leave of absence from actual confinement for a designated purpose and period of time". AS 33.30.901(9) (the definition of "furlough"). In other words, the Department of Corrections had affirmatively decided to relinquish physical custody of Crosby for the purpose of allowing him to participate in the residential drug treatment program at Akeela House. Under the terms of Crosby's furlough, he was obligated to participate in this residential treatment program—but the Department apparently trusted Crosby to do just that, and the Department took no steps (either directly, or through agreement with Akeela ***927** House) to physically confine Crosby to the treatment facility. Rather, in the words of AS 33.30.091(9), Crosby was on a "leave of absence from actual confinement".

In sum, our decision in *Crosby* appears to have been ultimately based on the fact that the defendant was on furlough at the time he engaged in his unauthorized departure from Akeela House. But in our discussion of this issue, we suggested that even when a person is under official detention and living at a residential facility, the person is not "confined" there, for purposes of the escape statute, unless (1) the person is required to reside at the facility, (2) the person's required residency is enforced by guards or by physical restraints on the person's ability to leave, and (3) the guards or physical restraints are used at the behest of, or under the agency of, the Department of Corrections for the purpose of maintaining security over its prisoners, rather than for the private purposes of the corporation or group that runs the facility.

We note that the Alaska Legislature has not enacted a statutory definition of "confinement", nor has the legislature altered the statutory definition of "correctional facility", since we decided *Crosby* in 1989.

Bridge's argument on appeal

In his brief to this Court, Bridge focuses on the portion of *Crosby* where we suggested that "confinement" hinges "not

so much [on] the extent to which [a person's] freedom is restrained[, but rather on] the specific manner in which the restraints are imposed and enforced". [8]

Bridge devotes the majority of his brief to a discussion of the lack of security measures at the Northstar Center. According to the testimony presented at the evidentiary hearing in this case, the Northstar Center is a "non-secure" facility, in that it does not have guards, or a security fence, or even surveillance cameras. Inmates wear their own clothes, they have their own money, and they are not locked inside the facility. The members of the Northstar staff do not carry weapons, and they are instructed not to try to physically restrain inmates who leave the premises.

Relying on the absence of guards and physical restraints at the Northstar Center, Bridge argues that the Northstar Center is not a "correctional facility" because he was not subjected to "confinement" in the sense of physical restraints on his freedom. The problem with Bridge's argument is that it hinges on a portion of *Crosby* that appears to be dictum.

As we explained above, the *Crosby* decision offered two different explanations of why Crosby's residence at Akeela House did not constitute "confinement". The first explanation —*i.e.,* the portion of *Crosby* that Bridge relies on—dealt with the fact that Akeela House *apparently* did not utilize guards or physical restraints to keep residents from leaving without permission. But the record was unclear on this point, so this Court offered a second, alternative explanation for why Crosby's residence at Akeela House did not constitute "confinement". And under this second explanation, it was *irrelevant* whether Akeela House used guards or physical restraints to maintain control of its residents. This Court stated that even if Akeela House *did* utilize guards or physical restraints to keep residents from leaving, this would not constitute "confinement" for purposes of the escape statute —because these guards and physical restraints were not employed at the behest of the Department of Corrections, but rather were employed for the private purposes of Akeela House. [9]

Under this second rationale, the question of whether (or to what degree) the defendant in *Crosby* was subjected to physical restraints on his liberty during his residence at Akeela House was moot. The answer to this question made no difference to this Court's decision. Thus, our discussion of what type of restraint might constitute "confinement" for purposes of the escape statute became dictum.

928 *The question of "confinement" revisited

Bridge was not on furlough at the Northstar Center. That is, unlike the defendant in *Crosby,* no one had authorized Bridge to embark on a "leave of absence from actual confinement". Rather, Bridge was a misdemeanor defendant who was awaiting trial, and who had been remanded to the custody of the Department of Corrections because he was unable to make bail. Because of this, Bridge's case requires us to re-examine the question of what constitutes "confinement" for purposes of the escape statute.

The State's main argument in this appeal is that Bridge should be deemed to have escaped from "confinement" because the Department of Corrections placed Bridge at the Northstar Center in lieu of housing him at the Fairbanks Correctional Center. The State points out that Bridge knew that he was legally obligated to remain at the Northstar Center: Bridge was a prisoner who was being held in custody awaiting his trial, and he remained a prisoner even though he had been granted the benefit of waiting for his trial at a non-prison facility.

The State's description of Bridge's status is correct, but the State's argument is essentially the same one we rejected in *Crosby.* In *Crosby,* the State argued that the term "correctional facility" applied to *any* facility utilized by the Department of Corrections to house prisoners. [10] But as this Court noted in *Crosby,* the statutory definition of "correctional facility" does not encompass any and all premises used for the *placement* or *custody* of persons under official detention. Rather, the statute defines "correctional facility" as premises used for the *confinement* of persons under official detention. *Crosby,* 770 P.2d at 1155. Thus, we must decide whether the legislature intended the word "confinement" to mean something more specific or limited than "placement" or "custody".

One basic difficulty in answering this question is the fact that the word "confinement", like the word "convicted", can mean different things, depending on the context. [11]

For example, AS 33.30.065 authorizes the Department of Corrections to allow a prisoner to serve their term of imprisonment, or to serve their period of temporary commitment while awaiting trial, by living at home under electronic monitoring. One might speak of these prisoners as being "confined" to their residence, even though no one is

guarding them, and even though they are permitted to leave their home for various authorized purposes.

But as we noted in *Crosby,* the commentary to the draft provisions of our current escape statutes suggests that the word "confinement" was being used in a more restrictive sense—the sense of actual physical restraints placed on a person's movement, enforced by officers whose duty is to keep the person from leaving without permission:

> [T]he tentative draft commentary to AS 11.56.310 ... suggests that escapes from "correctional facilities" were designated as [a higher degree of crime] because of the heightened danger posed by inmates who seek to remove themselves from secure facilities:
>
> > The Code classifies all escapes from correctional facilities ... as escape in the second degree, a class B felony. Existing law differentiates between an escapee who has committed a felony and one who has committed a misdemeanor; an escape by a misdemeanant is classified as a misdemeanor. The [Criminal Code Revision] Subcommission concluded that the danger to society resulting from correctional facility escapes is substantial, regardless of whether the escapee is a felon or misdemeanant. The classification of all correctional facility escapes as serious felonies is consistent with the Code provision on the justifiable use of force in preventing an escape from a correctional facility[.]

***929** *Crosby,* 770 P.2d at 1155, quoting Alaska Criminal Code Revision, Tentative Draft, Vol. 4 (1977), pp. 47–48.

This passage from the commentary to the Tentative Draft suggests that the drafters intended to draw a distinction between (1) all prisoners who unlawfully depart from the premises where they have been placed by the Department of Corrections, and (2) those prisoners who unlawfully depart from a facility where there are restraints or limitations on the prisoners' movement, and where corrections officers or other facility staff, acting as agents of the Department, are charged with the duty of preventing the prisoners from departing without permission. It is in these latter circumstances that an escape or attempted escape from the facility poses a heightened danger.

This was the context in which the *Crosby* court remarked that the word "confinement", as used in the statutory definition of "correctional facility", and as interpreted in the context of the second-degree escape statute, "seems to deal not so much with the extent to which [a person's] freedom is restrained as with the specific manner in which the restraints are imposed and enforced." *Crosby,* 770 P.2d at 1157.

In other words, there would be no "confinement" if a prisoner is subject only to *legal* restraints on their physical liberty, in the form of a Department of Corrections order directing them to reside at a particular facility. Rather, "confinement" would exist only when the prisoner's residence at the facility is forcibly maintained.

We note that the legislature appears to have used the word "confined" in this same narrow sense in AS 33.30.181(a), a statute that deals with prisoners whom the Department of Corrections has placed in a community restitution center. This statute declares that a prisoner who has been placed in one of these centers "shall be confined to the center at all times" *except* when the person is at work, or is traveling to and from work (or to attend a job interview), or is absent for another purpose specially approved by the commissioner. In this statute, the phrase "confined to the [community restitution] center" clearly means something more narrow than "placed in a community restitution center" or "classified to a community restitution center".

As we noted earlier in this opinion, this is not the only sense in which people use the words "confine" or "confinement". These words can mean different things in different contexts.

For example, when our supreme court declared in *Rust v. State* that the Commissioner of Corrections has the sole discretion to designate "the prison facility to which the prisoner is to be confined", [12] it is clear that the supreme court was using the word "confined" in the broader sense of "placed".

Similarly, it may make good sense to give the word "confinement" a broader meaning for purposes of interpreting AS 33.30.193, the statute that guarantees prisoners meaningful access to the courts for the purpose of challenging "the conditions of the prisoner's confinement". And it would seem that a broader interpretation of "confinement" might be justified when interpreting AS 33.30.211(b), the statute which provides that copies of a prisoner's pre-sentence report "and any other information ... that may affect the person's rehabilitation" shall be transmitted to the superintendent of the correctional facility in which the prisoner is "confined". For the same reasons, a broader interpretation of "confinement" might be warranted when interpreting AS 33.36.010, the statute which declares that it is the policy of the State of Alaska "not to transfer a resident inmate [to a facility] outside of [this] state"

under the Interstate Corrections Compact "if [the] inmate's continued confinement in Alaska will better facilitate [their] rehabilitation or treatment".

In Judge Bolger's dissenting opinion, he asserts that the definition of "confinement" that we adopt in the present case will have manifold unfortunate consequences—because that same definition will apply in all of the contexts we have just mentioned, as well as several other contexts that Judge Bolger lists in his dissent. We disagree.

***930** **1** The limited question before us is the proper interpretation of "confinement" for purposes of interpreting the scope of the second-degree escape statute. Our definition of "confinement" for this particular purpose does not necessarily govern the meaning of this term for other purposes —because it is possible for the same word or phrase to have different meanings in different contexts. For example, this Court has repeatedly recognized that the word "conviction" can mean different things, depending on the context of the statute or rule being construed. *See Larson v. State,* 688 P.2d 592, 597–98 (Alaska App.1984); *Kelly v. State,* 663 P.2d 967, 971–72 (Alaska App.1983).

In the present appeal, our task is to identify the conduct that constitutes an escape from confinement for purposes of the second-degree escape statute. This statute declares that any escape from a "correctional facility" is a class B felony, even when the defendant's underlying criminal conduct (or charged conduct) is only a misdemeanor.

As we explained in *Crosby,* and as we explained earlier in this opinion, the commentary to the Tentative Draft of our criminal code suggests that the legislature's underlying justification for this decision was the perception that escapes from correctional facilities pose a significantly greater degree of danger than other escapes, even when the defendant's underlying crime or criminal charge is not itself particularly serious.

But this rationale—the greater potential danger posed by an escape from "confinement"—does not appear to apply to situations like the one presented in Bridge's case: situations where a prisoner simply walks away from a residence where they have been directed to stay. Rather, the legislature's rationale appears to apply only when the restrictions on a prisoner's physical liberty are enforced by officers whose duty is to keep the person from leaving without permission.

We agree with the State that a prisoner can be "confined" in a facility, for purposes of the second-degree escape statute, even though that facility does not have "gun tower[s] or a fence topped with barbed wire to keep [prisoners] in place". The paramount distinction between "placement" at a facility and "confinement" at a facility is the presence of corrections officers or other people whose duty is to prevent unauthorized departures from the facility—because the increased danger posed by escapes or attempted escapes from such facilities stems from the conflict or risk of conflict between the prisoner and these officers.

Thus, for instance, a work farm that has no towers and no restraining wall or fence could still be a place of "confinement" if it was staffed by corrections officers whose duty was to prevent prisoners from leaving without permission. But on the other hand, the fact that a halfway house has a wall or fence running around the perimeter of its lawn would not, of itself, convert the halfway house to a place of "confinement" if, as in Bridge's case, no officer or staff member had the duty to stop residents from leaving the halfway house without permission.

For these reasons, we agree with Bridge that the superior court was wrong to instruct Bridge's jury that the Northstar Center was a "correctional facility" simply because it housed defendants who were placed there by the Department of Corrections pending their trial or sentencing. The Northstar Center's status as a "correctional facility" hinged on an additional question of fact: whether prisoners' residence at the Center was forcibly maintained by corrections officers or by other guards or staff members acting as agents of the Department of Corrections (either formally or *de facto*).

The procedural posture of Bridge's case

During the pre-trial proceedings in Bridge's case, the superior court ruled that it was irrelevant what types of restraints or controls were placed on prisoners at the Northstar Center. Instead, the superior court ruled that *any* halfway house was a "correctional facility" if, under contract with the Department of Corrections, it housed defendants who were in custody awaiting trial or sentencing.

At Bridge's trial, the jurors were instructed in accordance with the superior court's ruling. That is, the jurors were told: "A ***931** halfway house under contract with [the] Department of Corrections ... is a correctional facility for pre-sentenced individuals placed there by [the Department] for purposes of confinement." In addition, the trial judge barred the defense attorney from arguing that the Northstar Center did not qualify as a "correctional facility" because the Center did not impose physical restraints on the freedom of its residents.

As we have explained, this jury instruction and this ruling were wrong. If the staff of the Northstar Center had no duty to physically prevent inmates from leaving without permission, then the Northstar Center was not a "correctional facility"-not a facility where prisoners were "confined".

For this reason, Bridge is entitled to a new trial on the charge of second-degree escape.

2 In a single sentence at the end of his opening brief, Bridge asserts that the double jeopardy clause bars the State from retrying him on this charge. This is incorrect. The flaw in Bridge's trial is that the jurors were misinstructed, in the government's favor, on an element of the offense. The constitution does not bar a retrial under these circumstances. [13]

If the State believes that it will be unable to establish that the Northstar Center qualifies as a "correctional facility" under the test we have announced here, then the State may ask the superior court to enter judgement against Bridge on the lesser offense of fourth-degree escape under AS 11.56.330(a)(1)—the statute which prohibits any act of "remov[ing] oneself from official detention for a misdemeanor".

The judgement of the superior court is REVERSED.

BOLGER, Judge, dissenting.

We recently held that a prisoner at a halfway house was "confined" in a "correctional facility" for purposes of the good-time credit statute. [1] I believe that the escape statute should be construed the same way. The requirement of armed guards is not mentioned in the text or history of this statute or in the numerous other criminal procedure statutes where these terms are used.

The central issue in this case is whether Northstar Center is a "correctional facility"—that is, a "premises ... used for the confinement of persons under official detention." [2] We considered the meaning of the term "confinement" when we addressed another section of the escape statute in *Beckman v. State*. [3] We concluded that Beckman was subject to "confinement" when he was allowed to attend residential treatment at Akeela House. [4] But Beckman was not confined "under an order of a court," as required by the definition of "official detention," because he was released to attend Akeela House as a condition of his probation. [5]

The legislature amended the definition of "official detention" in 1991. [6] The amendment was intended to overrule two of our cases that had construed this term narrowly. [7] I believe that the amendment corrected an ambiguity in the term "confinement" as it had been previously construed. The definition of "official detention" now includes "actual or constructive restraint" imposed by a court order. [8] When this definition is inserted into the definition of "correctional facility," that term now includes a facility designated for "confinement" under the constructive restraint of a court order. In other words, the statute now includes facilities where the prisoners are constructively restrained ***932** as well as facilities with barbed wire and armed guards.

The terms "confinement" and "correctional facility" are used in many criminal statutes. The definition of "correctional facility" that we construe in this case will also determine the scope of correctional facility litigation, [9] liability for sexual assault, [10] liability for promoting contraband, [11] the responsibility for victim notification in domestic violence cases, [12] the liability for correctional facility surcharges, [13] and the deadline for sex offender registration. [14] None of these applications suggest that this term should be limited to facilities with armed guards.

These terms are also used to define the requirements for criminal punishment. Various statutes require that a person sentenced to imprisonment must report to serve a term of "confinement" at a "correctional facility," [15] that he will accrue good-time credit if he follows the rules of the "correctional facility" where he is "confined," [16] that he will be returned to "confinement" in a "correctional facility" if he violates parole, [17] and that he will begin probation upon his release from "confinement in a correctional facility." [18]

My point is that these terms are used throughout the criminal statutes, and they should be construed consistently. [19] I would read the terms that apply to the escape statute in the same way that we have applied those terms to the good-time credit statute. In other words, I agree with the trial judge's instruction in this case—a halfway house is a "correctional facility" for those pretrial detainees who are placed there by the Department of Corrections.

Footnotes

1 The term "official detention" is defined as "custody, arrest, surrender in lieu of arrest, or actual or constructive restraint under an order of a court in a criminal or juvenile proceeding, other than an order of conditional bail release". AS 11.81.900(b)(40).

2 *Crosby,* 770 P.2d at 1154.

3 *Id.* at 1155.

4 *Ibid.*

5 *Ibid.*

6 At the time of the litigation in *Crosby,* this definition was found in AS 11.81.900(b)(7). Since then, the statute has been renumbered as section 900(b)(9), but the definition remains the same.

7 *Crosby,* 770 P.2d at 1155.

8 *Id.* at 1157.

9 *Ibid.*

10 *Crosby,* 770 P.2d at 1155.

11 *See State v. Otness,* 986 P.2d 890, 893 (Alaska App.1999): "This court has recognized that the term 'convicted' can have different meanings, depending on the context. For some purposes, defendants are deemed 'convicted' when a jury or a judge finds them guilty. For other purposes, defendants are not 'convicted' until the court formally enters judgement against them following the sentencing hearing." (Footnotes omitted)

12 582 P.2d 134, 137 (Alaska 1978).

13 *See West v. State,* 223 P.3d 634, 639–640 (Alaska App.2010); *Burks v. United States,* 437 U.S. 1, 15–16, 98 S.Ct. 2141, 2149, 57 L.Ed.2d 1 (1978); *State v. Kalaola,* 124 Hawai'i 43, 237 P.3d 1109, 1141 (2010); *State v. Rosaire,* 123 N.M. 250, 939 P.2d 597, 601–02 (App.1996).

1 *State v. Shetters,* 246 P.3d 332, 333 (Alaska App.), *aff'd on reh'g,* 246 P.3d 338 (Alaska App.2010).

2 AS 11.81.900(b)(9).

3 689 P.2d 500 (Alaska App.1984).

4 *Id.* at 502.

5 *Id.*

6 *See* Ch. 91, § 3, SLA 1991.

7 *See id.* at § 1.

8 AS 11.81.900(b)(40).

9 *See* AS 09.19.200(g)(3).

10 *See* AS 11.41.425(a)(2).

11 *See* AS 11.56.375, .380.

12 *See* AS 12.30.027(d).

13 *See* AS 12.55.041(a).

14 *See* AS 12.63.010(a)(1).

15 *See* AS 12.55.025(c).

16 *See* AS 33.20.010(a).

17 *See* AS 33.16.250(a).

18 *See* AS 12.55.125(*o*).

19 *See State v. Strane,* 61 P.3d 1284, 1286 n. 4 (Alaska 2003) (stating that statutes relating to the same subject matter should be construed together as a scheme that maintains the integrity of each statute).

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