report be adopted by the legislature. As a result, the 1969 legislature enacted SLA 1969, Chapter 117 which provided for appellate review of criminal sentences along the lines recommended.

January 5, 6, 8, 1970 - Fairbanks, Anchorage, Juneau

Public Hearings on Improvement of the Administration of Justice

In early January, 1970 the Council held public meetings in Fairbanks, Anchorage and Juneau wherein testimony was heard from all interested persons relating to recommendations for the improvement in the administration of justice in the State of Alaska. The first in this series of public hearings was held in Fairbanks. The two Superior Court Judges from Fairbanks testified regarding judicial salaries and retirement and the need for an additional Superior Court Judge. Also testifying were persons from the Alaska State Troopers and the general public. The testimony covered a wide range of subjects. The Council then moved to Anchorage where testimony was taken from over twenty-five persons including Superior Court Judges, District Court Judges, attorneys, public officials (including representatives of law enforcement agencies) and other interested individuals. Judge Butcher of the Family Court, Third Judicial District, presented testimony relating to problems in Family Court matters, particularly in the handling of juvenile offenders. Judge Fitzgerald, the Presiding Judge

of the Superior Court, Third Judicial District, presented a report of the case load of the Superior Court in that District. He recommended increasing the jurisdiction of the District Court in order to relieve this case load. He also stated that the Superior Court was encountering a space problem in its existing facility. Testimony was also presented on the case load of the District Court. Attorneys and judges presented testimony regarding the need for increased judicial salaries and more liberal per diem allowances for officers of the judiciary when traveling. The Council then moved on to Juneau. In Juneau the presiding Superior Court and District judges testified in the morning followed by six members of the public in the afternoon. Testimony covered a broad range including judicial salaries and the inadequacy of the Juneau court facilities.

June 19 and 20, 1970 - Kodiak, Kenai — Public Hearings on Improvement of the Administration of Justice

These hearings were held to inquire into specific problems in the administration of justice in Kenai and Kodiak. Much of the testimony in both locations related to the need for a Superior Court Judge to serve these communities. Additionally, in Kodiak there was extensive testimony relating to the need for improved criminal law enforcement both by providing additional State Police officers and improving enforcement facilities. Similar testimony was presented in Kenai. In both

communities local members of the Bar testified as well as public officals and other persons. Persons of both communities expressed concern over the delay in obtaining judicial services and testimony was presented to the effect that a more readily available Superior Court judge would increase the lawyer population and provide better judicial services for the residents.

July 14 - 16, 1970 - Southeastern Alaska — Public Hearings on Improvements of the Administration of Justice

On July 14, 15 and 16, 1970 the Council held hearings in Sitka, Juneau and Ketchikan respectively. In each community testimony was given by members of the general public, public officials and members of the Bar including judges. In Sitka considerable testimony was presented relating to the need for a Superior Court judge. Residents testified with regard to the problems involved in litigating matters within the jurisdiction of the Superior Court when no judge was available in the community. In Juneau testimony was similarly presented on the need for an additional Superior Court judge. Also considerable concern was expressed regarding the inadequacy of Court facilities in Juneau.

The Ketchikan hearings also related to the inadequacy of Court facilities in that community. Superior Court Judge Hubert Gilbert presented a statement expressing his concern

for the need for more adequate facilities for the detention of juvenile offenders and their rehabilitation.

September 19, 1970 - Nome, Alaska — Public Hearings on Improvement of the Administration of Justice

The public hearings in Nome, while of a general nature, focused upon the problems of administration of justice in bush areas. Local Superior Court and District Court judges testified, as well as attorneys and law enforcement officials, on these problems. Also it was pointed out that judicial facilities in Nome were not adequate. While in Nome the Council personally inspected the Beltz School and juvenile detention facilities. The detention facilities were found to be woefully inadequate by the Council.

December 8-11, 1970 - Mt. Alyeska, Alaska — Alaska Bush Justice Conference

On December 8 to December 11, 1970, the Alaska Judicial Council sponsored a Bush Justice Conference which was held at Mt. Alyeska, Girdwood, Alaska. The purpose of this conference was to assemble in one place a number of individuals who possess different talents and experiences in an endeavor to formulate specific problems with recommended solutions. Distinguished members of the bench and bar, members of State agencies, university professors, recognized native leaders, law enforcement officials and a number of individuals in related

fields used both their knowledge and experience to narrowly define the problems that presently exist in the bush areas of Alaska. Having pinpointed the problem areas, specific recommendations were forthcoming for action by the judiciary, the legislature and the executive branch of Government.

The Chief Justice gave the opening conference address. This first day of the conference was construed as a problems day. Emphasis was placed upon pinpointing problem areas in the Alaskan villages rather than making specific recommendations for change. Various speakers presented their views as to what problems existed in the bush areas. These speakers included such persons as Nora Guinn, District Court Judge for Bethel, Alaska; Arthur Hippler, Professor at the University of Alaska; Captain William Nix of the Alaska State Troopers; Sadie Neakok, Magistrate for Barrow, Alaska; Elias Joseph, President of the Village Council for Alakanuk, Alaska; and Professor Douglas Schmeiser from the University of Saskatchewan, Saskatoon.

The second day of the conference focused on formal presentations by selected individuals heading speaker groups. Four groups of keynote speakers and team members presented to four different groups of conferees a one and a half hour presentation on four different general topics. In this manner, all of the conferees were able to hear all of the general topic areas presented to them on the second day. These topics included such areas as the sociological, cultural and political

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video taping of the program included the first day of speakers and a full day of coverage which included four different presentations by the speaker teams. All of the formal presentations by the speaker teams were recorded on the soundscriber. Also, on the last afternoon the general conference meeting which voted on the final resolutions was recorded on video tape. In addition to the formal presentations which were made to all of the conferees, each individual conferee was presented with a booklet which gave the agenda for the conference and also included selected writings which focused upon problems in the bush areas. Such writings included a work by Professor Douglas Schmeiser on "Indians, Eskimos and the Law", which gave a detailed analysis of the legal experience with the natives in Canada, particularly in the Yukon territory. Other articles included, "The Public Offender in Alaska, a Survey of Inmates Incarcerated under Alaskan Statutes", which was prepared by the Statewide Planning Project for Vocational Rehabilitation Services. Other miscellaneous articles which dealt in one way or another with problems in the bush areas and problems with the natives were included with this booklet for the edification of the conferees.

Funding for the Bush Justice Conference came from three sources; members of the State agencies participating in the planning and presentation of the conference provided matching funds by way of their salary costs and transportation costs which were matched by Federal funds from the Law Enforce-

ment Assistance Administration, and Alaska Legal Services contributed $500. A special action grant from the Criminal Planning Agency in Juneau in the amount of some $13,000 was made available to defray the expenses of the conference, including transportation, meals and lodging.

After the final resolutions were voted on by the conferees, they were submitted to the Office of the Administrative Director of the Alaska Court System for final stylistic changes. When the changes were affected, the resolutions were formally presented to the Chief Justice as Chairman of the Alaska Judicial Council. These resolutions are found in Appendix A.

B. Judicial Council Programs - 1971-72

In the next two years the Judicial Council plans to conduct studies with regard to the following subjects. These studies will include public hearings, seminars and studies to be conducted by the staff of the Judicial Council and other agencies.

1. Magistrate Training and Bush Justice in Practical Application

The December, 1970 Seminar on Bush Justice concerned these subjects. This Seminar, however, was preliminary only and served the purpose of defining specific problem areas. Future studies in depth are needed.

2. Correlation of Crime, Punishment, Rehabilitation and Protection of the Public

Throughout its hearings in 1969 and 1970, comment

was received by the Council regarding problems in criminal law enforcement particularly with regard to rehabilitation and punishment following conviction. A Grand Jury report in Anchorage in 1970 was critical of the judiciary in these respects. In view of public concern, and the very real need for improvement in these matters, the Council feels it is urgent that studies be conducted.

3. Law Enforcement Assistance Administration and Ford Foundation Funds through Grants for Alaska

In the summer of 1970 the Chief Justice and Mr. Lester Miller, law member of Anchorage, together with the Administrative Director of the Alaska Court System consulted in Washington, D. C. with various agencies and private foundations which have funds available for improvement in the administration of justice by the State. Two such agencies are the Law Enforcement Assistance Administration and the Ford Foundation. The Council is studying how these funds can be obtained and the uses to which such funds can best be put.

4. Problems Relating to Crime in the Bush

Crime in the bush in Alaska presents unique problems due to the lack of law enforcement officers, the remoteness of courts, and the nature of the crimes which generally occur. These questions were considered at the Alaska Bush Justice Seminar and further study is required. Considerable comment on problems in this regard was received by the Council at its Nome hearings.

5. Management and Custody of Juveniles Prior to Hearing and Custody Designation after Hearing

During its Nome hearings the Council visited juvenile detention facilities in Nome and found them completely inadequate. During its Southeastern hearings in the summer of 1970 the Council heard testimony regarding the need for improved facilities in that area. Because of the need to insure that juvenile offenders are treated fairly and rehabilitated at the earliest possible time the Council believes this to be a particularly urgent study area.

6. Study of Improved Methods of Recording Land Transactions and Care of Land Records

The State of Alaska has no central office for the maintenance of land records. Some of the outlying areas have extremely poor recording facilities. The Council believes that orderly population and industrial growth in Alaska is reliant upon safe and adequate land records. Improvements in this area are needed.

7. Security of Courtrooms, Judicial Officers and Witnesses

Although this problem is not as acute in Alaska as in other states, the Council believes it to be important that adequate measures be taken to insure the safety of Judicial officers and witnesses in order that the Judicial System be free from improper influence or disruption.

8. Improvement in Service of Process

Delay in service of process has been a continuing problem in the Alaska Court System. This is particularly true when process must be served in the outlying area and when an Injunction, Attachment or Writ of Execution is to be served.

9. Improvement in Court Calendaring

Problems in court calendaring result in delay and inefficiency in the judicial process. As the case load of the judges has increased the calendaring problem has become more complex. Improved calendaring is required to reduce delays in litigation.

V.

RECOMMENDATIONS FOR THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE DURING 1969 and 1970

A. Recommendations of the last Judicial Council Fifth Report 1967-68

1. Establishment of a Statewide Public Defender Program

This recommendation was acted upon by the legislature in 1969, which established the Public Defender Agency for the State of Alaska. SLA 1969, Chapter 109.

2. Establishment of a Coroner-Public Administrator

In its last report the Council urged that District judges be relieved of statutory duties as coroners and administrators of the property of deceased persons because these non-judicial duties were interfering with the judge's performance of his judicial duties. In 1970 the legislature enacted a Public Administrator Act authorizing the presiding judge of the District Court in each Judicial District, when authorized by the Supreme Court, to appoint a person to act as Public Administrator and as Coroner. SLA 1970, Chapter 216. This statute was substantially along the lines recommended by the Council.

3. Judicial Salaries

In its Fifth Report the Council recommended that salaries for Justices and Judges of the Supreme and Superior Courts be equated with those paid to judges of the Circuit Court of Appeals and United States District Courts respec-

tively and that Alaska District judges' salaries be set at a rate comparable to that of U. S. Magistrates. This recommendation was not followed by the legislature. However, the 1969 and 1970 legislatures made progressive increases in the salaries to the point that Supreme Court justices are now paid $36,000 annually, Superior Court judges $33,000 and District Court judges $25,000. SLA 1969, Chapter 101 and SLA 1970, Chapter 193. These salaries are still not comparable to those paid in the Federal Court System and the Council believes them inadequate. The Council, in this report, makes additional recommendations regarding judicial salaries.

4. Micro-filming of Public Records

The Alaska Court System budgeted funds in its 1970-71 budget for micro-filming of public records generally along the lines recommended in the Fifth Report of the Judicial Council. This budget was approved and the program is being implemented.

B. Additional Recommendations made during 1969-70

1. Appellate Review of Sentences

The Council recommended that the 1969 legislature adopt the proposals of the Statewide Committee on Sentencing and Appellate Review relating to Appellate Review of Criminal Sentences. In SLA 1969, Chapter 117 these recommendations were substantially enacted by the legislature.

2. Establishment of Judicial Salary Commission

In its 1970 legislative program the Judicial Council recommended in addition to an increase in judicial salaries that a salary commission to activated for continuing review of judicial salaries. This legislation was not enacted, but is contained in the current recommendations.

3. Rotation of the Office of Chief Justice

The Council also recommended to the 1970 legislature that the office of Chief Justice of the Supreme Court be rotated among the five Justices once each three years. The legislature voted that a Constitutional amendment providing for rotation of the office of Chief Justice be placed on the ballot at the next general election. In the August, 1970 elections this matter was voted favorably upon by the electorate and the Constitutional amendment adopted.

4. Increased District Court Jurisdiction

In its January 29, 1970 meeting the Council endorsed in principle pending legislation which would have increased the monetary jurisdiction of the State District Court to $7,500 to run concurrently with that of the Superior Court. This legislation was not enacted and a comparable recommendation is made with the current recommendations of the Council.

VI

CURRENT RECOMMENDATIONS

Pursuant to its constitutional directive, the Council makes the following recommendations for improvements in the administration of justice in the State of Alaska:

1. Increase in Civil Jurisdiction of District Courts.

The Council recommends that the legislature increase the monetary limitation on the jurisdiction of the District Courts of the State of Alaska from $3,000 to $10,000. The Council also recommends that the District Court jurisdiction be expanded to include equity jurisdiction in lien foreclosure matters where the amount in controversy is less than $10,000.

The Council believes that recent salary increases and changes in the qualifications required for a district judge have upgraded the quality of the court to the point where $10,000 jurisdiction is appropriate. It is believed that by so increasing the District Court jurisdiction, the case load of the Superior Court can be relieved. Also, an increase in District Court jurisdiction provides a more complete range of legal services in bush areas where Superior Courts are not readily available. Finally, such an increase in jurisdiction will make the court more attractive for future applicants for judgeship positions.

2. Juneau Court Facility. The Council recommends that monies be appropriated by the legislature for a preconstruction planning and site acquisition of a separate court facility in Juneau totaling not less than 75,000 square feet of office space.

The existing court facilities in Juneau are inadequate. Plans for the new State Office Building do not include space for the court facility. Therefore, the Judicial Council, working with the Juneau Bar Association, the court system and all interested state agencies, has conducted an inquiry to determine the total space requirements for a new court building. These requirements include those of the Supreme Court, Superior Court, District Court and Recording Office, Department of Health and Welfare, Department of Public Safety, Alaska Court System Administrative Offices and the news media.

Based upon the information received, the Council has made the foregoing recommendation. The Council believes that requirements for a new court facility in Juneau are urgent.

3. Judicial Salaries. The Council recommends that the salaries of judges in the Alaska Court System be equated to those paid the Federal Judiciary. The Council also recommends that a permanent salary commission be established to insure that judicial salaries in Alaska remain adequate.

The Judicial Council believes it to be of utmost importance that judicial salaries be such as to be attractive to experienced and well qualified lawyers so that the best available persons can serve as judges. To this end, the Council recommends that salaries of Justices of the Alaska Supreme Court be equated with those paid to the Judges of the

Unites States Court of Appeals, $42,500, and that Superior Court salaries be equated to those paid to United States District Judges, $40,000. Alaska District Judges should receive $30,000, as do Federal Magistrates. Moreover, because of continuing increases in the cost of living, it is important that these salaries be periodically reviewed. Therefore, the Council proposes a permanent salary commission to adjust judicial salaries subject to legislative veto.

4. Anchorage Court Facility. The Judicial Council is opposed to continuation of present plans for expansion of the existing Anchorage Court Building and recommends immediate appointment of a commission to explore the feasibility of constructing a judicial complex in Anchorage based upon a full consideration of long range needs.

The Council recognizes that there are present urgent space requirements for the Court System in Anchorage. However, the Council believes that the current, authorized expenditure of less than four million dollars is inadequate to properly provide for the long range needs of the Court System. These needs will be better and more efficiently served by an adequate appropriation based upon a thorough study of present and future requirements. The Council believes that to proceed with inadequate funds at present is to engage in a piecemeal approach to the immediate needs without fully considering the needs of the future.

APPENDIX A

BE IT RESOLVED THAT:

1. THE LOCUS OF DECISION-MAKING IN THE ADMINISTRATION OF JUSTICE IN VILLAGE ALASKA MUST MOVE CLOSER TO THE VILLAGE. TO ACHIEVE THIS RESULT THERE MUST BE GREATER NATIVE PARTICIPATION AT ALL LEVELS IN THE ADMINISTRATION OF JUSTICE.

a. There should be greater direct participation by Native citizens in the administration of justice at all levels, including their employment in policy-making positions in all agencies involved. Every agency should examine its qualifications requirements in order to revise them wherever they may arbitrarily exclude otherwise qualified Alaskan Natives. Examples include the height requirements for Alaska State Troopers, minor criminal records, formal education, etc.

b. Appointment of an Alaskan Native to membership on the Judicial Council and the Judicial Disqualification Commission is recommended.

c. The selection and removal of magistrates should be made more responsive to the desires of the communities served. Continuing critical evaluation of performance of duties by magistrates should be made. Consideration should be given to assigning principal responsibility for appointment and removal of magistrates to presiding district court judges.

d. The strengthening of village councils is central to the administration of justice in remote Alaska.

e. The Local Affairs Agency must be strengthened and upgraded to department level and its technical assistance functions fostered if there is to be successful administration of justice in the villages. Representatives of the Local Affairs Agency should visit villages to work with local officials. They should help the villages draft and revise ordinances, facilitate participation of villages in revenue-sharing programs, and improve law enforcement techniques.

2. THERE MUST BE A GREATER ACCESS TO LEGAL SERVICES AND THE PROCESS OF JUSTICE IN VILLAGE ALASKA.

a. The ordinary method of travel in the bush is by air. To meet the basic requirements of regular travel and to enable emergency service, State Troopers should be authorized to operate leased or state owned aircraft for their official duties and to aid officers of the court and associated agencies in the performance of their duties.

b. The Alaska Legislature should fund a program creating village constables in village Alaska to be chosen by village governing bodies to serve at their pleasure and to act as village law enforcement officers with the support of the Alaska State Troopers.

c. The travel budgets of the superior and district courts should be increased so that they may hold trials where the parties and witnesses live. When trials are elsewhere, but

witnesses live in the bush, the courts should use special masters to take evidence in the witnesses' villages. When actions are filed in places not accessible to defendants or their witnesses, changes of venue to the defendants' homes should be liberally allowed. These changes would facilitate more accurate factual determinations, avoid unfair default judgments, and provide education in judicial processes and substantive law in the bush.

d. The Supreme Court is encouraged to order at least an annual circuit court session of the superior court in the major community in each House election district.

e. The State Legislature should fund staff offices in Bethel and Nome for Alaska Legal Services Corporation and a Public Defender Agency office in Bethel as a step toward creation and support of rural principal judicial centers.

f. Techniques should be explored to encourage the private bar associations to provide better services in Alaska villages. As an example, group legal services experiments in other states should be studied. Public interest law firm efforts might also be encouraged.

g. Every village should have a detention facility and a juvenile detention facility separate from the detention facility and standards should be established for such facilities. These are needed to protect villages from dangerous persons without delay and without unduly long incar-

ceration because of transportation time.

h. Special emphasis must be given to the development of manpower capable of dealing effectively with the administration of justice in village Alaska, and to appropriate education for the affected public.

(1) The colleges and universities within the state should establish programs for the training and continuing education of magistrates, constables, paralegal and other associated personnel. Such programs should be developed and operated in cooperation with the Judicial Council, the Department of Public Safety, the Alaska Federation of Natives, and other appropriate agencies and organizations. Major emphasis should be placed on on-the-job training.

(2) The University of Alaska should establish an institute to train legal personnel in both rural and urban areas in Native culture and languages. Incentives should be provided for attendance at this institute.

(3) The Department of Education should develop curriculum concerning legal concepts, processes, rights and remedies for junior high school students throughout Alaska.

(4) The colleges and universities within the state should establish adult education programs concerning legal concepts, processes, rights and remedies for Alaskan villages. This program should include dissemination of printed materials in attractive format which explain the rights of individuals under the statutes and decisions.

(5) A program should be established for recruiting bi-lingual lawyers fluent in English and another recognized language common to a region of Alaska to serve in Alaskan public programs which relate to the administration of justice. Such a program would work through law school scholarships and financial grants equivalent to what bi-lingual college graduates might otherwise earn if they chose to work in other Alaskan community leadership or service positions.

(6) The colleges and universities within the state should be encouraged to establish a training and continuing education program for the development of paralegal personnel. Persons participating in and successfully completing such a program should be considered for certification to counsel persons within the limits of their training and expertise.

i. Greater understanding of and more information about all direct and related aspects of judicial administration are needed to provide a basis for policy making, for establishing appropriate administrative arrangements for training and education, and for improving other aspects of providing justice in rural areas. In particular, the cultural context and impact of judicial administration must be thoroughly understood by all involved in the system of bush justice. Toward these ends, the Judicial Council, the State Administration, the University of Alaska, and other appropriate organizations should initiate, sponsor and undertake programs of research concerning such areas as the character and processes of village law-making, judicial

administration, and law enforcement.

3. SOME MODIFICATIONS IN SUBSTANTIVE LAW ARE NECESSARY TO CORRECT INEQUITIES IN VILLAGE ALASKA. SUCH MODIFICATIONS RELATE TO THE ADMINISTRATION OF JUSTICE IN URBAN ALASKA AS WELL.

a. There should be a study of the program effectiveness of present correctional and dispositional alternatives in village Alaska. If particular techniques are inefficacious, they should no longer be employed.

b. Dispositional process alternatives prior to invocation of the criminal and juvenile process should be legitimated and encouraged. In the process, there should be guidance on what dispositional alternatives prior to invocation of the criminal process are appropriate.

c. Local alternatives for the control and rehabilitation of juveniles should be developed.

d. Review and changing of the laws concerning alcohol-related offenders throughout all areas of the state. This conference further recommends that training be given to all officers of the criminal justice system to recognize alcoholism as an illness and that this be done in conjunction with broad community education.

e. Waivers of rights to counsel, silence, trial by jury, trial by the district court, and other related rights, should be accepted by magistrates only after the most careful scrutiny

for voluntariness and understanding. Advice as to rights should be thorough and discursive and in the language primarily spoken by the defendant. Where an attorney or appropriate paraprofessional is available, his presence on behalf of the defendant should ordinarily be obtained.

f. It shall be a mitigating factor in sentencing, but not in the determination of guilt, that an act, violative of law, was committed pursuant to custom.

g. The courts and legislature should recognize customary adoptions should not involve lengthy court procedures but rather summary procedures.

h. Court arraignment procedures must include the advising of constitutional rights in a language understandable to the defendant. Boards of qualified interpretors should be established and funded and their services made available throughout the state for this purpose.

i. It is recommended that the boundaries and number of judicial districts be examined and changed where necessary to facilitate access to judicial services. The social and transportation patterns of the individuals to be served should be given prime consideration in the establishment of judicial districts. Example: Barrow should be part of the fourth judicial district and Bethel should be either part of the third judicial district or a new special Superior Court District should be created for Bethel.

j. The Alaska Administrative Procedures Act and the Alaska Administrative Code should be amended to:

(1) Require that hearings on administrative licenses, rules, and orders be held in the organized community or communities affected by the issuance of the license, rule or order.

(2) Extend the time allowed for administrative appeals from 30 days to 60 days.

(3) Require the posting of notice at the situs, the publication of notice in the newspaper published nearest the situs and public hearing be held at the situs or community nearest the situs prior to the granting of the application, the license or any interest in tidelands or property, in order to adequately protect rights or interests in these tidelands or property.

k. Civil Rule 53 should be interpreted and implemented to allow for the liberal appointment of special masters to take factual evidence in areas not frequently served by the superior court and where required for the ends of justice.

l. Changes in venue requirements should be as follows:

(1) For criminal actions, venue should be originally set in the election district in which the alleged crime was committed; for civil actions venue shall originally be set in the election district which has the most significant contacts with the transaction which is the subject of the action.

(2) AS 22.10.040 should be amended by deleting subsection (2) and enacting a new statute in the place of subsection (2) which reads:

A motion for change of venue shall be granted when required for the convenience of the witnesses and the ends of justice.

(This amendment will change the existing law which places a venue change for witness convenience and justice in the discretion of the superior court judge to a mandatory change requirement in this one instance.)

BE IT FURTHER RESOLVED THAT:

4. THE STATE SHOULD ENCOURAGE AND PROVIDE PLANNING ASSISTANCE IN THE ESTABLISHMENT OF COMMUNITY MENTAL HEALTH CENTERS IN THE REGIONAL SERVICE CENTERS OF THE STATE, SUCH AS BETHEL, NOME, KOTZEBUE, BARROW, FORT YUKON AND OTHERS. ALSO, THE COMMISSIONER OF THE DEPARTMENT OF HEALTH AND WELFARE SHOULD CONSULT WITH THE DIRECTOR OF MENTAL HEALTH AND THE SUPERINTENDENT OF THE ALASKA PSYCHIATRIC INSTITUTE TO PROVIDE RESIDENT QUARTERS FOR PERSONS REFERRED BY THE COURTS FROM RURAL AREAS FOR EVALUATION AND REFERRAL UNTIL SUCH TIME AS MENTAL HEALTH FACILITIES ARE AVAILABLE.

5. THE STATE DIRECTOR OF COMMUNICATIONS SHOULD COORDINATE PRESENT EXISTING RADIO COMMUNICATIONS NETS AND ESTABLISH OTHERS AS REQUIRED, WHEREBY ALL AREAS NOT HAVING ACCESS TO COMMUNICA-

TIONS MAY BE SERVED. THE CENTER OF EACH NET SHOULD BE LOCATED IN THE AREA OF EACH PRESIDING DISTRICT COURT JUDGE OF EACH JUDICIAL DISTRICT AND BE MADE AVAILABLE TO ALL AGENCIES AND PERSONS ASSOCIATED WITH THE JUSTICE SYSTEM ON A 24 HOUR PER DAY BASIS. IN CONJUNCTION WITH THE ABOVE, THE JUDICIAL COUNCIL OR OTHER APPROPRIATE AGENCIES SHOULD INTERVENE IN THE FCC DOCKET ON DOMESTIC SATELLITES TO URGE THE NEED IN VILLAGE ALASKA FOR IMPROVED COMMUNICATIONS IN THE ADMINISTRATION OF JUSTICE.

6. AS EACH COMMUNITY SHOULD HAVE BETTER CONTROL OF ITS AFFAIRS, LEGISLATION SHOULD BE ENACTED TO AUTHORIZE THE ISSUANCE OF PACKAGE AND BY-THE-DRINK LIQUOR LICENSES TO CORPORATIONS WHOLLY OWNED BY MUNICIPAL CORPORATIONS OR ORGANIZED COMMUNITIES.

7. THIS CONFERENCE RECOMMENDS THAT ANOTHER JUSTICE IN THE BUSH CONFERENCE BE HELD SOMEWHERE IN A RURAL COMMUNITY.

APPENDIX B

ALASKA JUDICIAL COUNCIL CURRENT MEMBERS

		Term of Office Expiration Date
V. Paul Gavora	Fairbanks	5/18/73
Michael A. Stepovich (attorney)	Fairbanks	2/4/76
Kenneth Brady	Anchorage	5/18/75
Lester W. Miller (attorney)	Anchorage	2/4/72
Frank M. Doogan (attorney)	Juneau	2/4/74
Chief Justice George F. Boney	Anchorage	5/8/73

FORMER MEMBERS:

William M. Whitehead, M.D.
Roy Walker
Raymond E. Plummer
Robert A. Parrish
Harold Butcher
Charles W. Kidd
H. Douglas Gray
William V. Boggess
John Cross
Ernest E. Bailey
Al Phelps
Thomas K. Downes
Jack Werner
Pete D. Meland
Former Chief Justice Buell A. Nesbett

ALASKA JUDICIAL COUNCIL
SIXTH REPORT
SUPPLEMENT

In response to inquiries and suggestions received from the Joint Senate and House Judiciary and Finance Committees, and to other matters which have come to the Council's attention during its Juneau session held on March 2 and 3, 1971, the Council submits the following supplementary report to be incorporated as a part of its Sixth Report.

1. Increase in Civil Jurisdiction of District Courts. In addition to the recommendations contained on page 47 of the Sixth Report relating to increased District Court jurisdiction, the Council recommends that such jurisdiction be concurrent with that of the Superior Court. Appeal from the District Court shall be to the Superior Court which may in its discretion augment the record on appeal, in whole or in part, or hold a hearing de novo.

2. Limitation on Penalties for Petty Offenses. As a result of the Supreme Court decision in Baker v. City of Fairbanks, 471 P. 2d 386 (Alaska 1970), persons accused of crimes which carry as a penalty the possibility of incarceration are entitled to a trial by jury. The result has been a tremendous increase in the number of jury trials in prosecutions for minor or petty violations, with a corresponding increase in cost both in jury fees and court time. Therefore, the Council recommends that the legisla-

ture act to limit the penalty imposed for all petty offenses, such as, but not restricted to, minor traffic violations, in all State statutes and municipal ordinances so that the element of criminality and the possibility of incarceration is deleted.

3. Jury Service. In a further effort to reduce the costs of jury trials, while at the same time limiting the burden of jury service on participating citizens, the Council reommends to the Supreme Court and the Legislature that, unless otherwise directed by the Supreme Court, citizens selected for jury service should not be required to serve for a period longer than 30 consecutive days; except that jurors who commence sitting in a trial within the 30 day period shall continue to sit in that matter until discharged by the trial court. The Council further recommends that fees for jury service be reduced to $15 per day for service of more than one-half day, or $7.50 per day for one-half day or less, such fees to be paid only upon receipt of an affidavit from the juror stating that he is not being compensated for his time by a source other than the Alaska Court System.

4. Alaska Court System Autonomy. The Council recommends to the legislature that it act to make the Alaska Court System autonomous in all fiscal planning and personnel classification matters.

5. Six-man Juries. In line with the interest

expressed by the Senate and House Joint Committees, the Council is undertaking a study to determine the desirability of recommending a constitutional amendment reducing the size of juries from twelve to six persons.

THE FOLLOWING PAGES WERE TREATED AS
A UNIT IN THE ORIGINAL FILE.

Judges' Salaries

Alaska Judicial Council
941 FOURTH AVENUE
ANCHORAGE, ALASKA
99501

April 23, 1971

Representative William J. Moran
Alaska State House
Pouch V
Juneau, Alaska 99801

Dear Representative Moran:

As you know, the Alaska Judicial Council this year recommended increases in judicial salaries. The Council also recommended the establishment of a Judicial Salary Commission to provide periodic review of judicial salaries. A bill was introduced this session providing for such a commission to include review of legislative and executive salaries. Although it appears that salary increases will not be voted this session, the Council again urges that a salary commission be established at this time. This is particularly important because recent and anticipated pay increases to classified employees will create a situation where judges in some cases are compensated less than some classified employees of the state. Appropriate balance in compensations between classified employees and executive, legislative and judicial officials can only be maintained by periodic review of all salaries.

Very truly yours,

Theodore Russ Dunn
Executive Secretary to the Council

TRD:lb

Mental Competency

THE SUPREME COURT OF THE STATE OF ALASKA

ARLIE ROY POPE,

Appellant,

v.

STATE OF ALASKA,

Appellee.

File No. 1127

O P I N I O N

[No. 660 - December 21, 1970]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Ralph E. Moody, Judge.

Appearances: James R. Clouse, Jr., Anchorage, for Appellant. G. Kent Edwards, Attorney General, Juneau, Harold W. Tobey, District Attorney, and Richard R. Felton, Assistant District Attorney, Anchorage, for Appellee.

Before: Boney, Chief Justice, Dimond, Rabinowitz, Connor and Erwin, Justices.

ERWIN, Justice.
CONNOR, Justice, concurring in part and dissenting in part.

Appellant, Pope, was convicted of second degree murder in connection with the death of one David Silva on July 9, 1968. According to his own testimony, he arose on that date at his usual hou· and prepared himself for work. While driving to work he began to feel sick and decided to have only coffee in place of his usual breakfast. As appellant continued towards his job, the sickness became more severe and he

decided to turn around and drive back to his motel He testified that this condition of nervousness and sickness at his stomach had occurred with frequency in the period of time shortly before the shooting occurred.

After returning to his motel room, appellant consumed a little less than one-half of a pint of alcoholic beverage, remaining in his room and watching television. He made several attempts to reach his former wife, Irma Pope, and was at last successful. However, Mrs. Pope refused to speak with him, slamming down the telephone. Appellant stated that the reason that he had attempted to call his former wife was that he felt really sick and was looking for help from someone.

After being rejected over the telephone, appellant described a strange feeling, "like something was spinning around the top of my head, from right to left, right underneath the skin against the skull and when you closed your eyes you could see -- could see a streak of light coming around and around. . . ." He described the light as not being mean or anything, but the light said "kill him, kill him, kill him" -- just kept repeating it; and finally he said it to himself and as soon as he did he felt very good and was not sick any more. Appellant further stated that after the lights had stopped in his head, he felt very sorry for David Silva because of what was going to happen; he did not think there was anything that he could do to prevent the killing of David Silva, and he knew he was going to do it, but he didn't yet know just how. When

appellant finally agreed with the light in his head which told him to kill Silva, the nervousness disappeared, as did his upset stomach.

Appellant's recollection of the events that occurred after he left the motel was hazy and vague. He recalled only being near the parking lot at Anchorage Bedding and Furniture and next seeing the gun in his hand on the door ledge of his automobile. Appellant did not recall shooting the decedent, but only remembered watching the decedent sitting down and then lying backwards on the ground.

Officer Pavlovich was the first law enforcement officer to arrive on the scene. Upon arriving he observed the deceased, a woman at the head of the decedent, and another man, later identified as the appellant, alongside the decedent in either a squatting or kneeling position. Officer Pavlovich went over to the decedent, checked his pulse, and pronounced him dead. He next asked the woman what had happened. The woman, Mrs. Silva, indicated that appellant had shot Mr. Silva. In response to this, Pavlovich stood the appellant up and started to search him for weapons.

At this point in the sequence of events there is a dispute as to the actual occurrences. A Mr. McConnell testified that he observed Officer Pavlovich going over to appellant and questioning him for a minute or two before finally searching him for a weapon. The officer, on the other hand, testified that after he had examined Silva he immediately started to search

appellant. Appellant's version of the story is that as he was being frisked by Officer Pavlovich, he was asked if he had a gun, to which he responded yes, that it was in the car. Officer Pavlovich claims that the information about the gun was volunteered by Pope and that no such question had been asked.

Mr. McConnell stated that after eliciting this information, Officer Pavlovich proceeded to appellant's car, with his arm on appellant's arm, to retrieve the weapon, which was located in the middle of the front seat. Officer Pavlovich stated that after Pope had volunteered the information as to the whereabouts of the gun, Pope proceeded to the automobile and Pavlovich hurried to beat him to the car in an effort to retrieve the weapon.

On cross-examination Officer Pavlovich described the appellant's appearance as being dazed and testified that his feeling at the time was that appellant was not drunk, but either dazed or at least under the influence of alcohol -- but he could not tell which. Officer Pavlovich further testified that although he detected nothing radically wrong with appellant, that is, appellant walked normally and spoke clearly and distinctly, albeit very slowly, he nevertheless seemed to be preoccupied. At another point in his testimony Pavlovich stated that he thought appellant was either under the influence of alcohol or in a state of shock. Furthermore, he was not sure whether appellant was in possession of his faculties at this time.

On August 5, 1968, Pope was indicted by the grand jury for first degree murder and arraigned immediately thereafter.

Appellant entered a plea of not guilty, and the trial date was set for December 12, 1968, before the Honorable Edward V. Davis, Superior Court Judge. Prior to trial, on November 29, 1968, at the request of the prosecutor, a competency hearing was held. On January 16, 1969, the Superior Court entered an order to the effect that the appellant was competent to stand trial.

Because of continuances, trial did not begin until February 10, 1969. At that time the defendant appeared before the Honorable Ralph E. Moody, Judge of the Superior Court, rather than Edward V. Davis, to whom the case had been assigned originally. Timely objection was made by appellant to the unannounced change. On February 18, 1969, the jury returned a verdict of guilty of murder in the second degree. Notice of appeal was duly filed.

Appellant raises four specifications of error in the trial below. His first specification is that the court committed prejudicial error in reassigning appellant's case from Judge Davis to Judge Moody without giving appellant five days from the date of reassignment to consider and possibly file a peremptory challenge affidavit as provided in AS 22.20.022; his second, that the trial court erred in overruling the appellant's motion to suppress the evidence seized by Officer Pavlovich from the appellant's car prior to a lawful arrest; and his third, that the trial court incorrectly admitted the statements of appellant made prior to his being given the proper Miranda warnings and after he had become a suspect in the crime and had been substantially deprived of his freedom of action.

Finally, he contends that the trial court should have ruled as a matter of law that the burden of proving sanity is on the state rather than the burden of proving insanity being upon the defendant, when there was some evidence in the record to indicate that sanity was at issue.

I

In his first claim of error, appellant contends that because of the assignment procedure used herein,[1] he did not have sufficient opportunity to determine and if necessary file an affidavit alleging he believed that he could not obtain a fair and impartial trial.

Trial proceeded on February 10, 1969, appellant making timely motion,[2] which motion was denied.

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[1] There was no advance notice to counsel of the reassignment of this case from Judge Davis to Judge Moody on the day of trial. It should be noted that subsequent to the trial herein this court in the case of Roberts v. State, 458 P.2d 340, 346 (Alaska 1969) pointed out the potential problems of such a practice in suggesting that this method of reassignment of a case should be avoided in the future:

> A method should be devised and utilized to make assignment of cases to judges sufficiently in advance of trial or hearing, with notice of the assignment being given to the parties, so that the parties can be afforded their rights under AS 22.20.022 without interfering with the scheduled hearing or trial dates.

[2] The motion was as follows:

> Mr. Clouse: Your Honor, for the record, at this time, I would like to state an objection to the Court's requiring us to go to trial at this time and not before the -- Judge Davis who was previously assigned this case. This deprives the defendant of the opportunity to investigate and exercise any challenge that he may have within the five day period as provided by rule and statute.

Appellant correctly points out that the granting of the five-day period is to allow a party or his attorney an opportunity to investigate the judge to whom the case is assigned and if necessary file the requisite affidavit for disqualification, thus avoiding the waste of judicial time which would result if an affidavit or disqualification were not filed until the date of trial because this would mean that the case would have to be continued until another judge could be assigned and the disqualified judge would not be ready at that time to start the trial of another action.[3] Appellant

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2 [Contd.]

> The Court: Motion's denied since this is merely a procedural matter and it delays the -- delays the carrying on of Court business if we give effect to that for the five days rule. Other than the objection, is defense ready to proceed?
>
> Mr. Clouse: Yes, your Honor.

AS 22.20.022 states in relevant part:

> "Peremptory disqualification of a superior court judge. (a) If a party or his attorney in a superior court action, civil or criminal, files an affidavit alleging under oath that he believes that he cannot obtain a fair and impartial trial, the presiding judge shall at once, and without requiring proof, assign the action to another judge of that district, or if there is none, the chief justice of the supreme court shall assign a judge for the hearing or trial of the action. The affidavit shall contain a statement that it is made in good faith and not for the purpose of delay."
>
> * * *
>
> "(c) The affidavit shall be filed within five days after the case is at issue upon a question of fact, or within five days after the issue is assigned to a judge, whichever event occurs later, unless good cause is shown for the failure to file it within that time."

3 Roberts v. State, 458 P.2d 340, 346 (Alaska 1969).

further correctly argues that the provisions of this statute have been interpreted by this court to mean that once the affidavit is filed, the judge involved is without power or jurisdiction to take any further action in the proceeding. Channel Flying Inc. v. Bernhardt, 451 P.2d 570 (Alaska 1969).

But appellant has not shown that any harm resulted to him from the denia. of his motion. Instead, he invites us to speculate that he suffered some possible prejudice, even though he did not challenge the trial judge because he felt that any challenge he made might have a prejudicial effect on the jury. The gist of appellant's argument appears to be that since any challenge might affect the jury he never seriously considered whether or not he should exercise the challenge because the reassignment made the choice more difficult. Since appellant could have exercised the challenge at any time within five days of reassignment, even during trial, we hold that his failure to do so was a waiver of his right to a peremptory challenge to the trial judge, and it was not error for the court to refuse to grant a continuance of five days to permit appellant to ponder this matter at length.

II

Appellant claims that the trial court committed error in refusing to suppress as evidence (1) appellant's oral statement about the gun, and (2) the gun itself, which the officer seized in appellant's car. The argument is that this evidence is tainted because the required warnings under Miranda v.

Arizona, 384 U.S. 436, 16 L.Ed.2d 694 (1966) were not given by the officer until after the seizure of the gun, that appellant had already become a suspect in the crime, and that he had been substantially deprived of his freedom in a significant way. The test of when warnings must be given under Miranda is whether the accused has been "taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning." 384 U.S. at 478, 16 L.Ed.2d at 726.

We need not explore such problems as whether the "in custody" test of Miranda displaces the "focus" test of Escobedo v. Illinois, 378 U.S. 478, 12 L.Ed.2d 977 (1964), or whether the two tests can be regarded as alternatives to some extent.[4] For it is plain to us that this case falls within an important exception stated by the court in its opinion in Miranda. After pointing out that it did not intend to hamper the traditional function of police officers in investigating crime, the court said:

> General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling

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[4] United States v. Hall, 421 F.2d 540 (2nd Cir. 1969); Graham, What is Custodial Interrogation?: California's Anticipatory Application of Miranda v. Arizona, 14 U.C.L.A. L.Rev. 59, 114-15.

> atmosphere inherent in the process of in-custody interrogation is not necessarily present. 384 U.S. at 477-78, 16 L.Ed.2d at 725-26.

In interpreting Miranda various courts have had to draw lines between what are permissible investigative interviews and custodial interrogations. The United States Supreme Court itself has made it plain that custodial interrogation could take place outside the station-house where one was "not free to go where he pleased but was 'under arrest.'" Orozco v. Texas, 394 U.S. 324, 325, 22 L.Ed.2d 311, 314 (1969). The courts must determine, therefore, in each case whether the atmosphere and setting of an interrogation are of such coercive effect or indicate such significant restraint as to trigger the need for a Miranda warning. There is not always agreement about the criteria for such a determination.

But the case at bar is a strong one for applying the "on-the-scene questioning" exception to the Miranda warning requirement. The officer here was presented with a situation of great emergency. A crime of violence had occurred, the victim was lying on the ground dead. There was more than one person present. Both to protect his own safety and that of others, the officer had to elicit information about what had happened, and about the gun which had obviously been used in the killing. For the same reason the officer also had the right to conduct a strictly limited search ("frisk") of Pope's person for weapons under the rule of Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889 (1968),

which he did.[5] To hold that, while a policeman faced with an emergency such as the one which confronted Officer Pavlovich may "frisk" a suspect for weapons he may not simultaneously ask him whether he is armed, would be an unrealistic and unreasonable extension of the Miranda rule.

Appellant also contends that, because the revolver was seized from Pope's automobile prior to the time he was placed under arrest, it was inadmissible because it was not the product of a search incident to arrest. The difficulty with this line of argument is that the gun was not the product of a "search" at all; it was lying on the front seat of the car in plain view. As soon as he saw it, Officer Pavlovich seized it and unloaded it, both to preserve it and its cartridges as evidence and to prevent appellant, who was standing beside him, from getting hold of it. His conduct was entirely justified.

> It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence.[6]

III

The final point raised by appellant is a challenge to the burden of proof in insanity cases as set forth in the

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[5] See Maze v. State, 425 P.2d 235, 238 (Alaska 1967).

[6] Harris v. United States, 390 U.S. 234, 236, 19 L.Ed.2d 1067, 1069 (1968); Creighton v. United States, 406 F.2d 651 (D.C. Cir. 1968); Klockenbrink v. State, 472 P.2d 958, 961 (Alaska 1970). See Stevens v. State, 443 P.2d 600, 602 (Alaska 1968).

opinion of this court in Chase v. State.[7] A review of the record reveals that the only testimony before this court in reviewing this point is the testimony of Officer Pavlovich, the appellant, Pope, Bill McConnell, and the cross-examination of appellant's ex-wife. Testimony given by Dr. J. Ray Langdon, a psychiatrist, and Marie Doyle, a psychologist, at the trial, as well as the testimony of additional police officers and others at the scene of the crime, was not made a part of the record on appeal.

While proper objections were made at the trial concerning burden of proof in insanity cases, no objection was made to instructions on the test for insanity as given by the trial court, nor was any testimony presented nor instructions requested concerning such an issue.

Since in our opinion the burden of proof as to the defense of insanity and the actual test for insanity are inseparably intertwined,[8] we are placed in the position of attempting to review the entire basis for the present rule on the defense of insanity in Alaska on an inadequate record without complete presentation of these issues to the trial court. This we decline to do.[9]

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[7] 369 P.2d 997, 1003 (Alaska 1962).

[8] Approximately one-half of the states put the burden on the defendant while the other half and the federal courts put the basic burden on the prosecution. See annot. 17 A.L.R.3rd 146 (1968).

[9] For a similar action by a federal court, see Ramer v. United States, 390 F.2d 564 (9th Cir. 1968).

The importance of the defense of insanity has been underscored recently by a series of excellent opinions in federal courts which have considered, and in many cases adopted, the A.L.I. test for insanity,[10] and a series of equally searching state court opinions which have noted more than one position, but have tended to retain the M'Naghten rule.[11] These opinions note that there are presently four separate tests for insanity[12] which have received varying degrees of judicial acceptance. They serve to underscore the difficulty of choosing a proper test for insanity and the corresponding burden of proof without

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[10] Wade v. United States, 426 F.2d 64 (9th Cir. 1970); Blake v. United States, 407 F.2d 908 (5th Cir. 1969); United States v. Chandler, 393 F.2d 920 (4th Cir. 1968); United States v. Shapiro, 383 F.2d 680 (7th Cir. 1967); Pope v. United States, 372 F.2d 710 (8th Cir. 1967), vacated on other grounds, 392 U.S. 651, 20 L.Ed.2d 1317 (1968); United States v. Freeman, 357 F.2d 606 (2nd Cir. 1966); Wion v. United States, 325 F.2d 420 (10th Cir. 1963), cert. denied 377 U.S. 946, 12 L.Ed.2d 309 (1964); United States v. Smith, 404 F.2d 720 (6th Cir. 1968).

[11] FOR A.L.I.: State v. White, 456 P.2d 797 (Idaho 1969).
FOR M'NAGHTEN: State v. Malumphy, 461 P.2d 677 (Ariz. 1969); State v. Moeller, 433 P.2d 136 (Hawaii 1967); State v. Harkness, 160 N.W.2d 324 (Iowa 1968); Williams v. State, 451 P.2d 848, 851 (Nev. 1969); State v. Gilmore, 410 P.2d 240 (Ore. 1966); Commonwealth v. Rightnour, 253 A.2d 644 (Pa. 1969) (Aff'd by equally divided court).

[12] (1) The M'Naghten Test, Daniel M'Naghten case, 8 Eng. Rep. 718 (H.L. 1843).
(2) Durham Test, Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).
(3) American Law Institute Test, American Law Institute, Model Penal Code, Section 4.01(1) (Final Draft 1962).
(4) English Test, British Royal Commission on Capital Punishment, 1949-1953, 1953 Report at page 116, quoted in United States v. Currens, 290 F.2d 751, 774, n. 32 (3rd Cir. 1961).

complete presentation on the issue in the trial court and ultimately in this court.[13]

The judgment of the Superior Court is hereby affirmed.

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[13] Once before this court has refused to review the test for insanity for Alaska based on an inadequate record. See Dimmick v. State, 449 P.2d 774, 776 (Alaska 1969).

CONNOR, J., concurring in part and dissenting in part.

I concur with the majority opinion except the portion dealing with the burden of proof in insanity cases, and allied questions. As to that portion of the majority opinion I must respectfully dissent.

This case went to the jury on instructions concerning the defense of insanity which were patterned on those approved by this court in Chase v. State, 369 P.2d 997 (Alaska 1962). Counsel for appellant objected to those instructions as improperly placing the burden on the accused to establish his insanity by a preponderance of the evidence. He thus raised and preserved for appeal the questions of what is the burden of proof and where it should be placed in these cases. He is properly entitled to a decision on those questions.

The majority of my colleagues feel that the burden of proof question and the substantive test of insanity are interrelated. I agree. But for that very reason I believe that both topics logically can, and properly should, be determined by the court.[1/]

The lack of an adversary presentation of the legal arguments bearing upon the proper test of insanity in criminal cases should not be an impediment to decision in this particular instance. Ultimately one must read a large body of legal and

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1/ For a case in which a distinguished court took a relaxed view of the manner in which counsel raised the question of the proper test of insanity in the trial court, see United States v. Freeman, 357 F.2d 606 (2d Cir. 1966). The failure of trial counsel in that case to object to the insanity test itself was not deemed critical.

psychiatric material even to become conversant with these subjects. Appellate briefs are of much less value here than in the resolution of more usual questions.[2] Surely this would not be the first time that this court decided a case on grounds or under a doctrine not fully presented in the briefs.[3]

There is another reason why we should decide these questio.. now, not later. In my opinion the test currently obtaining under Chase v. State, supra, is so inherently unfair as to dissuade either defendants or their counsel from raising the defense of insanity, or adducing evidence in support of it. Thus it is difficult to get the insanity question before us on appeal.

The insanity defense is much like a confession and avoidance. One virtually admits all factual elements of the crime but claims insanity as a special ground of exoneration. One claiming that he did not commit the offense, but who alternatively claims that he was insane when he did commit it, has little hope of success. While such an approach is procedurally permissible, as a practical matter it is a foolhardy strategy.

2/ The question of the test of insanity as a criminal defense has already been briefed in Chase v. State, 369 P.2d 997 (Alaska 1962). There the state urged that if the M'Naghten test was not employed, the American Law Institute test (discussed later herein) would be the most suitable.

3/ One such case was Grossman v. State, 457 P.2d 226 (Alaska 1969), adopting an objective standard of entrapment, though neither party directly briefed that doctrine. Surely others could be found by searching the briefs and comparing them with the opinions rendered by this court during the last ten years.

A person invoking the Alaska rule on insanity, even in a strong case, has almost precluded himself from an acquittal. The current test thus exerts a chilling effect upon one who might seek a change in the law through the appellate process. This is true even though he may have suffered from serious mental illness, of a psychotic type, at the time he committed the act with which he is charged. Because of the in terrorem effect of the current Alaska test, I see no reason to postpone corrective measures, especially if we believe that the test can be improved.

I

All discussion of the tests of criminal responsibility inevitably must refer to M'Naghten's Case, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843), which is regarded as the English source of the rule followed in most American jurisdictions for over a century. In that case Daniel M'Naghten attempted to assassinate Robert Peel, the Prime Minister. Because Peel, on the fatal day, happened to ride in Queen Victoria's carriage instead of his own, M'Naghten shot into the wrong carriage and killed Drummond, Peel's secretary. From all of the available information it seems quite plain that M'Naghten was suffering from psychotic delusions of persecution. At his trial Lord Chief Justice Tindal virtually directed a verdict in his favor.[4/] At the trial the medical witnesses and the court had been influenced by the writings and

4/ Guttmacher & Weihofen, Psychiatry and the Law, 403 (1952); Roche, "Criminality and Mental Illness - Two Faces on the Same Coin," 22 U. Chi. L. Rev. 320, 324 (1955); Biggs, The Guilty Mind, 95-97, 102 (1955).

theories of such advanced thinkers as Dr. Isaac Ray, the first great forensic psychiatrist in America. It was Dr. Ray's thesis that insanity must be measured by evaluating the entire personality structure of an individual, and not by tests such as merely the ability to know right from wrong.[5/] At any rate, M'Naghten was acquitted. Unfortunately for the development of law, the case did not end there.

Despite commitment of the hapless M'Naghten to an insane asylum, Queen Victoria was outraged by the acquittal, probably because there had already been three attempts on her life and one on that of the Prince Consort. In a letter to Sir Robert Peel, the Queen deplored the action of the judges in allowing verdicts of not guilty by reason of insanity in cases of this kind because she was convinced that such malefactors "were perfectly conscious and aware of what they did." She pressed for legislation to require judges "to interpret the law in this and no other sense in their charges to the Juries."[6/] The House of Lords was convened, and the fifteen judges of the common law courts were called upon, in an atmosphere of political pressure, to answer five rather vacuous questions about criminal responsibility in English law. Interestingly enough, it was Lord Chief Justice Tindal who

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5/ Dr. Ray's views have a modern ring. "[T]he insane mind is not entirely deprived of ... power of moral discernment, but on many subjects is perfectly rational and displays the exercise of a sound and well balanced mind." Ray, Medical Jurisprudence of Insanity 13 (3d ed. 1853).

6/ Biggs, supra n. 4, 103.

responded with a test more rigid than that which he had used when M'Naghten was tried before him. The M'Naghten rule in essence is:

> "[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing: or, if he did know it, that he did not know he was doing what was wrong." 10 Cl. & Fin., at 210, 8 Eng. Rep., at 722.

Thus, in a case which was no longer a case, in response to hypothetical questions based on notions of phrenology and monomania which were then in vogue, the judges, in a dramatic departure from common law decisional technique, acting more as a governmental committee than a court, pronounced a rule which has been followed unthinkingly by many courts ever since. Of little avail was the restrained observation of Sir James Stephen that "every judgment delivered since the year 1843 has been founded upon an authority which deserves to be described as in many ways doubtful."[7/] The test could at least have been limited to cases of paranoia like that suffered by M'Naghten, but instead it was applied by many courts as a rule of universal and implacable validity, appropriate for all types of mental and emotional derangement.

The M'Naghten test has been supplemented in many jurisdictions by the "irresistible impulse" test, under which one suffering from a mental disease, of such severity that the

7/ II Stephen, History of the Criminal Law of England 153 (1883).

freedom of will is destroyed, may be excused from culpability.[8]

In Alaska, before statehood, the right-and-wrong test, supplemented by the irresistible impulse test, was considered the applicable rule.[9] In Chase v. State, 369 P.2d 997 (Alaska 1962), however, this court adopted a particular version of what it regarded as the M'Naghten rule. The test laid down there was that in order to exculpate the defendant he must be laboring under such mental disease or derangement at the time of the act "as to render him incapable of knowing the nature and quality of his act and of distinguishing between right and wrong in relation to the act with which he is charged." 369 P.2d, at 998. (Emphasis supplied.) This results in a formulation more rigid than the M'Naghten test, and without the irresistible impulse supplement which had previously obtained in Alaska.[10] In that sense the Chase case is a retrograde decision in a time of

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8/ As of 1955, about 14 states, and the federal judiciary, had adopted the irresistible impulse addition to the test.

Mod. Penal Code, Tent. Dr. No. 4,161 (1955).

9/ Matheson v. United States, 227 U.S. 540 (1913); Davis v. United States, 165 U.S. 373 (1897); Sauer v. United States, 241 F.2d 640 (1957), cert. denied 354 U.S. 940: Rivers v. United States, 270 F.2d 435 (1959).

10/ That the Alaska test is more restrictive than M'Naghten is apparent from the following example. One laboring under a psychotic delusion, such as that he is being persecuted or that God has ordained that he must kill, may well know the nature of the act committed, yet not be able to appreciate its wrongfulness. Under M'Naghten he would not be culpable, but under Chase he could not be acquitted. Cf. People v. Schmidt, 110 N.E. 945 (N.Y. 1915), per Cardozo, J.

generally forward legal progress.[11/]

The court in Chase relied on three cases: Jessner v. State, 202 Wis. 184, 231 N.W. 634, 71 A.L.R. 1005 (1930); Maas v. Territory, 10 Okla. 714, 63 P. 960 (1901); and Montgomery v. State, 68 Tex. Crim. 78, 151 S.W. 813 (1912). As the Note, "Criminal Insanity," UCLA-Alaska L. Rev., 8 Alaska L.J. 152, 153-54 (Aug. 1970), points out, these cases were decided before many of the modern advances in psychiatry had been widely disseminated. Moreover, the instructions given in these cases lacked clarity and therefore were extremely confusing. Jessner and Montgomery indeed held that the phrases "the nature and quality of the act" and "the difference between right and wrong" were synonymous; if the defendant could not understand the one, he could not distinguish the other. However, as the Note, supra, indicates, these phrases are not at all synonymous in ordinary speech.

To torture English into performing such a linguistic cakewalk requires unusual skill. Since juries are composed of but ordinary reasonable laymen, additional complicated instructions would have to be given to insure that the jury does not consider the terms according to their usage in common everyday

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11/ Speculation persists in Alaska legal circles that the use of the conjunctive "and" in the instructions which were validated in Chase possibly came about through a typographical error by the secretary to the trial court judge. If this is so, then Chase is no less an historical accident than M'Naghten's Case.

speech and thereby misapply the law. Such verbal gymnastics should not be employed in jury instructions. The purpose of jury instructions is to instruct and enlighten the jury on the law, not to confuse them.[12/]

It also appears that the instructions in Jessner focused solely on the defendant's ability to distinguish between right and wrong, ignoring completely his ability to understand the nature and quality of his act.[13/] In Maas, the actual instruction did follow the disjunctive form of the M'Naghten test.[14/] If anything, this case stands for an adoption of the true M'Naghten rule, not the rule of Chase. In sum, I do not find any of these cases of sufficient precedential value to warrant an adherence by this court to what is little more than a modified "wild beast" test.[15/]

Since the M'Naghten case, and even in the eight years since Chase v. State was decided, a great deal of critical

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12/ "But 'glory' doesn't mean 'a nice knockdown argument,'" Alice objected.

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean--neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master--that's all."

L. CARROLL, Through the Looking Glass, in THE ANNOTATED ALICE 269 (1960).

This nonsensical repartee brings sharply into focus a problem which has plagued logicians since at least the time of William of Occam. A lack of awareness of this problem has led to much mischief in legal interpretation.

13/ 202 Wis. at 196, 231 N.W. at 639.
14/ 10 Okla. at 717, 63 P. at 961.
15/ Rex v. Arnold, 16 How. St. Tr. 695, 764 (1724).

evaluation and development has occurred, in an effort to achieve more advanced and just techniques for handling this serious problem.

The torrent of legal writing is so vast that it is nearly impossible for all but a few to read or comprehend everything which has been said on this basic issue of criminal responsibility. Still, certain broad outlines can be stated. There is nearly universal dissatisfaction with the M'Naghten rule on the part of scholars, jurists, and psychiatrists who have seriously inquired into the subject. The main difficulty with the M'Naghten rule is that it focuses exclusively on the cognitive element in mental life, that is, the knowledge of right and wrong or of the nature of one's act. One of its underlying assumptions is that mental illness is a failure of intellectual function. This reflects an artificial dualism of mind and emotions which ignores the affective aspects of the human personality. While there are many schools of psychiatric thought, there is broad agreement that mental illness can be understood only by looking at man as an integrated, psychobiological whole.[16/] Because the M'Naghten

16/ "Psychiatry may be defined as that branch of medicine which deals with the genesis, dynamics, manifestations and treatment of such disordered and undesirable functionings of the personality as disturb either the subjective life of the individual or his relations with other persons or with society.... Viewed a little differently, psychiatry may be regarded as the science which deals with the psychopathological aspect of human biology. The latter considers man not only as a living organism but also as a thinking, feeling and striving one." Noyes & Kolb, Modern Clinical Psychiatry (5th Ed. 1958), 1.

rule views man within the artificial strictures of cognition, courts and juries are deprived of much of the benefit to be gained from the modern science of psychiatry.[17/]

Other criticisms of the M'Naghten rule would probably be applicable to any verbal formulation.[18/] The difficulty stems from the different functions and purposes of law and psyciatry. The aim of psychiatry is to examine human behavior and mental disease in a scientific manner and to develop therapeutic methods of dealing with the emotional problems of mankind. On the other hand, it is the task of the law to develop normative rules to control human behavior. It has always been recognized that certain persons must be regarded as not the proper subjects of criminal conviction, and that because of their mental aberrations it would be unjust to hold them responsible for their conduct.[19/] Ultimately this is an ethical and social judgment and not a medical determination.

Scholars and jurists have expended great effort over the years to achieve a standard reflecting both society's need for criminal accountability and the converse demand for a rule flexible enough to cover the varieties and combinations of serious emotional and mental illness which destroy the capacity to commit a crime, in any just conception of the term.

17/ P. Roche, The Criminal Mind (1957), 168-195, 244-274.

18/ F. Allen, The Borderland of Criminal Justice (1964), 111.

19/ A. Platt & B. Diamond, "The Origins of the 'Right and Wrong' Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey," 54 Calif. L. Rev. 1227 (1966). In early law the "insane" were considered homologous to children.

One great developmental breakthrough occurred with the famous decision in Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954). There Judge Bazelon laid down a test under which a defendant was to be held not responsible "if his unlawful act was the product of mental disease or mental defect." 214 F.2d at 874. This was an adaptation of a rule which had previously existed solely in New Hampshire, and which had developed under the influential work of Dr. Ray. State v. Pike, 49 N.H. 399 (1870). While Durham represents a courageous attempt to state a modern standard of responsibility, certain deficiencies were encountered in its administration. For example, the use of the term "product" created difficult problems of causation.[20/] And as Judge (now Chief Justice) Burger complained, concurring in Blocker v. United States, 288 F.2d 853, 860 (D.C. Cir. 1960), the test in many cases put the legal determination in the hands of psychiatric witnesses rather than judge and jury. Finally, in Washington v. United States, 390 F.2d 444 (D.C. Cir. 1967), Judge Bazelon noted certain shortcomings of the Durham test, in that it allowed the psychiatrist to make too many legal and moral judgments which should be within the province of the jury. In substance, he appears to have acceded at least partially to the view of Judge Burger that psychiatrists should no longer be permitted to render an opinion on whether the act was a "product" of mental disease. A lengthy form of instruction was adopted to clarify the respective functions of expert

20/ Weihofen, "The Flowering of New Hampshire," 22 U. of Chi. L. Rev. 356, 360 (1955).

witness and jury.

Shortly after the Durham rule was announced, the American Law Institute promulgated a draft rule on this subject. This rule represents the collective efforts of some of the leading thinkers in this field. After nine years of research and consideration, the proposed rule was stated as follows:

> "(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.
>
> "(2) The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."
>
> A.L.I. Mod. P. Code §4.01 (final draft) (1962).

Since then this test, or some variant of it, has met with increasing judicial acceptance, particularly in the federal courts. In a luminous opinion by Judge Kaufman, the Second Circuit adopted the test in United States v. Freeman, 357 F.2d 606 (2nd Cir. 1966). Chief Judge Haynsworth adopted it for the Fourth Circuit in United States v. Chandler, 393 F.2d 920 (4th Cir. 1968) (en banc), and the Ninth Circuit has now embraced it in Wade v. United States, 426 F.2d 64 (9th Cir. March, 1970)(en banc). The M'Naghten test has now been overthrown in all but the First Circuit.[21/] These

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21/ In addition to the above cited cases, see United States v. Currens, 290 F.2d 751 (3rd Cir. 1961); Blake v. United States, 407 F.2d 908 (5th Cir. 1969) (en banc); United States v. Smith, 404 F.2d 720 (6th Cir. 1968); United States v. Shapiro, 393 F.2d 680 (7th Cir. 1967) (en banc); Pope v. United States, 372 F.2d 710 (8th Cir. 1967) (en banc), vacated on other grounds, 392 U.S. 651 (1968); Wion v. United States, 325 F.2d 420 (10th Cir. 1963) (en banc), cert. denied, 377 U.S. 946 (1964). While not all of these cases embrace the A.L.I. test totally, they reject the

cases contain excellent disquisitions on the M'Naghten rule, its deficiencies, and the legal and psychiatric framework underlying the A.L.I. test. As Chief Judge Haynsworth said of the A.L.I. test:

> "With appropriate balance between cognition and volition, it demands an unrestricted inquiry into the whole personality of a defendant who surmounts the threshold question of doubt of his responsibility. Its verbiage is understandable by psychiatrists; it imposes no limitation upon their testimony, and yet, to a substantial extent, it avoids a diagnostic approach and leaves the jury free to make its findings in terms of a standard which society prescribes and juries may apply. [Footnotes omitted.]" United States v. Chandler, supra, at 926.

This wide acceptance of the American Law Institute test is significant. I believe that this formulation affords a workable standard, permitting realistic expert testimony about the personality and characteristics of the defendant as a whole man, but leaving to the court and jury the ultimate legal pronouncement. It avoids many of the problems encountered under the Durham rule.

No verbal formulation of this standard can achieve perfection, as there may always be doubt about the application of general terms to marginal situations. Yet the American Law Institute standard, in the view of many, does represent the best in current thinking on this subject. It is the standard

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21/ [cont'd] M'Naghten rule and include a test whereby the effect of mental illness on one's capacity to conform his conduct to law is stressed. Judge (now Chief Justice) Burger, in his separate concurring opinion in Blocker v. United States, 288 F.2d 853 (D.C. Cir. 1960), laid great emphasis on a test which would focus on the relationship between mental illness and one's capacity to refrain from wrongdoing.

which should be employed in Alaska.[22] I regard it unfortunate that we are not taking this step today.

II

Appellant has raised the question of where the burden of proof should be placed in these cases. In Chase v. State, supra, this court adopted the rule that the burden was on the defendant to establish his insanity by a preponderance of the evidence. Approximately one-half of the states follow this rule.[23] But in the rest of the states, and in the federal

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22/ The standard need not be frozen entirely within only one rigid form of words. In appropriate cases the testimony might require some amplification of the test in the instructions to the jury. Nor is this an occasion to consider the undue resort to diagnostic labels and conclusionary medical terms which plagued the court under the Durham rule and which the court sought to limit in Washington v. United States, 390 F.2d 444 (D.C. Cir. 1967). Hopefully, care would be taken to see that experts explain such labels and terms in language understandable to the jury.

23/ Alabama, Knight v. State, 142 So.2d 899 (Ala. 1962); Alaska, Chase v. State, 369 P.2d 997 (Alas. 1962); Arkansas, Kelley v. State, 242 S.W. 572 (Ark. 1922); California, People v. Monk, 363 P.2d 865 (Calif. 1961); Delaware, Longoria v. State, 168 A.2d 695 (Del. 1961); Georgia, Ross v. State, 124 S.E.2d 280 (Ga. 1962); Iowa, State v. Drosos, 114 N.W. 2d 526 (Iowa 1962); Kentucky, Tungent v. Commonwealth, 198 S.W.2d 785 (Ky. 1947); Maine, State v. Park, 193 A.2d 1 (Me. 1963); Minnesota, State v. Finn, 100 N.W.2d 508 (Minn. 1960); Missouri, State v. King, 375 S.W.2d 34 (Mo. 1964); Montana, State v. DeHann, 292 P. 1109 (Mont. 1930); Nevada, State v. Behiter, 29 P.2d 1000 (Nev. 1934); New Jersey, State v. Kudzinowski, 147 A. 453 (N.J. 1929); North Carolina, State v. Swink, 47 S.E.2d 852 (N.C. 1948); Ohio, State v. Stewart, 198 N.E.2d 439 (Ohio 1964); Oregon, 14 Ore. Rev. Stat. 136.390 (1960); Pennsylvania, Commonwealth v. Updegrove, 198 A.2d 534 (Pa. 1964); Rhode Island, State v. Gunnites, 161 A.2d 818 (R.I. 1960); South Carolina, State v. Tidwell, 84 S.E. 778 (S.C. 1915); Texas, Carrell v. State, 283 S.W.2d 793 (Tex. 1951); Virginia, Christian v. Commonwealth, 117 S.E.2d 72 (Va. 1960); Washington, State v. Mays, 395 P.2d 758 (Wash. 1965); West Virginia, State v. McCauley, 43 S.E.2d 454 (W. Va. 1947). See 17 A.L.R.3d 146 (1968).

courts, the accused need only show some evidence of insanity. The prosecution must then prove his sanity beyond a reasonable doubt.[24/]

Those who place the burden of establishing sanity on the defendant usually argue that this accords with the presumption of sanity. Because there is a presumption, it is said that the prosecution should not be put to proving that which normally is not imposed upon it. But under the federal rule, the presumption of sanity is still employed. It is operative until some evidence is produced which adequately brings into issue the sanity of the defendant. The presumption then disappears and the mental capacity of the defendant to commit the crime becomes an essential element, to be proved beyond a reasonable

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24/ Those states following the federal rule are: Arizona, State v. Schantz, 403 P.2d 521 (Ariz. 1965); Colorado, Castro v. People, 346 P.2d 1020 (Colo. 1959); Connecticut, State v. Joseph, 115 A. 85 (Conn. 1921); Florida, Farrell v. State, 101 So.2d 130 (Fla. 1958); Hawaii, State v. Moeller, 433 P.2d 1[illegible] (Hawaii 1967); Idaho, State v. Clokey, 364 P.2d 159 (Idaho 1961); Illinois, People v. Robinson, 174 N.E.2d 820 (Ill. 1961); Indiana, Whitaker v. State, 168 N.E.2d 212 (Ind. 1960); Kansas, State v. Penry, 368 P.2d 60 (Kan. 1962); Maryland, Jenkins v. State, 209 P.2d 616 (Md. 1965); Massachusetts, Commonwealth v. McHoul, 226 N.E.2d 556 (Mass. 1967); Michigan, People v. Eggleston, 152 N.W. 944 (Mich. 1915); Mississippi, McGarrh v. State, 148 So.2d 494 (Miss. 1963); Nebraska, Thompson v. State, 68 N.W.2d 267 (Nebr. 1955); North Dakota, State v. Barry, 92 N.W. 809 (N.D. 1902); New Hampshire, State v. Bartlett, 43 N.H. 224 (N.H. 1861); New Mexico, State v. Roy, 60 P.2d 646 (N.M. 1936); New York, People v. Kelley, 99 N.E. 2d 552 (N.Y. 1951); Oklahoma, Whisenhunt v. State, 279 P.2d 366 (Okla. 1954); South Dakota, State v. Waugh, 127 N.W.2d 429 (S.D. 1964); Tennessee, Jordan v. State, 135 S.W. 327 (Tenn. 1911); Utah, State v. Green, 40 P.2d 961 (Utah 1935); Wisconsin, State v. Esser, 115 N.W.2d 505 (Wis. 1962); Wyoming, State v. Pressler, 92 P. 806 (Wyo. 1907). The District of Columbia also follows this rule: Jones v. United States, 284 F.2d 245 (D.C. Cir. 1960). See 17 A.L.R.3d 146 (1968).

doubt, like any other.[25/]

It has been said that the burden of establishing insanity should be placed on the accused because sanity is not an element of the offense but a quality of the one who commits it. Chase v. State, supra, at 1003. But this overlooks the important consideration that once sanity is in issue it is a fact to be established like any other ultimate fact essential to culpability. The United States Supreme Court made this plain in Davis v. United States, 160 U.S. 469 (1895), when it said:

> "No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged." (Emphasis supplied.) 160 U.S. at 493.

Realistically speaking, when sanity is an issue, it is not only a major element of the criminal proof, it may be the central factual issue in the case. For that matter, it may be the only issue. Logically, sanity is an essential element of a crime because mens rea is a necessary primary factor. If insanity exists at the time of the criminal act, mens rea fails, there is

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25/ Fitts v. United States, 284 F.2d 108 (10th Cir. 1960). There the court said:

> "When, however, evidence of insanity is produced, from whatever source, the presumption of sanity disappears, and the mental capacity of the accused to commit the crime becomes an essential element to be proved by competent evidence beyond a reasonable doubt." 284 F.2d at 112.

This is the general rule which is followed in approximately one-half or more of the jurisdictions of the United States.

no jointure of act and intent, and under the traditional analysis no crime has been committed. As Mr. Justice Frankfurter noted, dissenting in Leland v. Oregon, 343 U.S. 790, 803 (1952):

> "Even though a person be the immediate occasion of another's death, he is not a deodand to be forfeited like a thing in the medieval law. Behind a muscular contraction resulting in another's death there must be culpability to turn homicide into murder."

Placing the burden on the prosecution has substantial advantages. First, it accords with the presumption of innocence and the thesis that the accused need not undertake to prove anything in a criminal case.[26/]

An additional advantage is that the jury is not given the confusing task of juggling two different burdens, each of which carries a different standard. This anomaly is pointed out by Professor McCormick:

> "Thus it seems inconsistent to demand as to some elements of guilt, such as an act of killing, that the jury be convinced beyond a reasonable doubt, and as to others, such as duress or capacity to know right from wrong, the jury may convict though they have such doubt. Accordingly, the recent trend both in English and American decisions is to treat these so-called matters of defense as situations wherein the accused will usually have the first burden of producing evidence in order that the issue be raised and submitted to the jury, but at the close of the evidence the jury must be told that if they have a reasonable doubt of the fact on which the justification is based they must acquit." McCormick, Evidence § 321, p. 684 (1954). (Footnote omitted.)

26/ As a practical matter the accused often must undertake to adduce proof of insanity if he is to prevail in creating a reasonable doubt on the whole evidence.

There are also important aspects of constitutional policy to be weighed in the balance. It has been held unconstitutional to shift the burden of persuasion on the defense of alibi to the accused. Stump v. Bennett, 398 F.2d 111 (8th Cir. 1968) (en banc), and cases cited therein. This may or may not represent some future trend. But when it comes to shifting burdens, there is not much difference between proof that a defendant was physically present, and not elsewhere, at the commission of a crime, and that he was "mentally present," in the sense that he was sane.

Lastly, the experience of the federal courts, in their treatment of the burden of persuasion, is of value. The federal courts have worked under the rule of Davis v. United States, supra, since 1895, and have not found it a handicap in effecting criminal justice. In my view, when sanity is in issue, the burden of persuasion should be upon the prosecution to establish the sanity of the accused beyond a reasonable doubt.

III

In fairness, to avoid surprise, the prosecution should be entitled to notice that it must adduce evidence of the defendant's sanity. Because the mental status of an accused, in terms of sanity, is usually not in issue in a criminal prosecution, it would be an unfair burden to require the state invariably to guess at whether this issue might be raised at trial, and possibly to prepare on this issue, only to have it not raised at all. Nor is it fair for defendants to wait in

ambush until trial to inject the sanity issue as a surprise tactic.

Therefore, if we were to alter our insanity rules, we should also change our procedural rules to require that at the time of plea, or within a certain number of days thereafter, one intending to raise the issue of insanity at his trial must specially plead that he was insane at the time he committed the act charged.

For the reasons given I would reverse and remand for a new trial.

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Pipeline

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Pipeline

STATEMENT OF COMMISSIONER FREDERICK McGINNIS
DEPARTMENT OF HEALTH AND WELFARE, STATE OF ALASKA

DEPARTMENT OF INTERIOR HEARING, 2/24/71
ON THE
TRANS-ALASKA PIPELINE

MY NAME IS FREDERICK McGINNIS. I AM THE COMMISSIONER OF THE ALASKA DEPARTMENT OF HEALTH AND WELFARE, AN ALASKAN DEPARTMENT WITH BROAD POWERS, DUTIES AND RESPONSIBILITIES FOR THE PROTECTION OF ALASKA'S ENVIRONMENT. AT THE SAME TIME, OUR DEPARTMENT IS MOST DEEPLY INVOLVED IN RESPONSIBILITIES IN HEALTH AND WELFARE NEEDS OF OUR PEOPLE.

THIS DEPARTMENT HAS REVIEWED IN CONSIDERABLE DEPTH THE ENVIRONMENTAL IMPACT STATEMENT AND CONSIDERS IT TO BE A REASONABLE EVALUATION OF PROBABLE EFFECTS OF THE PIPELINE ON THE RELATED ENVIRONMENT. THE STIPULATIONS WHICH ACCOMPANY THE IMPACT STATEMENT HAVE BEEN DEVELOPED WITH THE ACTIVE PARTICIPATION OF MEMBERS OF OUR STAFF.

I BELIEVE THAT THEY PROVIDE ADEQUATELY FOR MAXIMUM CONTROL OF POSSIBLE ENVIRONMENTAL INSULTS, BOTH DURING CONSTRUCTION AND IN OPERATION OF THE PIPELINE. THE ALASKA STATUTES AND THE ALASKA ADMINISTRATIVE CODE SPELL OUT THE AUTHORITY OF THE DEPARTMENT OF HEALTH AND WELFARE IN ENVIRONMENTAL MATTERS. COMPLIANCE WITH ALL STATE LAWS AND REGULATIONS IS REQUIRED BY GENERAL STIPULATION #9 ON PAGE 15 OF THE STIPULATIONS DOCUMENT. IT SHOULD BE UNDERSTOOD THAT THE DEPARTMENT WILL ENFORCE OUR LAWS AND REGULATIONS, NOT ONLY ON THE 120 MILES OF THE PIPELINE WHICH CROSS STATE CONTROLLED LAND BUT, THROUGHOUT THE LENGTH OF THE PROJECT.

THE RESPONSIBILITY AND RIGHT OF THE STATE OF ALASKA TO ABATE AND TO PREVENT WATER POLLUTION IS SET FORTH IN THE FEDERAL WATER POLLUTION CONTROL ACT OF 1956. ALTHOUGH THIS STATUTE HAS BEEN AMENDED MANY TIMES

SINCE ITS ORIGINAL PASSAGE, THE LEGISLATION DEFINES IN CLEAR TERMS CONGRESSIONAL INTENT TO MAKE THIS ACTIVITY A STATE RESPONSIBILITY.

OUR SERIOUS CONCERN FOR PROTECTING THE VALUABLE FISHERY IN THE VALDEZ ARM HAS RESULTED IN ONE OF THE MOST STRINGENT OIL REMOVAL REQUIREMENTS IN THE WORLD. ALTHOUGH OUR WATER QUALITY STANDARDS IMPLY A MAXIMUM OF ABOUT 15 PARTS PER MILLION OF OIL (A VISIBLE SHEEN OCCURS AT ABOUT THIS LEVEL) OUR ENGINEERS HAVE REQUIRED THE ALYESKA PIPELINE SYSTEM STAFF TO DEVELOP EQUIPMENT TO REDUCE OIL IN THE EFFLUENT FROM THE BALLAST WATER TREATMENT PLANT TO A MAXIMUM OF 10 PARTS PER MILLION. SINCE THE 1970 LEGISLATURE HAS ENACTED A LAW TO PROVIDE THAT TANKERS BRING ALL BALLAST ASHORE FOR TREATMENT, THE ALYESKA VALDEZ TERMINAL TREATMENT PLANT WILL ACTUALLY BE PROTECTING NOT ONLY THE VALDEZ ARM, BUT AREAS OFF

PRINCE WILLIAM SOUND WHERE TANKERS MIGHT HAVE BEEN EXPECTED TO DISCHARGE SURPLUS BALLAST PRIOR TO COMING INTO PORT.

THE STATE OF ALASKA IS PREPARED BY PRESENT AND PROPOSED ARRANGEMENTS TO MONITOR A PROJECT OF THIS MAGNITUDE. BOTH FROM THE STANDPOINT OF ADEQUATE LAWS AND REGULATIONS AND FROM THE STANDPOINT OF COOPERATIVE EFFORT WITH OTHER STATE AND FEDERAL AGENCIES WE HAVE DEVELOPED A STRONG PROGRAM WHICH EXHIBITS OUR COMMON CONCERN FOR ENVIRONMENTAL PROTECTION.

THROUGH A PROGRAM OF PLAN REVIEW AND PERMIT ISSUANCE, THE DEPARTMENT EXERCISES JURISDICTION OVER ALL NEW INDUSTRIAL AND MUNICIPAL SOURCES OF POLLUTION. PRELIMINARY PLANS USUALLY ARE DISCUSSED WITH OUR STAFF ENGINEERS, FINAL PLANS AND SPECIFICATIONS ARE REVIEWED FOR COMPLIANCE WITH OUR STATUTE AND CODES, AND THE COMPLETED

PROJECT IS MONITORED FOR ADHERENCE TO REQUIREMENTS SET FORTH IN A WASTE DISCHARGE PERMIT.

PRIOR TO THE GREATLY ENHANCED FEDERAL OIL POLLUTION LEGISLATION OF 1970, THE ALASKA OIL POLLUTION TASK FORCE, CONSISTING OF REPRESENTATIVES OF STATE AND FEDERAL GOVERNMENTS AS WELL AS OF INDUSTRY, PROVIDED A MECHANISM FOR DEVELOPMENT OF A CONTINGENCY PLAN, A COMMUNICATIONS NETWORK, AND FOR EVALUATION OF PLANS FOR PREVENTING AND CONTROLLING OIL POLLUTION. PARTICULAR STRESS WAS PLACED ON THE NEED FOR ALL EMPLOYEES ON DRILL RIGS AND PIPELINES TO UNDERSTAND THE ABSOLUTE NECESSITY FOR PREVENTING THE LOSS OF OIL FROM ANY SYSTEM.

AS SPILLS ARE REPORTED ANYWHERE IN ALASKA TODAY, STATE AND FEDERAL ENGINEERS AND BIOLOGISTS INVESTIGATE PROMPTLY TO ASSURE ABSOLUTE MINIMUM RESIDUAL EFFECT ON THE ENVIRONMENT. THE INDUSTRY OR AGENCY RESPONSIBLE IS

ADVISED REGARDING CLEAN-UP, AND THE INVESTIGATING OFFICER MAY ASSIST IN LOCATING ADSORBENTS AND EQUIPMENT FOR CLEAN-UP. THE ALYESKA PIPELINE CORPORATION WILL BE REQUIRED TO SHOW IN ITS PLAN SUBMITTED FOR DEPARTMENT APPROVAL THAT ADEQUATE STOCKPILES OF CLEAN-UP MATERIALS WILL BE PROVIDED ALONG THE PIPELINE AND THAT ITS EMPLOYEES HAVE BEEN TRAINED TO MAKE USE OF THESE MATERIALS AS NEEDED.

AN IMPORTANT PART OF THE DEPARTMENT EDUCATIONAL AND CONTROL PROGRAM HAS BEEN DIRECTED BY A SENIOR STAFF ENGINEER LOCATED IN FAIRBANKS. HERE, A PROGRAM IS DIRECTED TO ACQUAINT ALL OPERATORS ON THE NORTH SLOPE WITH STATUTORY AND REGULATORY REQUIREMENTS DEALING WITH WATER SUPPLY, SEWAGE DISPOSAL, FOOD SERVICE, HOUSING HYGIENE, OCCUPATIONAL HEALTH, SOLID WASTE MANAGEMENT, PEST CONTROL, AND AIR POLLUTION CONTROL. SUCCINCT PORTIONS OF