

91

HJ: LAW AND ORDER PACKET

THE SUPREME COURT OF THE STATE OF ALASKA

ROY ANTHONY SCOTT,)
a/k/a ROY ANTHONY STROPKAI,)

Petitioner,)

v.)

STATE OF ALASKA,)

Respondent.)

File No. 1968

O P I N I O N

[No. 1004 - March 1, 1974]

Petition for Review from the Superior Court of
the State of Alaska, Third Judicial District,
Anchorage.

Ralph E. Moody, Judge.

Appearances: Herbert D. Soll, Public Defender, and
Larry A. Jordan, Assistant Public Defender,
Anchorage, for Petitioner. John E. Havelock,
Attorney General, Juneau, Seaborn J. Buckalew,
Jr., District Attorney, and Louis Agi, Assistant
District Attorney, Anchorage, for Respondent.

Before: Rabinowitz, Chief Justice, Connor, Ex
Boochever, and Fitzgerald, Justices.

FITZGERALD, Justice.

This petition for review raises the question of the con-
stitutionality of a superior court pretrial order authorizing
broad prosecutorial discovery.

The petitioner Scott was arraigned in superior court
on an indictment charging him with rape. ¹ The court in conformity
to Rule 16(f) of the Alaska Rules of Criminal Procedure scheduled
a pretrial omnibus hearing. A few days before the hearing, the
respondent State of Alaska filed a motion for a sweeping discovery

1. AS 11.15.120.

order. Petitioner filed opposition to the motion, but his objections were overruled. The superior court granted respondent's motion and ordered petitioner to disclose:

- (1) the names and addresses of all prospective defense witnesses, other than defendant himself.
- (2) the production or inspection and copying of any written or recorded statements in defendant's possession or prospective defense or government witnesses, other than defendant himself.
- (3) advance notice of an alibi defense, together with information indicating the place or places defendant claims to have been and the names of witnesses upon whom he intends to rely.

Petitioner promptly sought interlocutory appellate review of the discovery order by way of a petition for review.

We granted the petition for review in this case because we concluded that postponement of appellate review until a final judgment may "result in injustice because of impairment of a legal right" and because "the order . . . sought to be reviewed is of such substance and importance as to justify deviation from the normal appellate procedure by way of appeal and to require the immediate attention of this court."²

In his petition for review, Scott claims error on the part of the trial court in several respects. He suggests that the court, in ordering the pretrial production of certain information not expressly provided for in Rule 16(c) of the Alaska Rules of Criminal Procedure, promulgated a new rule of criminal procedure. This is, he argues, constitutionally impermissible since article IV, section 15 of the Alaska constitution placed

2. Alaska App. R. 23(e), 24(a).

the rule-making authority in this court. Petitioner also claims that the discovery order infringes upon his privilege against compulsory self-incrimination under article I, section 9 of the Alaska constitution and the fifth and fourteenth amendments of the United States Constitution. Furthermore, he argues that the discovery order violates his right to effective confrontation and cross-examination secured by article I, section 11 of the Alaska constitution and the sixth and fourteenth amendments to the United States Constitution. Petitioner also advances one claim of procedural error. He argues that the superior court abused its discretion in making a discovery order which goes beyond the express provisions of Criminal Rule 16(c).

We find no merit in Scott's claim that the superior court, in ordering the production of certain information not expressly mentioned in Criminal Rule 16(c), effectively promulgated a new rule of criminal procedure and thereby usurped this court's constitutional rule-making authority. The record does not establish that the superior court intended to promulgate new rules to govern pretrial procedure in criminal

3. Alaska R. Crim. P. 16(c) provides:

(1) Non-Testimonial Identification Procedures.
A judicial officer may upon motion, for good cause shown, require the accused to do or submit to any or all of the following:

- (i) Appear in a line-up;
- (ii) Speak for identification by witnesses to an offense;
- (iii) Be fingerprinted;
- (iv) Pose for photographs not involving reenactment of a scene;
- (v) Try on articles of clothing;

(continued)

proceedings. Moreover, petitioner's reliance upon Lee v. State is misplaced. While in Lee we did observe that the "superior court has no responsibility or authority to promulgate rules of

3 (continued)

- (vi) Permit the taking of specimens of material under his fingernails;
- (vii) Permit the taking of samples of his blood, hair and other materials of his body which involve no unreasonable intrusion thereof;
- (viii) Provide specimens of his handwriting;
- (ix) Submit to a reasonable physical or medical inspection of his body.

(2) Reports or Statements of Experts. The trial court may require that the prosecuting attorney be informed of and permitted to inspect and to copy or photograph any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons which are intended by the defendant to be used at trial. Information obtained by the state under the provisions of this section shall be used only for cross-examination or rebuttal of defense testimony.

(3) Notice of Intent to Raise Insanity Defense. Following substantial compliance by the state with section (b) of this rule a defendant who intends to offer evidence of a defense of insanity shall inform the state of such intention at the time of plea or at such other time as may be designated by the trial court. The court may order the defendant to submit to psychiatric examination by a psychiatrist or psychologist selected by the court, and the report shall be made available to both parties. Notice of intent to raise a defense of insanity shall not be commented on by the prosecution at trial.

4. 374 P.2d 868 (Alaska 1962).

practice and procedure," the statement was not made in the context of a pretrial order by the superior court. In Lee the appellants contended that the trial court was in error for having failed to promulgate rules of procedure by which appeals could be taken from the magistrate's court. In the case before us now, the trial court was ruling upon a motion for discovery brought under existing rules of criminal procedure. Since the underlying facts of the Lee case are essentially different, its rationale is not applicable to the case at bar.

We also disagree with petitioner's contention that since the order in question exceeds the scope of materials discoverable under Criminal Rule 16(c), it constitutes an abuse of trial court discretion. Criminal Rule 16(c) permits the trial court, upon proper motion by the prosecution, to order the accused to submit to certain non-testimonial identification procedures, to allow discovery of experts' reports or statements and to require notice if the accused intends to raise insanity as a defense. The discovery order before us, however, goes beyond the material enumerated in the rule and orders the petitioner to produce the names and addresses of defense witnesses, written statements taken from defense and government witnesses, advance notice of an alibi defense, together with names of prospective alibi witnesses and information concerning the locations to be relied upon for alibi purposes.

5. Id. at 869.

In our opinion, broad latitude must be accorded a trial court in the conduct and management of pretrial procedures. This interpretation is in keeping with the spirit and purpose of discovery rules generally, and comports with the expressed term of Criminal Rule 16(a).

(a) Scope of Discovery. In order to provide adequate information for informed pleas, expedite trial, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process, discovery prior to trial should be as full and free as possible consistent with protection of persons, effective law enforcement, and the adversary system. (emphasis added)

Reading sections (a) and (c) of Rule 16 together, we conclude that a ruling compelling the production of items not expressly mentioned in section (c) of the rule is within the "broad discretion of the trial court." We find no abuse of discretion merely because information not specifically included in the rule is ordered to be disclosed.

The most serious constitutional claim advanced by petitioner is that the broad prosecutorial discovery order⁶ contravenes his privilege against self-incrimination under the fifth and fourteenth amendments to the United States

6. Recently, the tension existing between prosecutorial discovery and the constitutional privilege against self-incrimination has received considerable attention from legal commentators. See, e.g., Everett, Discovery in Criminal Cases -- In Search of a Standard, 1964 Duke L.J. 477, 492-94, 503-05; Moran, Federal Criminal Rules Changes: Aid or Illusion for the Indigent Defendant?, 51 A.B.A.J. 64 (1965); Nakell, Criminal Discovery for the Defense and the Prosecution -- the Developing Constitutional Considerations, 50 N.C.L.Rev. 437, 479-516 (1972); Reznick, Justice

Constitution and article I, section 9 of the Alaska constitution. In other words, we must determine whether petitioner has a constitutional right to refuse to disclose some or all of the evidentiary material required to be disclosed by the discovery order.

We begin our analysis by examining the historical development of criminal discovery in the context of the privilege against self-incrimination under the fifth amendment to the United States Constitution. The common law recognized no right

6. (continued)

Brennan and Discovery in Criminal Cases, 4 Rutgers-Camden L.J. 85 (1972); Symposium, Discovery in Federal Criminal Cases, 33 F.R.D. 47-128 (1965); Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U.L.Rev. 228 (1964); Wilder, Prosecution Discovery and the Privilege Against Self-Incrimination, 6 Am. Crim. L.Q. 3 (1967); Zagel and Carr, State Criminal Discovery and the New Illinois Rules, 1971, U. Ill. L. Forum 557 (1971); Annot., 45 A.L.R.3d 959 (1972); Annot., 96 A.L.R.2d 1224 (1964); Comment, Developments in the Law -- Discovery, 74 Harv. L.Rev. 940 (1961); Note, The Self-Incrimination Privilege: Barrier to Criminal Discovery?, 51 Calif. L.Rev. 135 (1963); Note, Prosecutorial Discovery Under Proposed Rule 16, 85 Harv. L.Rev. 994 (1972); 35 Colo. L.Rev. 290 (1963); 63 Colum. L.Rev. 361 (1963); 76 Harv. L.Rev. 838 (1963); 49 Ia. L.Rev. 176 (1963); 61 Mich. L.Rev. 987 (1963); 15 Stan. L.Rev. 700 (1963).

7. The fifth amendment to the United States Constitution provides in part:

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law

The fifth amendment has been made applicable to the states through the fourteenth amendment to the United States Constitution. Malloy v. Hogan, 378 U.S. 1, 12 L.Ed.2d 653 (1964).

8. Art. I, §9 of the Alaska constitution provides:

No person shall be compelled in any criminal proceeding to be a witness against himself.

of discovery in a criminal case by either the prosecution or the defendant. NOR was such a right said to exist under traditional concepts of due process.⁹ In recent years, however, several exceptions have emerged. The prosecution has an affirmative duty to disclose to an accused any information within its control which tends to negate defendant's guilt.¹⁰ It has now become well-settled in many jurisdictions that trial courts have broad discretionary power to order the prosecution to disclose to the defendant any relevant information in the possession or control of the prosecution.¹¹

Prosecutorial discovery was strongly condemned in early American jurisprudence. The United States Supreme Court in 1886 announced strong opposition to compulsory self-incrimination through discovery orders. In Boyd v. United States,¹² Mr.

9. Cicenia v. LaGay, 357 U.S. 504, 510, 2 L.Ed. 1523, 1529 (1958); State v. Thompson, 134 A.2d 266, 268 (Del. 1957); Commonwealth v. Bartolini, 13 N.E.2d 382, 386 (Mass. 1938), cert. denied, 304 U.S. 565, 83 L.Ed. 1531 (1938); State v. Goldberg, 134 S.E.2d 334, 340-41 (N.C. 1964).

10. Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215 (1963); United States ex rel. Butler v. Maroney, 319 F.2d 622, 627 (3d Cir. 1963); People v. Hoffman, 203 N.E.2d 873 (Ill. 1965).

11. State v. Coon, 2 Alaska L.J. No. 1 at 3 (Super. Ct. 1964); State ex rel. Polley v. Superior Court of Santa Cruz County, 302 P.2d 263, 265 (Ariz. 1956); People v. Riser, 305 P.2d 1, 12 (Cal. 1956), cert. denied, 358 U.S. 646, 3 L.Ed.2d 568 (1959); State v. Haas, 51 A.2d 647, 649 (Md. 1947); Commonwealth v. Bartolini, 13 N.E.2d 382, 385 (Mass. 1938), cert. denied, 304 U.S. 565, 83 L.Ed. 1531 (1938); People v. Johnson, 97 N.W.2d 739, 741-43 (Mich. 1959); People v. Calandrillo, 215 N.Y.S.2d 364, 366 (Suffolk County Ct. 1961); State v. Leland, 227 P.2d 785, 793 (Ore. 1961), aff'd, 343 U.S. 790, 793, 96 L.Ed. 1302 (1952).

12. 116 U.S. 616, 29 L.Ed. 746 (1886).

Justice Bradley, speaking for the court, stated:

Now it is elementary knowledge that one cardinal rule of the court of chancery is never to decree a discovery which might tend to convict the party of a crime, or to forfeit his property. And any compulsory discovery by extorting the party's oath, or compelling the production of his private books and papers, to convict him of crime or to forfeit his property, is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom. 13

Similar views have since been expressed by Professor Wigmore:

It follows that the production of documents or chattels by a person (whether ordinary witness or party witness) in response to a subpoena, or to a motion to order production, or to other form of process relying on his moral responsibility for truth-telling, may be refused under the protection of the privilege [against self-incrimination]. This 14 is universally conceded. (emphasis in original)

As recently as 1967, a federal district court observed that the fifth amendment privilege against self-incrimination operated to bar prosecutorial discovery of evidence to be used in the government's case-in-chief. 15

13. Id. at 631-32, 29 L.Ed. at 751 (footnote omitted).

14. 8 J. Wigmore, Evidence §2264 (McNaughton rev. 1961) (footnote omitted).

15. In *United States v. Fratello*, 44 F.R.D. 444 (S.D.N.Y. 1967), the trial court declined to condition defense discovery upon the defendant's provision to the prosecution of documentary evidence under the former's control. The court concluded that "the right of a defendant in a criminal case to remain silent in face of accusations against him, even at the discovery stage, seems clear."

The constitutional questions arising out of prosecutorial discovery are reflected in Rule 16(c) of the Federal Rules of Criminal Procedure. That rule by its terms does not directly compel the defendant to provide prosecutorial discovery. Rather, it permits the court to condition discovery when sought by the defense by requiring the defense to make a reciprocal exchange with the government. Any possible conflict with fifth amendment rights is thought to be avoided on theories of implied consent or waiver by the defendant. Thus the Federal Rules of Criminal Procedure have preserved without resolving the constitutional questions raised by

16. Fed. R. Crim. P. 16(c) provides:

(c) Discovery by the Government. If the court grants relief sought by the defendant under subdivision (a)(2) or subdivision (b) of this rule, it may, upon motion of the government, condition its order by requiring that the defendant permit the government to inspect and copy or photograph scientific or medical reports, books, papers, documents, tangible objects, or copies or portions thereof, which the defendant intends to produce at the trial and which are within his possession, custody or control, upon a showing of materiality to the preparation of the government's case and that the request is reasonable. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.

prosecutorial discovery.

Possibly one of the greatest influences in the development of new concepts of criminal discovery generally and prosecutorial discovery in particular has been Justice Roger J. Traynor, formerly Chief Justice of the Supreme Court of California. Writing for that court in 1962, Justice Traynor upheld broad prosecutorial discovery in Jones v. Superior Court of Nevada County.¹⁸ The defendant in the case had been charged with rape. He asserted an affirmative defense of impotency. The Supreme Court of California upheld the prosecution's right to discover the names of witnesses upon whom the defendant intended to rely in advancing his affirmative defense as well as any relevant medical reports and x-rays.¹⁹ Justice Traynor reasoned that prosecutorial discovery of information relating to issues raised by the affirmative defense

17. The Advisory Committee on Rules suggested:

"Mutual disclosure so far as consistent with the privilege against self-incrimination would seem as appropriate as in civil cases." Fed. R. Crim. P. 16, 18 U.S.C.A. Rule 16, at 19 (1969).

18. 372 P.2d 919 (Cal. 1962).

19. For critical constitutional commentary upon the holding reached in Jones, supra n. 19, see Smith and McCollom, Counterdiscovery in Criminal Cases: Fifth Amendment Privileges Abridged, 54 A.B.A.J. 256 (1968); Wilder, Prosecution Discovery and the Privilege Against Self-Incrimination, 6 Am. Crim. L.Q. 3 (1967); Note, 63 Colum. L. Rev. 361 (1963); Note, 25 Stan. L. Rev. 700 (1963).

does not violate the privilege against self-incrimination. Nor to this extent does it violate the attorney-client privilege. It simply requires petitioner to disclose information that he will shortly reveal anyway. Such information is discoverable. 20

Justice Traynor has discussed the holding in Jones in a law review article and has further explained his reasoning that prosecutorial discovery merely accelerated the timing of the defendant's strategic mid-trial decisions.

[Notice-of-alibi] statutes have been sustained over the objection that they violate constitutional privileges against self-incrimination, for they do not compel the defendant to reveal or produce anything, but merely regulate the procedure by which he presents his case. We found this reasoning persuasive. The trial court's order that the defendant reveal the names of witnesses he intended to call and produce reports and x-rays he intended to introduce in evidence simply required him to disclose information that he would shortly reveal in any event. He was thus required only to decide at a point earlier in time than he would ordinarily have to whether to remain silent or to disclose the information. He lost only the possible tactical advantage of taking the prosecution by surprise at the trial, an advantage that in any event would easily have gone for naught given the probability that the trial court would have granted the prosecution a continuance to prepare a rebuttal. 21

In the same discussion, Justice Traynor went on to analogize criminal discovery to civil discovery in which pretrial discovery is a "two-way street" for both litigants.

20. 372 P.2d at 922.

21. Traynor, Ground Lost and Found in Criminal Discovery, 39 N.Y.U. L.Rev. 228, 247 (1964) (footnote omitted).

Likewise, nothing is lost of the privilege, and much is gained in orderly procedure, if the defendant is required to give advance notice of the evidence he intends to offer in defense after he has himself received pretrial discovery of the prosecution's case. He can hardly demand pretrial discovery and still insist on reserving his own surprises for the trial. The good coin of discovery gains in value when it is fairly exchanged at the appropriate procedural hours.

. . . .

The Jones case, indicating the two-sidedness of the discovery process, suggests that we may be on the way to abandoning our preoccupation with surprise tactics just as we have substantially abandoned the technicalities of pleading that in their time were also overvalued. 22

Seven years after Jones the California Supreme Court²³ decided People v. Pike. In that case, a prosecution for first degree murder, the court held that the state was entitled to pretrial discovery of the names, addresses and expected testimony of defense witnesses. But within a year, the California Supreme Court retrenched somewhat from its leading position on prosecutorial discovery. In Prudhomme v. Superior Court of Los Angeles County,²⁴ another prosecution for murder, a trial court was restrained from enforcing a discovery order which would have compelled the defendant's attorney to disclose to the

22. Id. at 248, 250.

23. 455 P.2d 776 (Cal. 1969).

24. 466 P.2d 673 (Cal. 1970).

prosecution the names, addresses and expected testimony of
defense witnesses. Concluding that the "trial court failed to
inquire into the incriminatory nature of the information sought,"²⁵
the Supreme Court of California was apparently influenced by the
limited and conditional nature of the provisions of Rule 16(c)
of the Federal Rules of Criminal Procedure.²⁶ The court may also
have been cautiously anticipating a negative decision by the
United States Supreme Court on the constitutionality of
prosecutorial discovery.²⁷ Thus having substantially advanced the
concept of prosecutorial discovery, the California court in
Prudhomme, after carefully reviewing the policy consideration
underlying the privilege against self-incrimination, retreated
from its vanguard position.

Ironically perhaps the case which may have influenced the
California court to draw back in Prudhomme was decided the other

25. 466 P.2d at 678.

26. Regarding Fed. R. Crim. P. 16(c), the court stated:

Thus, federal rule 16, subdivision (c) is limited to the "reasonable" disclosure of physical evidence; there is no provision authorizing disclosure of names, addresses or expected testimony of defense witnesses.

Id. at 675-76 (footnote omitted.)

27. Regarding the forthcoming United States Supreme Court decision on notice-of-alibi statutes, the court observed:

Finally, the United States Supreme Court recently granted certiorari in Williams v. Florida (C.A. Fla.) 224 So.2d 406, which had upheld Florida's alibi statute against the claim that it violated the accused's Fifth Amendment rights.

466 P.2d at 676.

way by the United States Supreme Court. The Court in
28
Williams v. Florida 29 upheld a Florida notice-of-alibi rule
against a claim of fifth amendment privilege, adopting the
rationale of Jones v. Superior Court of Nevada County. In that
case, the defendant in a robbery prosecution challenged the
constitutionality of a Florida rule of criminal procedure which
compelled him in advance of trial to provide the prosecution with
the names and addresses of prospective alibi witnesses as well as
information pertaining to the place where he claimed to have been.
Rejecting the defendant's fifth amendment claim, the Supreme
Court cited Jones v. Superior Court of Nevada County and
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Justice Traynor's law review article. Speaking for six
members of the court, Justice White concluded that:

However "testimonial" or "incriminating" the
alibi defense proves to be, it cannot be
considered "compelled" within the meaning of
the Fifth and Fourteenth Amendments. 31

Accepting Justice Traynor's rationale in Jones that pretrial
prosecutorial discovery merely accelerated the defendant's mid-

28. 399 U.S. 78, 26 L.Ed.2d 446 (1970).

29. For state cases that have upheld notice-of-alibi
defense and alibi witnesses requirement, see State v. Stump,
119 N.W.2d 210, 219-20 (Iowa), cert. denied, 375 U.S. 853, 11 L.Ed.2d
80 (1963); State v. Baldwin, 221 A.2d 199, 204-05 (N.J.), cert.
denied, 385 U.S. 980, 17 L.Ed.2d 442 (1966); People v. Rakiec, 23
N.Y.S.2d 607, 612-13 (App. Div. 1940); Commonwealth v. Vecchiolli,
208 A.2d 96, 99 (Pa. Super. 1966).

30. 399 U.S. at 83, n. 13, 26 L.Ed.2d at 451.

31. Id. at 84, 26 L.Ed.2d at 451.

trial strategy decisions, Justice White reasoned that:

[T]he notice-of-alibi rule by itself in no way affected petitioner's crucial decision to call alibi witnesses or added to the legitimate pressures leading to that course of action. At most, the rule only compelled petitioner to accelerate the time of his disclosure, forcing him to divulge at an earlier date information that the petitioner from the beginning planned to divulge at trial. Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself. 32

The holding of the court squarely upheld the prosecution right in advance of trial to obtain the names of witnesses and the location of defendant's alibi against his claim of self-incrimination.

We decline to hold that the privilege against compulsory self-incrimination guarantees the defendant the right to surprise the State with an alibi defense. 33

Justice Black, with whom Justice Douglas concurred, forcefully dissented from the majority's holding on the prosecutorial discovery question. According to Justice Black, the Florida notice-of-alibi rule violated the defendant's fifth amendment privilege against self-incrimination, and the majority's decision constituted a dangerous move towards the

32. Id. at 85, 26 L.Ed.2d at 452.

33. Id. at 86, 26 L.Ed.2d at 452.

erosion of a constitutional scheme which imposes upon the prosecution the complete burden of proof. Justice Black reasoned:

Although this case itself involves only a notice-of-alibi provision, it is clear that the decision means that a State can require a defendant to disclose in advance of trial any and all information he might possibly use to defend himself at trial. This decision, in my view, is a radical and dangerous departure from the historical and constitutionally guaranteed right of a defendant in a criminal case to remain completely silent, requiring the State to prove its case without any assistance of any kind from the defendant himself. 34

The dissenting justices disputed the central premise upon which the court based its holding.

The core of the majority's decision is an assumption that compelling a defendant to give notice of an alibi defense before a trial is no different from requiring a defendant, after the State has produced the evidence against him at trial, to plead alibi before the jury retires to consider the case That statement is plainly and simply wrong as a matter of fact and law, and the Court's holding based on that statement is a complete misunderstanding of the protections provided for criminal defendants by the Fifth Amendment and other provisions of the Bill of Rights. 35

The rationale of Justice Black's objection to the majority's reasoning is that a defendant's "pretrial decision cannot be analyzed as simply a matter of 'timing,' influenced by the same factors operating at trial itself." ³⁶ Moreover, Justice

34. Id. at 107-08, 26 L.Ed.2d at 480.

35. Id. at 108, 26 L.Ed.2d at 480-81 (footnote omitted).

36. Id. at 110, 26 L.Ed.2d at 482.

Black expressed his concern that the "timing" rationale employed by the Court would predictably be applied to justify the prosecutorial discovery of other information in the defendant's possession.

The rationale of today's decision is in no way limited to alibi defenses, or any other type or classification of evidence. The theory advanced goes at least so far as to permit the State to obtain under threat of sanction complete disclosure by the defendant in advance of trial of all evidence, testimony, and tactics he plans to use at that trial. In each case the justification will be that the rule affects only the "timing" of the disclosure, and not the substantive decision itself. This inevitability is clearly revealed by the citation to *Jones v. Superior Court* 37

A substantial number of states in addition to Florida have by rule or statute imposed upon the defendant an obligation to disclose his defenses to the prosecution in advance of trial. Almost without exception provisions of this type have been upheld. In reaching that result the courts have grounded their decision on a variety of reasons. Some of the decisions would seem to apply notice-of-alibi provisions without discussing the constitutional considerations. *E.g.*, *State v. Baldwin*, 221 A.2d 199, 204-05 (N.J. 1966); *State v. Thayer*, 176 N.E. 656, 657 (Ohio 1931); *Commonwealth v. Vecchiolli*, 224 A.2d 96, 99 (Pa. Super. 1966); *State v. Kopacka*, 51 N.W.2d 495, 498 (Wis. 1952). Still other decisions do not extensively discuss or analyze the constitutional problems but subordinate the issues to matters of procedure. *E.g.*, *State*

37. *Id.* at 114, 26 L.Ed.2d at 484 (citation omitted).

v. George, 414 P.2d 730, 733 (Ariz. 1966); People v. Shulenberg, 112 N.Y.S.2d 374, 375 (App. Div. 1952).

One state decision which does squarely face the constitutional issues arising out of a notice-of-defense statute is State ex rel. Sikora v. District Court of the Thirteenth Judicial District, 462 P.2d 897, decided by the Supreme Court of Montana in 1969. Sikora arose under the following circumstances. Under Montana law the defendant in a criminal case is required to give advance notice of his intention to interpose the defenses of insanity, self-defense or alibi and to file with the clerk names and addresses of supporting witnesses. Marie Sikora and two others were charged with murder. After an unfavorable ruling on a pretrial motion, the defendants filed petitions with the Supreme Court of Montana challenging the constitutionality of the statute. Addressing itself first to the notice provision of the statute, the court found no apparent constitutional infirmity. This was so, the court reasoned, since merely giving notice of an intended defense at a procedural stage is ordinarily not
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incriminating. Turning to the statutory requirement compelling pretrial disclosure of supporting witnesses, the court concluded

38. Justice Haswell dissented in part contending that required disclosure of claims of self defense or insanity violated the constitutional privilege against self incrimination.

that not all information obtained from a defendant is privileged
under the fifth amendment. ³⁹ Nevertheless, the court recognized
that the application of the statute might itself lead to an
invasion of the privilege against self-incrimination. Essentially,
the court's holding comes down to this: while much of the statute
requiring a defendant to make a pretrial disclosure of his defense
and his witnesses may not be on its face unconstitutional, the use
or application of the statute may lead to an unconstitutional result.
The principal significance of Sikora is that it points out
the difficulty in upholding disclosure provisions when courts do
attempt to deal directly with constitutional issues of self-
incrimination arising out of compelled pretrial disclosure.

The rather extended review which we have taken furnishes
a backdrop against which we are prepared to consider the question
in the light of our own state's legal history and our own state's
constitution.

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In Baker v. City of Fairbanks, we acknowledged our
responsibility to depart whenever necessary from constitutional
interpretations enunciated by the United States Supreme Court
and to develop rights and privileges under the Alaska constitution
in accordance with our own unique legal background. In particular,
we stated:

39. This has been widely recognized. E.g., Gilbert v. California, 388 U.S. 263, 18 L. Ed.2d 1178 (1967); United States v. Wade, 388 U.S. 218, 18 L. Ed.2d 1149 (1967); Schmerber v. California, 384 U.S. 757, 16 L. Ed.2d 908 (1966); Roberts v. State, 458 P.2d 340 (Alaska 1969).

40. 471 P.2d 386 (Alaska 1970).

While we must enforce the minimum constitutional standards imposed upon us by the United States Supreme Court's interpretation of the Fourteenth Amendment, we are free, and we are under a duty, to develop additional constitutional rights and privileges under our Alaska Constitution if we find such fundamental rights and privileges to be within the intention and spirit of our local constitutional language and to be necessary for the kind of civilized life and ordered liberty which is at the core of our constitutional heritage. We need not stand by idly and passively, waiting for constitutional direction from the highest court of the land. Instead, we should be moving concurrently to develop and expound the principles embedded in our constitutional law. 41

We are not bound to follow blindly a federal constitutional construction of a fundamental principle if we are convinced that the result is based on unsound reason or logic.

We agree with the general principle that the court has a substantial interest in reducing the element of surprise in criminal proceedings. So to this extent at least we must be concerned with the constitutional administration of criminal justice as well as with efficient management of prosecutions and other trial activities. However, we share Justice Black's concern for the integrity of the privilege against self-incrimination and agree with his conclusion that the "timing" rationale employed by the United States Supreme Court in Williams v. Florida to justify pretrial prosecutorial discovery is unpersuasive.

It is our view that a defendant's mid-trial strategy choices are not identical to his pretrial decisions; nor are the

41. Id. at 401-02 (footnote omitted).

problems and opportunities contemplated by an accused in formulating the course of action to be followed during the presentation of his defense at trial identical to the same considerations before trial. The weakness of this "timing" rationale has been accurately pointed out by at least one commentator:

But Justice White's analysis--which equates the defendant's at-trial choice, either to open a source of potentially incriminating information or to forego the opportunity to present a defense, with a parallel choice before trial--confuses one issue and begs a second. Of course, there is some similarity between defendant's pretrial and at-trial choices: in each case the defendant must weigh his critical need to produce exculpatory evidence against the risks of revealing incriminating information. But because of the prosecutor's heavy burden of proof, the defendant is best advised not to open up any source of potentially adverse information unless he feels that the state has in all likelihood proved its case; and it is only after the prosecutor has presented his evidence in court that the defendant can adequately make this judgment. By contrast, there is no way the defendant can know before trial the actual strength of the evidence against him as it will appear to the trier of fact, even if he has himself benefited from extensive discovery; witnesses' testimony under oath and cross-examination may radically depart from their versions of the events as given to the police or defense counsel prior to trial. 42

Our form of government has imposed an extraordinary burden of proof upon the state in criminal litigation.

42. Note, Prosecutorial Discovery Under Proposed Rule 16, 85 Harv. L.Rev. 994, 1007-1008 (1972) (footnote omitted).

We think that the appropriate constitutional analysis is not the mere balancing of the state's interests in facilitating efficient law enforcement with the interest of the citizenry in maintaining

43

maximum liberty. As Justice Black observed:

A criminal trial is in part a search for truth. But it is also a system designed to protect "freedom" by insuring that no one is criminally punished unless the State has first succeeded in the admittedly difficult task of convincing a jury that the defendant is guilty. That task is made more difficult by the Bill of Rights, and the Fifth Amendment may be one of the most difficult of the barriers to surmount. The Framers decided that the benefits to be derived from the kind of trial required by the Bill of Rights were well worth any loss in "efficiency" that resulted. 44

43. Cf. Baker v. City of Fairbanks, 471 P.2d 386, 394 (Alaska 1970):

Substantial reasons of policy must play an important part in any disposition of [the question whether petty offenses fall within the right to a jury trial]. These naturally divide themselves into two major groups. On the one hand, we have considerations of convenience or expediency for the state and its legal subdivisions. It imposes a certain burden upon the machinery of government to make every offense triable by jury. . . .

The argument from expediency contains inherent defects. If an individual right is vested by the Constitution, the overriding demands of governmental efficiency must be of a compelling nature and must be identifiable as flowing from some enumerated power. To allow expediency to be the basic principle would place the individual constitutional right in a secondary position, to be effectuated only if it accorded with expediency. (footnote omitted)

44. Williams v. Florida, 399 U.S. at 113-14, 26 L.Ed.2d at 484 (concurring and dissenting opinion).

Nor are we convinced that discovery in criminal proceedings is completely analogous to discovery in civil litigation; pretrial criminal discovery is not a "two-way street." The analogy to civil discovery fails for a number of reasons. A criminal proceeding from its very inception is quite unlike civil litigation. There is ordinarily available to the prosecution substantial and effective avenues of discovery, such as the investigative resources of the police, access to official records, the power to compel testimony by way of grand jury subpoena which are not equally at the hand of the accused. Even more, as Justice Peters noted in his dissent in Jones v. Superior Court:

The simple fact is that our system of criminal procedure is founded upon the principle that the ascertainment of the facts is a "one-way street." It is the constitutional right of the defendant, who is presumed to be innocent, to stand silent while the state attempts to meet its burden of proof, that is, to prove the defendant's guilt beyond a reasonable doubt. (emphasis in original) 45

In our examination of the constitutional issues we found difficulty in accepting the reasoning of Jones v. Superior Court of Nevada County⁴⁶ and Williams v. Florida⁴⁷. The dissenting opinions of Justice Peters in Jones and Justice Black

45. Jones v. Superior Court of Nevada County, 372 P.2d 919, 924 (Cal. 1962) (dissenting opinion). Similarly, in Prudhomme v. Superior Court of Los Angeles County, 466 P.2d 673, 678 (1970) (concurring opinion), Justice Peters stated:

Discovery is not a "two-way street" because of the constitutional rights of defendants not accorded the prosecution

46. 372 P.2d 919 (Cal. 1962).

47. 399 U.S. 78, 26 L.Ed.2d 466 (1970).

in Williams seem to us more logical and better reasoned.

We are therefore persuaded to interpret article I, section 9, of the Alaska constitution more broadly than the United States Supreme Court construed the fifth amendment in Williams. We hold that the privilege against compelled self-incrimination under the Alaska constitution prohibits extensive pretrial prosecutorial discovery in criminal proceedings.⁴⁸

The principles we choose to follow in deciding whether or not compelled disclosure of defenses may undermine the privilege against self-incrimination involve a three-fold test: Is the evidence testimonial; is it incriminating; and is it compelled? Applying this three part rule to the court's discovery order in the case now before us leads to the conclusion that the order is in a large part constitutionally impermissible.

The discovery order directs petitioner to produce "the names and addresses of all prospective defense witnesses, other than the defendant himself," including "the names of [alibi] witnesses upon whom he intends to rely."

48. At least one legal commentator construes the privilege against self-incrimination under the fifth amendment to the United States Constitution in a similar manner.

. . . [T]he policies inherent in the fifth amendment privilege against self-incrimination indicate that the prosecutorial discovery provisions of the proposed amendment to [federal criminal] Rule 16 are unconstitutional and should be rejected . . . [and] that the contention that increased defense discovery must be dependent upon increased prosecutorial discovery exaggerates the risk of defense discovery and is unpersuasive.

Note, Prosecutorial Discovery Under Proposed Rule 16, 85 Harv. L.Rev. 994 (1972).

The requirement that petitioner produce a list of names and addresses of witnesses meets the testimonial or communicative criterion of the constitutional analysis. That is, a document containing such facts transmitted from one party to another constitutes a communication of cognizable information from one source to another. Secondly, we are of the opinion that the list of names of prospective witnesses may, at least in some instances, tend to be incriminating. Although the list might not appear to be incriminating on its face, certain of the persons identified in such a list may be known felons, perjurers, accomplices, co-defendants, or individuals under suspicion or police surveillance. Moreover, the police may possess additional incriminating information about some of the witnesses and an accused's reference to such persons may tend to arouse suspicion about his relationship with the witness or may tend to implicate him in the criminal activities of such witness.

The incriminating nature of requiring a defendant to disclose the names and addresses of his witnesses prior to trial may be more readily understood if placed in another context. We doubt, for instance, whether any court would uphold a statute or rule which would require the defendant to make such disclosure to the police at the station house. It can be said with assurance that such a procedure would be universally found to be a rank violation of the defendant's privilege against self-incrimination. There are, of course, important substantive

differences between the investigatory stage of a criminal proceeding and the point of pretrial procedure. Our purpose in using the example is to make clear the incriminating nature of the disclosure. However, we feel the stage of the proceedings is irrelevant to the analysis of this constitutional privilege. The fundamental right not to incriminate one's self should apply at every stage of criminal inquiry or proceedings regardless of judge-made exclusionary or evidentiary rules. As Justice Erwin noted in his concurring opinion in McConkey v. State:

The privilege extends not only to answers that would in themselves support a conviction but also to those which might furnish "a link in the chain of evidence" leading to a conviction. 49

Finally, we agree with petitioner's contention that the names and addresses of the witnesses would by the terms of the order be "compelled" from him in a constitutional sense. Since the production of a list of names and addresses of witnesses is testimonial in nature, incriminating, and compelled by court order, we hold that this portion of the superior court's discovery order violates petitioner's privilege against self-incrimination under article I, section 9, of the Alaska constitution.

The discovery order next commands "the production or inspection and copying of any written or recorded statements in

49. 504 P.2d 823, 826 (Alaska 1972) (footnote omitted).

defendant's possession of prospective defense or government witnesses" Again, we are of the view that written or recorded statements are "testimonial" or "communicative" in nature. Nor do we think it inconceivable that some, although not necessarily all, of such statements will be incriminating and will tend to furnish a link in the chain of evidence leading to a conviction. The potential incriminating nature of such statements was recognized by the Supreme Court of California in Prudhomme v. Superior Court:

The concerns which lead us to the conclusion that compelled disclosure of defense witness names prior to trial may tend to incriminate apply with greater force to disclosure of witness statements. For example, a defense witness in a rape prosecution might be prepared to testify, as a "last resort", that other forms of criminal abuse but not rape occurred. 50

As in the case of the list of names and addresses of witnesses, we conclude that the witness statements are being "compelled" in a constitutional sense. Indeed, we are of the opinion that among the species of information sought to be discovered by respondent, disclosure of pretrial recorded statements of defense witnesses presents the most serious infringement upon petitioner's privilege against self-incrimination. Hence, we hold that this section of the superior court's discovery order is unconstitutional under article I, section 9 of our constitution.

50. See Prudhomme v. Superior Court of Los Angeles County, 466 P.2d 673, 677 (Cal. 1970).

Finally, the discovery order requires petitioner to produce "advance notice of an alibi defense, together with information indicating the place or places defendant claims to have been" As with the list of witnesses' names, addresses and recorded statements, information going to alibi is, in our opinion, "communicative" or "testimonial." Again, the information is verbal rather than physical, direct rather than indirect, and immediately cognizable. Documents containing written information are simply not fingerprints, voice samples, physical appearances or line-up identifications. Additionally, for the reasons set forth above, we conclude that the information commanded by this portion of the discovery order is "compelled" in a constitutional sense from petitioner. And we are of the view that information pertaining to an alternate location where an accused claims to have been tends to be uncriminating and may provide the state with another "link" in its chain of evidence. The information sought could be particularly incriminating if the state were able to demonstrate that no one else in such alternative location had seen the accused during the relevant time period. Further, compelled disclosure of the place the defendant claims to have been is as constitutionally infirm as coerced disclosure of witnesses' names, for it may serve to identify the witnesses. Often the place a defendant will specify will be a residence or a place of business, and in many instances the residents of the home or the proprietor of the place of business will have been present. These persons may be able to provide the police with information probative of the

defendant's guilt--information the police might never have found but for the compelled disclosure.

It is no answer to say that the defendant would have to disclose the same facts at trial anyway if he intended to rely on an alibi defense, for the state's case may be so weak that the defendant will choose not to expose himself to further criminal liability by revealing incriminating evidence which was nonetheless exculpatory of the crime for which he stands charged. Hence, we hold that the portion of the superior court's order which commands the production of alibi information concerning the place or places the accused claims to have been also offends petitioner's privilege against self-incrimination under the Alaska constitution.

Whether the mere notice of an alibi defense tends to be incriminating to an accused, however, is more questionable. We find it difficult to conceive how a notice of this particular defense, standing by itself, might tend to be incriminating. Nor has petitioner persuasively demonstrated to us how such notice alone would disclose the substance of his defense theory or any incriminating weaknesses or inconsistencies therein. Rather, we are of the view that the advance notice of an alibi defense is in the nature of any pretrial plea, much like a plea of "not guilty." We find nothing incriminating about this inquiry. Accordingly, we hold that the portion of the superior court's discovery order which calls upon petitioner to furnish respondent with advance notice of an alibi defense does not violate article I, section 9, of the Alaska constitution.⁵¹

51. We do not, however, mean to express our view of the constitutionality of portions of Criminal Rule 16(c) or other pretrial prosecutorial discovery orders not presently before us.

We do not believe that our decision in the instant case will leave respondent in a disadvantaged posture during future prosecutions. Certainly in the past, the state has experienced no substantial inability to conduct prosecutions without the benefit of extensive pretrial discovery. We anticipate that it will continue to perform as effectively in the future. In the event that the state should be unfairly surprised or prejudiced at trial by unexpected defense witnesses, statements or theories, we assume that the trial courts will exercise sound discretion in the regulation of trial proceedings and grant the state a continuance or other appropriate remedy. We recognize that in some cases this may result in delays and inconvenience at trial, but we are not prepared to exchange a fundamental constitutional right for expediency.

We vacate the superior court's pretrial order and
52
remand the case for further proceedings.

52. Due to our holdings and disposition in this petition for review, we decline to reach petitioner's claim that the discovery order violated his right to effective confrontation and cross-examination under article I, section 11 of the Alaska constitution or the sixth and fourteenth amendments to the United States Constitution.

THE SUPREME COURT OF THE STATE OF ALASKA

MAX RAY MARTIN, RICHARD CARL)
SNYDER, ALOYISUS STEPHAN)
FABIAN,)

Appellants,)

v.)

STATE OF ALASKA,)

Appellee.)

File No. 1785

O P I N I O N

[No. 983 - January 2, 1974]

Appeal from the Superior Court of the State of
Alaska, Third Judicial District, Anchorage,
C. J. Occhipinti, Judge.

Appearances: Herbert D. Soll, Public Defender,
and Larry A. Jordan, Assistant Public Defender,
Anchorage, for Appellants. John E. Havelock,
Attorney General, Juneau, Seaborn J. Buckalew,
Jr., District Attorney, and Stephen G. Dunning,
Assistant District Attorney, Anchorage, for
Appellee.

Before: Rabinowitz, Chief Justice, Connor, Erwin,
Boochever, and Fitzgerald, Justices.

FITZGERALD, Justice.

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

On June 7, 1972, appellant Richard Snyder was arraigned
in the superior court on a charge of forgery. At the time of

this arraignment, Snyder was free on bail following three in-
1
dictments issued previously on other charges.

At his arraignment and at a later hearing for plea, Snyder requested the court to set bail on the forgery charge. The trial court refused to set bail finding that Snyder was "a danger to society." On August 10, 1972, a notice of appeal was filed on the decision denying bail. However, on November 9, 1972, the court on the motion of the prosecutor dismissed the forgery
2
charge against Snyder.

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

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

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

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

conviction.

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

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

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

Notice of appeal from the ruling of the superior court was filed August 10, 1972. On October 3, 1972, Fabian appeared

in superior court and was convicted upon his plea of guilty and was sentenced to a term of one year of confinement.

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

We cannot ignore, however, the preliminary procedural difficulties which these cases present. In each case before us, it is argued that the issues arising on appellant's application for bail have been mooted by either a subsequent dismissal, a conviction, or a revocation of probation. An application for review of an order of the trial court denying bail should be promptly filed. The Alaska procedures for review of a denial for bail are designed to ensure speedy consideration at the appellate level. Although in this appeal the slower appellate

3. AS 12.30.010 et seq.

4. See App. R. 23, 24. The need for rapid review of bail orders is also reflected in the Alaska Bail Reform Act of 1966, AS 12.30.030:

" (a) A person who remains in custody after a review provided for in §20(f) of this chapter may move the court having original jurisdiction over the offense to amend the order. The motion shall be determined promptly.

(b) When a court denies a motion under (a) of this section or conditions of release have been imposed by the court having original jurisdiction over the offense, an appeal may be taken to the court having appellate jurisdiction over the court denying the motion or imposing the conditions subject to the rules of the Supreme Court of Alaska, and the District Court Rules of Criminal

(continued)

process was utilized, we undertake to consider the substantive claims raised by appellants because they involve important recurring issues of law which may be capable of evading review.⁵

Appellants would have us interpret the eighth amendmant⁶ of the federal constitution to create a right to bail. The eighth amendment provides in pertinent part: "Excessive bails shall not be required" Appellants' argument raises two questions for consideration: 1) whether the fourteenth amendment⁷ due process clause⁸ incorporates the excessive bail provision of

4. (continued)

Procedure. The order of the lower court shall be affirmed unless it is found that the lower court abused its discretion. If it is held that the lower court did abuse its discretion, the appellate court may modify, vacate, set aside, reverse, remand the action for further proceeding, or remand the action directing entry of the appropriate order, which may include ordering the person to be released under §20(a) of this chapter. The appeal shall be determined promptly."

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

6. U.S. Const. amend. VIII.

7. U.S. Const. amend. XIV, §1.

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

the eighth amendment; 2) whether the excessive bail provision includes the unqualified right to bail.

As to the first question, the United States Supreme Court has not ruled on whether the eighth amendment bail provision applies to the states through the fourteenth amendment.⁹ The most recent discussion on this subject by the Supreme Court occurred in Schilb v. Kuebel, 404 U.S. 357, 30 L.Ed.2d 502, reh. denied, 405 U.S. 948, 30 L.Ed.2d 818 (1971). In Schilb the issue before the Supreme Court related to the constitutionality of Illinois' bail statutes which permitted a defendant in some instances to post 10% of the bail directly to the court, of which the state retained 10% of the posted security as administrative "bail bond costs." Justice Blackman, in the course of defining the issue before the court, stated:

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

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

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

There remains a substantial controversy over the eighth amendment's inclusion of an unqualified right to bail.¹⁰ Much of the discussion on the issues appears prompted by the District of Columbia Court Reform and Criminal Procedure Act of 1970. The Act allows courts of the District to detain a defendant without bail for up to 60 days prior to trial if the court concludes that the defendant's release would constitute a danger to the community. D.C. Code Ann. §§23-1321 to 1332 (1973).

Perhaps the most widely cited case for supporting a right to bail under the eighth amendment is Stack v. Boyle, 342 U.S. 1, 96 L.Ed. 3 (1951)¹¹ Stack, however, is not convincing authority for supporting an unconditional eighth amendment right to bail. Although the opinion speaks to the right of release before trial, this discussion relates to federal statutes providing

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

11. In Stack, twelve petitioners were charged with violating the Smith Act, 18 U.S.C. §371, 2385 (1970). Bail was first set for each defendant in varying amounts ranging from \$2,500 to \$100,000. Subsequently, bail was uniformly fixed at \$50,000. In an effort to reduce bail, petitioners presented uncontroverted evidence concerning financial resources, family relationships, prior criminal records and other information. The government, on the other hand, presented evidence showing that four persons previously convicted under the Smith Act had forfeited bail. In vacating the lower court order denying petitioners' writs of habeas corpus, the Supreme Court held that the lower court had not followed proper criteria delineated in the Federal Rules of Criminal Procedure in fixing a reasonable bail.

a right to bail following arrest for a noncapital offense.

Once this statutory right to bail is recognized, then the eighth amendment excessive bail provision assures a reasonable bail.

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

" The bail clause was lifted with slight changes from the English Bill of Rights Act. In England that clause has never been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail. When this clause was carried over into our Bill of Rights, nothing was said that indicated any different concept." 342 U.S. at 545, 96 L.Ed. at 563 (footnotes omitted).

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

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

Article I, §11 of the Alaska Constitution provides:

" In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by an impartial jury of twelve, except that the legislature may provide for a jury of not more than twelve nor less than six in courts not of record. The accused is entitled to be informed of the nature and cause of

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

the accusation; to be released on bail, except for capital offenses when the proof is evident or the presumption great; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." (emphasis supplied)

Article I, section 11 was originally introduced as section 12 of Committee Proposal No. 7, offered by the Committee on the Preamble and Bill of Rights to the Alaska Constitutional Convention in December, 1955.¹³ Section 12 of the committee proposal read in part:

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

The commentary attached to the proposal indicated that section 12 was intended to give defendants "the opportunity to be released on bail except in capital offenses."¹⁴ When the committee's proposal was discussed on the floor of the convention, Delegate Victor Fischer introduced an amendment to qualify the right to bail in cases involving capital offenses by adding the words "when the proof is evident or the presumption great."¹⁵ The delegate's comments on this amendment clearly indicate the guarantee of a right to bail:

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

13. 6 Alaska Constitutional Convention, Minutes, Appendix V, at 65 (1963) [hereinafter cited as Minutes].

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

15. 2 Minutes, supra, at 1344.

on bail except for capital offenses. But in practically every case where this new language is used, the words, 'when proof is evident and the presumption great' and that is a necessary protection for the accused and we shall follow the majority of the states in this case. It has proven a desirable practice. The actual determination of when a person is released on bail, if charged with a capital offense, is still up to the judge." 16

Our study of Article I, section 11 thus compels a conclusion that the Alaska Constitution without doubt guarantees to every accused person the right to be released on bail except for capital offenses where the proof is evident or the presumption great.

16. 2 Minutes, supra, at 1344-345. See American Law Institute, Code of Criminal Procedure 338-41 (1930) which indicates that 40 states had similar constitutional provisions providing for the right to bail except in capital offenses. See also Application of Corbo, 54 N.J. Super. 575, 149 A.2d 828, 833 (1959).

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

18. " The early common law did not permit bail in felony cases; later on bail was permitted before trial, but not during trial. When bail was permitted, it was a matter of discretion with the court, not a matter of right. . . .

. . . .
Most states have limited the judicial discretion of the common law by guaranteeing, by constitutional or statutory provision, that all persons shall be bailable by sufficient sureties except in certain cases." 8 Am.Jur. 2d Bail and Recognizance §§22, 23, at 796-797 (1963) (footnotes omitted).

Some jurisdictions with similar bail provisions have created an implied limitation on this constitutional right. But in Alaska such an implied limitation would necessarily contravene both the plain language of this constitutional provision and its intended purpose as stated at the constitutional convention.

In Reeves v. State, 411 P.2d 212 (Alaska 1966), we held that indigent defendants did not have an absolute right to be released on personal recognizance prior to trial. In Reeves, the defendant was charged in a four count indictment of serious offenses, including first degree murder, burglary and robbery. The trial court first set bail at \$50,000, which was later reduced to \$10,000. On appeal, the issue was limited to a claim that all indigent defendants were entitled to pretrial release as a matter of right. We rejected this contention as unsound and approved the rationale of Pilkinton v. Circuit Court,

19. See, e.g., State v. Johnson, 61 N.J. 351, 294 A.2d 245, 250 (1972). New Jersey has a similar constitutional bail provision to that of Alaska. There the court said in part:

"Expressed in pragmatic terms this right to bail means that the accused has the right to pretrial liberty on such bond in such amount as in the judgment of the trial court under the circumstances of the case will insure his appearance at the trial. If, however, the court is satisfied from the evidence presented on the application for bail that regardless of the amount of bail fixed, the accused if released will probably flee to avoid trial, bail may be denied."

324 F.2d 45 (8th Cir. 1963). Reeves, however, as was pointed out in Doe vs. State, 487 P.2d 47 (Alaska 1971), should not be taken as denying the right to bail provided under Article I, section 11.

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

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

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

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

This section was originally section 9 of Committee Proposal No. 7 introduced by the Committee on the Preamble and Bill of Rights

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

to the Alaska Constitutional Convention in December, 1955.

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

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

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

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

In re Underwood, 508 P.2d 721 (Cal. 1973).

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

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

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

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

22. In his dissent Justice Burke suggests that since the Constitution of California recognizes the inalienable right of all men "to enjoy and defend their life and liberty, and to protect their property, and to pursue and obtain safety and happiness", the courts should exercise an inherent power to achieve a suitable balance between society's rights and the defendant's right to bail. This suggestion rests wholly on the questionable assumption that man's inalienable rights are incompatible with the constitutional right of an accused to bail.

An additional argument for the "public safety" exception advocated by the dissent is that courts may accomplish the same result when the judge fixes an amount of bail which the particular defendant is unable to furnish. According to Justice Burke, this merely evades the issue and does indirectly what may not be done directly, and moreover violates the prohibition against excessive bail. Such an argument furnishes little support for the central thesis in Justice Burke's contentions. To the extent it suggests that difficulty in application of a constitutional principle provides justification for its rejection, the argument itself evades the issue.

23. SLA 1966, Ch. 20, §1.

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

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

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

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

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

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

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

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

Subsection (a) of AS 12.30.020 requires a defendant to be released on his personal recognizance or upon the execution of an unsecured appearance bond "unless the officer determined that the release of the person will not reasonably assure the appearance of the person as required." The "unless" clause relates only to denial of personal recognizance or an unsecured appearance bond and not to the right of bail. Subsection (b) provides that in the event the judicial officer should determine that a personal recognizance release or an unsecured appearance

bond would not reasonably assure the appearance of a defendant, the judicial officer could impose other requirements to assure the presence of the defendant. Section (b)(6) authorizes a judicial officer to impose any other reasonable conditions to assure the defendant's appearance. But this may not be interpreted so as to empower a judicial officer to absolutely deny the right to bail. Such a construction would not only be inconsistent with the basic purpose of the Bail Reform Act but would be unconstitutional under Article I, section 11 of the Alaska Constitution.

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

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

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

The State urges that these amendments permit the detention of defendants without bail when the judicial officer determines that the defendant "will pose a danger to other persons and the community." To support this argument the State refers

to the Judiciary Committee Report on House Bill No. 166:

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

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

Thus the amendment to subsection (a) of AS 12.30.020 operates to add another factor to be considered in determining whether an accused person is entitled to be released on personal recognizance or on an unsecured appearance bond. This amendment does not amount to a repeal of the right to bail found in AS 12.30.010. In like manner, the amendment to paragraph (b)(6) of AS 12.30.020 added another factor to consider in determining whether additional conditions should be imposed on a defendant. Neither provision may be read as empowering a judicial officer to deny bail. In reaching this construction, we consider it significant that the legislature did not undertake to amend AS 12.30.010 which we have noted remains as in the original Alaska Bail Reform Act and expressly provides for right to bail. Although the trial court may not deny bail to an accused, the trial judge can consider danger to the community as a factor in assessing the amount of bail or fixing the terms of a conditional

release. We hold therefore that the 1967 amendments, Ch. 112 SLA 1967, to the Bail Reform Act do not permit the detention of persons without bail. Moreover, a legislative enactment expressly permitting the detention of persons without right to bail would be unconstitutional unless a constitutional amendment was adopted.²⁵

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

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

24. Other factors to take under consideration are enumerated in AS 12.30.020(c).

" In determining the conditions of release under (b) of this section the judicial officer shall take into account

- (1) the nature and circumstances of the offense charged,
- (2) the weight of the evidence against the person,
- (3) the person's family ties,
- (4) the person's employment,
- (5) the person's financial resources,
- (6) the person's character and mental condition,
- (7) the length of the person's residence in the community,
- (8) the person's record of convictions,
- (9) the person's record of appearance at court proceedings,
- (10) the flight of the accused to avoid prosecution or his failure to appear at court proceedings.

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

the efforts to achieve reasonable and adequate public safety.

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

The case of Max Ray Martin presents different considerations. Article I, section 11, as we have said, guarantees the accused in a criminal prosecution the right to bail.

However, a probation revocation hearing is not a criminal prosecution looking toward an adjudication of guilt or innocence. Although this court in Hoffman v. State, 404 P.2d 644 (Alaska 1965), required the appointment of counsel to indigent probationers in a revocation hearing, that decision rested on a statutory interpretation of AS 12.55.110 consistent with the equal protection

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

27. Trumbly v. State, Opinion No. 957 (November 9, 1973). Gagnon v. Scarpelli, ___ U.S. ___, 36 L.Ed.2d 656, 651-662 (1973) ("Probation revocation, like parole revocation, is not a stage of a criminal prosecution, but does result in a loss of liberty." (footnote omitted)). Cf., Morrissey v. Brewer, 408 U.S. 471, 33 L.Ed.2d 484 (1972).

28. AS 12.55.110 governs revocation of probation proceedings.

clauses of both the Federal and Alaska Constitutions. Hoffman does not hold that probation revocation hearings are to be equated to a criminal prosecution.²⁹

We do not interpret Article I, section 11 of the Alaska Constitution to extend the right of bail to probation revocation proceedings. While the Alaska Constitution and statutes insure to the accused in all criminal prosecutions a right to bail, Martin was not the accused in a criminal prosecution at the time he requested bail from the trial court.³⁰

Nor do we find that appellant was entitled to bail under the Alaska Bail Act. His reliance on AS 12.30.010 is misplaced, because the right to bail under this statute is guaranteed prior to conviction. When a defendant reaches the status of a probationer, he can no longer claim the right to bail protected by AS 12.30.010. Nor can he claim bail under the probation statutes,³¹ since they fail to mention bail, and AS 12.30.040,

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

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

31. AS 12.55.080 and AS 12.55.110.

which provides for release after trial is limited in application to convicted persons awaiting sentence or whose appeal is pending.

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

The Gagnon due process requirements were adopted by this court in Trumbly v. State, Opinion No. 957 (November 9, 1973). Both Trumbly and Gagnon evinced a concern for considering the rehabilitative treatment afforded by probation as a factor in determining whether probationary status should be revoked.

As this court stated in Trumbly,

"The requirement that probation revocation follow after a showing of 'good cause' requires the trial judge to find that continuation of probationary status would be at odds with the need to protect society and society's interest in the probationer's rehabilitation. Revocation should follow violation of a condition of probation when that violation indicates that the corrective aims of probation cannot be achieved." Trumbly v. State, Opinion No. 957 (November 9, 1973) (footnotes omitted).

In Martin's case, there has been no showing that there was abuse of the trial judge's discretion in refusing to allow Martin's release on bail pending a revocation hearing.³²

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

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

Memorandum

Alaska Court System

TO: [Hon. Clem R. Tillion
Chairman, Judiciary Committee
Alaska House of Representatives
Pouch V
Juneau, Alaska 99801

DATE : March 7, 1974

FROM: Sheldon S. Sprecker *SSS*
Magistrate
Box 86
Glennallen, Alaska 99588

SUBJECT: Plea Bargaining and
Mandatory Sentences

I would like to offer my personal opinion upon the two subjects at hand. Due to the recent increase in concern of the ability of the courts to handle the criminal element of our state, I would like to comment on plea bargaining as a useful tool in the disposition of cases and I would like to point out its severe limitations.

In light of the experiences that I have had in sitting the bench in Anchorage, Glennallen, Valdez and Tok I have seen the effects of plea bargaining upon the populous of a large city, a small municipality, a native village and rural areas of sparse population. My experience has shown that the populous of all four areas have learned plea bargaining is a very effective means of avoiding punishment or consequences of their criminal acts. The native people have learned through the offices of the Public Defender Agency that simply by agreeing to plea guilty to a much lesser charge that they can leave the court room without financial losses, harm to reputation or punishment. The sophisticated criminals of the larger cities with highpowered attorneys experience the same.

Plea bargaining in itself serves a fundamental means of clearing the court case load. However, somewhere in the past we have lost the objective of prosecution. My personal legal training is extremely limited but my personal sense of right and protection of society has received sufficient training and experience. Can you justify turning loose upon society a person charged with a serious crime (take your pick from the gauntlet of drunken driving to murder)? This person agrees to plea guilty to a reduced charge (example: charged with armed robbery and agrees to plea guilty to petty larceny; or is charged with drunken driving and agrees to plea guilty to speeding; or is charged with first degree murder and agrees to plea guilty to assault with a dangerous weapon; or is charged with statutory rape and agrees to plea guilty to contributing to the delinquency of a minor child). These examples are cases that I have had personal involvement with.

Hon. Clem R. Tillion

Page 2

March 7, 1974

These are some of the tremendous shortcomings of plea bargaining. I do not advocate doing away with plea bargaining but it must be severely restricted to bargaining and negotiation of the sentence to be received, not the reduction of a charge dealing with serious impacts upon society. This practice borders on the absurd and criminal negligence.

The most criticism seems to fall upon the District Attorney's office and the judge sitting the bench and well it should. By rule of court the judges do not have to accept the plea bargains offered by the prosecution and defense and yet we have become rubber stamps for practicing attorneys. The District Attorney must face the responsibility of agreeing to accept and even suggest the lesser charges with inconsequential sentences. It seems to me that the State must take the position that if a man is charged with a crime of a serious nature and is found guilty of the charge upon his own admission he must be prepared to face the consequences of his action. Though the District Attorney may be overworked and understaffed and underpaid he still has a responsibility to society to see that a fair sentence is placed upon the individual. The judges upon the bench have that same responsibility to issue forth a sentence that is fair and just.

I would strongly recommend to this committee that in your consideration of any bill that would effect plea bargaining that you take into account the criminal can negotiate only for a lesser sentence, not for a lesser charge and sentence. The criminal must receive the message that he is responsible to society for his actions.

Again, I totally support the concept of plea bargaining where a man will agree to plea guilty and negotiate a reduced sentence or a conditional sentence but he should be held accountable for the charge levied against him.

MANDATORY SENTENCES

In regard to any bills considering mandatory sentences, again through personal experiences I feel the judges of the State of Alaska have abused the discretion of sentencing that they enjoy. I have repeatedly seen drunken drivers released back out on the highway with their driver's license intact, no financial loss and no incarceration. I have seen men charged with assault and battery, assault with a dangerous weapon and other violence related crimes given a lecture and told not to do it again and turned upon the streets.

5/4 COTTON FIBER

Hon. Clem R. Tillion

Page 3

March 7, 1974

Perhaps if we had a mandatory minimum some people would get the message that crime does not pay. As it is now, the message is exactly the opposite. Crime does pay and pay very well and if you're caught it is just an inconvenience. I would recommend, as a practicing judge, some minimum mandatory guide lines in sentencing.

Thank you very much for allowing me to take this time to comment upon the pending legislation before your committee.



Supreme Court

State of Alaska

CHIEF JUSTICE
JAY A. RABINOWITZ

JUSTICES
ROGER G. CONNOR
ROBERT C. ERWIN
ROBERT BOOCHEVER
JAMES M. FITZGERALD

February 14, 1974

POUCH U, CAPITOL BUILDING
JUNEAU, ALASKA
99801
907-586-5380

The Hon. Clem V. Tillion
Chairman, House Judiciary Committee
Alaska House of Representatives
Capitol Building
Juneau, Alaska 99801

Re: HB 452, 460, 512, 513,
515, 563, 564, 565, 566,
570, HJR 67, 71

Dear Mr. Tillion:

The Supreme Court of Alaska has reviewed the bills to be considered at public hearings to be conducted by the House Judiciary Committee on Wednesday and Thursday, February 13 and 14, 1974. We did not feel that it was appropriate to comment on all of the bills, but it did seem desirable for us to express our views on certain subjects set forth in some of the bills and resolutions. Specifically, we have the following comments:

HBs 452, 460, 512, 513 and 465--All of these bills involve mandatory minimum sentence provisions. Enclosed herewith is a copy of our letter addressed to the Hon. Lowell Thomas, Jr. dated January 30, 1973 with reference to a provision for a mandatory minimum prison term. While the letter pertains to SB 15, the comments are equally applicable to other bills containing similar provisions. For the reasons set forth in the letter of January 30, 1973, the Supreme Court disapproves of statutory requirements compelling mandatory minimum prison sentences. HBs 452, 460, 512, 513 and 565 involve mandatory minimum sentence provisions and the Supreme Court accordingly recommends that those requirements of the bills be deleted.

The Hon. Clem V. Tillion
February 14, 1974
Page 2

HB 563--The Supreme Court endorses this bill requiring the transmittal of criminal records and data to the place where a criminal is confined, and recommends its passage.

HB 564--We recommend against passage of this bill, which in effect prohibits plea agreements between the prosecuting attorney and defense counsel. We do not believe that any such agreements should be binding on the court; but under the present system of handling criminal cases, plea agreements between prosecuting attorneys and defense counsel as to recommended sentences are a necessary tool. Without plea agreements, many cases now disposed of by plea would in all probability require full trial at a great deal of unnecessary expense and loss of time by court personnel, prosecuting attorneys, defense counsel and witnesses.

HB 566--This bill requires a mandatory pre-sentence investigation report by the Probation Service within the Department of Health and Social Services before a court imposes sentence on a convicted felon. It would amend Criminal Rule 32(c) which presently provides for such reports when directed by the court.

Good
The Supreme Court is willing to modify its rule so as to require a pre-sentence investigation report in all cases if the court can be assured of adequate funds for implementation of such a rule. If the legislature does decide to proceed with this bill, we would recommend that the words "by the Probation Service within the Department of Health and Social Services" be deleted since there is a likelihood that such reports may be obtained from other reliable sources as well as the Probation Service. The bill would, in effect, prohibit the use of reports by other personnel.

HB 570--We oppose this bill which requires restitution or reparation to aggrieved parties through the Alaska Court System for actual damages or loss caused by a crime for which a conviction is had. This bill would necessitate lengthy trials on unrelated damage issues as a part of criminal proceedings. Often damage issues are among the most involved and time consuming portions of civil litigation. The bill would further place a heavy burden on administration of the Alaska Court System with reference to the collection of such damages and payment to aggrieved parties. While in some cases a requirement of reparation is a valuable sentencing tool to be used by a trial judge, the mandatory requirement of the statute would place an unnecessary financial burden on the judicial system. Unfortunately, in the vast majority of criminal cases, the defendant has no funds with which to meet damage awards; and in the cases where the defendant is financially responsible, civil remedies are available. The court does feel that the present laws providing for compensation to victims of crime could well be broadened in scope so as to increase the amount of payments.

The Hon. Clem V. Tillion
February 14, 1974
Page 3

HJR 67--This resolution proposes an amendment to the constitution so as to except from bailable offenses those having a penalty of imprisonment in excess of eight years to be imposed upon conviction. We are enclosing herewith a copy of the opinion of the court in the case of Martin, et al v. State, No. 1785. You will note that the opinion specifically refers to the 1967 amendment of AS 12.30.020 permitting judicial officials to consider "danger to the community" as a factor in setting bail. We stated at Page 17 of the opinion:

Although the trial court may not deny bail to an accused, the trial judge can consider danger to the community as a factor in assessing the amount of bail or fixing the terms of a conditional release.

We thus believe that the trial judges have adequate power to consider danger to the community as a factor in setting bail and it thus appears to us that there is no necessity for amending the constitutional provision relating to release on bail.

HJR 71--We oppose this proposed amendment to the constitution which would add to the criteria for penal administration, now based on "the principle of reformation and the need for protecting the public," the further provision "and the need for proper punishment as a deterrent to the commission of future crimes". We have construed the Alaska Constitutional provision pertaining to punishment in the case of State v. Chaney, 477 P.2d 441 (1970). You will thus note that in holding that the sentence imposed by the trial court was too lenient we specifically construed the existing constitutional provision as including consideration of:

deterrence of the offender himself after his release from confinement or other penological treatment, as well as deterrence of other members of the community who might possess tendencies toward criminal conduct similar to that of the offender, and community condemnation of the individual offender, or in other words, reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves. 477 P.2d at 444.


Thus, deterrence of the offender and others from commission of future crimes has been construed by our court as being encompassed in the present constitutional provision. We therefore do not believe that the proposed amendment is necessary. We enclose a copy of our opinion in the case of State v. Chaney.

The Hon. Clem V. Tillion
February 14, 1974
Page 4

Our failure to discuss some of the proposed legislation is not intended to indicate either approval or disapproval, nor are we intending to give any indication as to whether or not any of the bills or portions thereof may be invalid for any reason. The views expressed in this letter are those of the Supreme Court and are not of the trial judges within the Alaska Court System.

We appreciate the opportunity of presenting these comments to you.

Very truly yours,


Jay A. Rabinowitz
Chief Justice
Alaska Supreme Court

cc: Sen. Robert H. Ziegler, Chairman
Senate Judiciary Committee

March 14, 1974

The Honorable Terry Miller,
President Alaska State Senate
State of Alaska
Capitol Building
Juneau, Alaska 99801

The Honorable Tom Fink,
Speaker Alaska State House
State of Alaska
Capitol Building
Juneau, Alaska 99801

The Honorable Robert Ziegler,
Chairman Judiciary Committee
Alaska State Senate
State of Alaska
Capitol Building
Juneau, Alaska 99801

The Honorable Clem Tillion,
Chairman Judiciary Committee
Alaska State House
State of Alaska
Capitol Building
Juneau, Alaska 99801

The Honorable Richard McVeigh,
Chairman Alaska Legislative Council
State of Alaska
Capitol Building
Juneau, Alaska 99801

Gentlemen:

Fully realizing the importance of establishing some priorities out of the list of some 67 law and order bills currently pending in the Legislature, a meeting was held at the office of Trooper Colonel Ed Dankworth at Anchorage, Wednesday, March 13, 1974. A group of top law enforcement officers and prosecuting attorneys, as well as private citizens, and a representative of the trial court judges were present. This group of individuals, whose names appear below, reviewed the package of law and order bills in order that a priority list could be submitted to you by this group for your consideration.

- 2 -
The meeting was attended by:

Bob Atwood, Editor Anchorage Times
Joe Balfe, District Attorney Anchorage
Ed Dankworth, Colonel Alaska State Troopers
Earl Hibpshman, Anchorage Police Chief
Dan Hickey, District Attorney Juneau
Mark Hogan, Captain Anchorage Police Department
Eben Lewis, Superior Court Judge
John Spencer, Anchorage City Attorney
Harold Sydnam, Captain Alaska State Troopers
Bill Tobin, Anchorage Times
Pat Wellington, Commissioner Public Safety

After a complete review of the law and order bills, the following list was extracted as being the tools to accomplish the most good in curbing the raging criminal activities in our State. Comments are set out by each bill if amendments were suggested and adopted by the group.

BILL NO.

COMMENTS

SB 297 - by Lewis

An Act relating to the making of false reports to a peace officer.

Endorsed as amended - copy attached.

SB 313 - by Rules Committee - Governor

An Act relating to bail; and providing for an effective date.

Endorsed as introduced.

HRJ 66 - by Fisher

Proposing an amendment to the Constitution of the State of Alaska relating to release on bail.

SB 321 - by Rules Committee - Governor

An Act amending the Uniform Narcotic Drug Act; and providing for an effective date.

Recommend the deletion of the mandatory provisions under subsection (a) (1) (line 14 and 15) substitute to read as follows: by imprisonment for a term of not more than 10 years.

SB 322 - by Rules Committee - Governor

An Act relating to operating a motor vehicle while under the influence of intoxicating liquor or narcotic drugs; and providing for an effective date.

Endorsed as introduced.

<p>SB 323 - by Rules Committee - Governor An Act concerning immunity of a witness from prosecution related to court ordered testimony; and providing for an effective date.</p>	<p>Endorsed as introduced.</p>
<p>SB 335 - by Rules Committee - Governor An Act relating to the crime of resisting arrest; and providing for an effective date.</p>	<p>"</p>
<p>SB 336 - by Rules Committee - Governor An Act relating to unlawfully obtained property; and providing for an effective date.</p>	<p>"</p>
<p>SB 338 - by Rules Committee - Governor An Act relating to the crime of conspiracy; and providing for an effective date.</p>	<p>"</p>
<p>SB 446 - by Rules Committee - Governor An Act relating to homicide; and providing for an effective date.</p>	<p>"</p>
<p>SB 391 - by Hartig and Hackney An Act relating to disorderly conduct; and providing for an effective date.</p>	<p>Endorsed as amended - copy attached.</p>
<p>SB 512 - by Fisher, Hackney and Huber An Act relating to the imposition of minimum penalties for the conviction of certain crimes; and providing for an effective date.</p>	<p>Endorsed; suggest amending by adding at line 13 between the words "possession or" the words "purpose of sale".</p>
<p>HB 513 - by Fisher, Hackney and Huber An Act relating to the commission of a felony while released on bail; and providing for an effective date.</p>	<p>Endorsed, suggest amending by deleting at line 16 and 17 the words "provided that he is convicted on the initial felony charge".</p>
<p>HB 633 - by Urion An Act relating to the carrying of firearms in places licensed to sell intoxicating liquor.</p>	<p>Endorsed as amended - copy attached.</p>

HB 562 - by Rules Committee - Legislative Council by request of the Interim Committee on Correstions and Probation. Endorsed as introduced.

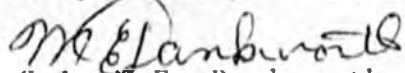
An Act relating to increased punishment for prior criminal conviction.

HB 543 - By Rules Committee - Governor Endorsed as introduced.
An Act relating to unfair trade practices and consumer protection; and providing for an effective date.

HJR 93 - Judiciary Committee " Proposing an amendment to the grand jury section of the Constitution of the State of Alaska.

We urge you to consider these bills in the light of the unanimous support given by the named officers and officials. Our support of these particular bills is not a demonstrative effort to minimize the need of any other bills or to reflect adversely on them. This list is our attempt at sifting through the total package and determining the laws we feel are most needed at the present time in order to effect the necessary curbing of the inordinately high percentage increase in crime in Alaska.

Respectfully submitted,


Col. M.E. Dankworth
Director
Alaska State Troopers

ED:JRS:gml:saa
Enclosures
cc: Members listed above.

IN THE SENATE

BY LEWIS

SENATE BILL NO. 297

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to the making of false reports to a peace officer."

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

* Section 1. AS 11.30 is amended by adding a new section to read:

Sec. 11.30.215. MAKING A FALSE REPORT TO A PEACE OFFICER.

(a) Except as provided in (b) of this section, a person who wilfully and knowingly makes, or causes another to make, a false report of an alleged criminal offense to a peace officer or a law enforcement agency is guilty of a misdemeanor, and upon conviction is punishable by a fine of not more than \$1,000, or by imprisonment for not more than one year, or by both.

(b) A person who wilfully and knowingly makes, or causes another to make, a false report of an alleged criminal offense to a peace officer or a law enforcement agency is guilty of a felony if the false report causes an innocent person to be wrongfully charged with, or convicted of, a criminal offense or if a person is physically injured as a result of the false report. A person convicted under this subsection is punishable by imprisonment for not less than one year nor more than 15 years, or by a fine of not more than \$25,000, or by both.

(c) In addition to the penalties prescribed in (a) and (b) of this section, the court may, in its discretion, require restitution by the convicted person to the law enforcement agency involved for all expenses incurred as a direct result of the false report.

IN THE HOUSE

BY HARTIG AND HACKNEY

HOUSE BILL NO. 391

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to disorderly conduct; and providing
for an effective date."

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

* Section 1. AS 11.45.030(a) is amended by adding a new paragraph
to read:

(5) in a public or private place addresses language to
anyone present which would be likely to provoke a violent reaction in
a person of ordinary sensibility.

*Sec. 2. This Act takes effect on the day after its passage and approval
or on the day it becomes law without approval.

March 7, 1974

Representative Glen Tillion
Pouch V
Juneau, Alaska

Dear Glen:

Re: Law & Order legislation.

It seems to me that our judicial branch of state government is exerting undue pressure on the legislative branch in an effort to suppress effective law and order legislation.

Certainly anyone living in our state for the past few years can see the dismal failure of our judicial system, in fact, the failure of the legal profession in general to adequately protect the law abiding segment of our society.

Well do I remember the sad day when capital punishment was abolished in Alaska. It was after the conviction of a man who confessed to the assault and rape of one woman and the rape and murder of another. He was sentenced to hang on the rape and murder charge and sentenced to 15 years on the assault and rape. He got off the hanging conviction on a technicality and served 6 years of the other sentence after which he was released. In three weeks he was back in jail for another violation of the same nature.

It has gotten to the point now where organized groups must patrol their neighborhoods to protect themselves and neighbors from the muggers, rapists, and burglars. Residences and cabins in remote areas are almost impossible to protect and when a criminal is arrested, he is back on the street almost immediately.

The administrator of our judicial system says he needs more money - money for what? To finance the Public Defenders office so they can turn the hoods out faster?

I say if the first and second offenders were properly taken care of, we would not have the third, fourth, fifth, etc. offenders to worry about and our judicial system could operate on less money - not more.

I hope that you and your colleagues in our state legislature will work hard for the passage of legislation that will guarantee society adequate protection from the criminal element.

Sincerely yours,



Bob Barrett

P.S. I also think that "pushers" of hard drugs should be on the list for capital punishment.

March 10, 1974

The Honorable Clem Tillion,
Alaska State Representative
Pouch V
Juneau, Alaska 99801

Dear Clem:

I am enclosing a copy of the resolutions our committee came up with at the convention yesterday. (Time did not permit much in the way of quantity as we finished the whole convention in the afternoon). You will note #4, on capital punishment. This brought on considerable debate the opposition being led by Don Oberg. He swung only three votes to his side in spite of much emotional input. There were nine members on my committee and Don offered the only opposition.

In reply to Don's disertation on the right of society to take revenge and his effort to put faces on the criminals involved, I said, " We seem to be puting faces on the offender. How about the Victim ? Can we close our eyes to those who suffer at the hands of these criminals ? It is, indeed, a shame that any member of our society must place himself in a position where we have no reasonable alternative but to determine he no longer is able to live amongst decent people. In any event, when it becomes necessary to invoke the death penalty, we should not do it as revenge, but rather with a prayer in our hearts that others of our species will not sink to the dephts which requires such drastic action."

I have talked to many people since receiving a copy on H.B. #675 and have yet to find one who opposed the bill, except as stated above. I have talked to Ministers, Business men, Police officers, Working men, Teachers and others. The public, Clem, is overwhelmingly in favor of this bill.

You may read any part or all of this into the record should you so desire.

Regards,  Earl Westphal

March 9th, 1974

Resolutions approved by the House District 11 Convention.

1. Resolved that OSHA be reduced to an advisory instead of a regulatory agency.
2. Resolved that ASHA (Alaska state housing authority) confine their functions to that of personal, people type housing projects.
3. Resolved that the commissioners of the Dept. of Environmental Conservation exercise the power placed in their hands and that the Department perform greater educational functions and seek public input prior to issuance of any proposed regulations.
4. Resolved that we support the concept of capital punishment for certain specified crimes such as those described in House Bill #675. Also those found guilty of wholesale Distribution of illicit drugs.
Note: (Don Oberg wished it to be noted that he takes exception.)



Earl Westphal, Chairman, Resolutions and Platform Committee

CLEM - PLEASE NOTE #4. THIS PASSED BY AN OVERWHELMING MAJORITY AFTER MUCH FLOOR DEBATE. LESS THAN 10% OF THOSE PRESENT VOTED IN THE NEGATIVE.
Earl.

5360 E. 41st Avenue
Anchorage, AK 99504
March 7, 1974

Hon. Clem Tillion
House Judiciary Committee
Pouch V
Juneau, AK 99801

Dear Mr. Tillion:

The following are some personal observations about how our criminal justice system may be improved, that I wish to present to you and your committee for consideration. Although I am presently employed by the Court System, the comments herein are not necessarily those of the judiciary, but rather are offered strictly as a private citizen interested in making our justice system more responsive to the present and future crime problem. My ideas have been formulated as a result of having been the Director of the Criminal Justice Commission during 1970 and 1971, and since then as a Planner for the Court System.

My recommendations are primarily from the standpoint of management and systems analysis, rather than that of a professional police officer, attorney, or correctional official, and to that extent, may approach the crime problem from a different perspective than most other observers to date.

Rather than comment on the multitude of pending bills, I wish to restrict my observations to what I consider the most pressing problems in our justice system. My comments concern - 1) the need for greater coordination and exchange of information among justice system agencies and among those agencies and the legislature; and 2) the problem of plea bargaining.

Perhaps the area most in need of change, as well as having the greatest potential for improvement, at no additional cost, is greater information exchange and coordination among the justice system agencies and between the justice system agencies and the legislature. We like to think our justice system is indeed a system. I suggest it is a "non-system", comprised of a multitude of independent agencies competing for scarce resources, with little concern or even awareness that they are but a part of a much larger system. If we agree that the goal of the "justice system" is to reduce crime, then the components comprising the system should all strive toward that goal, realizing that each is but an integral part, and that each must work with the other, since each has a vested interest in the activities of the other, in order that as a group, their goal may be realized and society thereby served. In fact, however, coordination and communication, at least at the policy level, is minimal. The sub-goals of each agency seems to be paramount, and the overall goal of the system secondary. Rather than work together, they criticize and point

Hon. Clem Tillior.
March 7, 1974
Page Two

the finger of blame at their colleagues, often taking to the public media in the process.

The recent Big Lake conference seems to be nothing less than a public admission that the agencies in the justice system have not and do not periodically meet together to coordinate their activities and resolve differences. Significantly, it took the legislature to get them all together and talk over their problems. The legislature did what they apparently were incapable of doing themselves. The need is obvious - and it will not require an appropriation.

Closely related to, and a part of, the lack of cooperative action by the components of the justice system is the resulting tendency toward independent decision-making by both the legislature and the agencies of the system without concern for the impact of their decision on the other parts of the system. And here is a problem in which the legislature must share in the blame. Perhaps the best and most recent illustration was the appropriation last session of \$350,000 to the State Troopers for additional efforts for apprehension of drug violators. Recognizing a possible problem with such an infusion of money into only the law enforcement sector, without apparent concern for the related needs of additional prosecutors, among other system needs, I wrote to an Anchorage area legislator who is quite concerned about law and order, suggesting that part of the appropriation buy additional prosecutors. To not do this would result in a glut of additional cases on the District Attorney, and the necessity to plea bargain, resulting in the legislative intent being watered-down and thereby relatively ineffective. Just a month or two ago, this fear was realized when the Anchorage District Attorney was quoted in the newspaper as needing more staff to handle the additional drug cases being generated. The lesson seems clear. Both the legislature and the individual agencies must come to realize that their perceived needs must be viewed in the context of the entire system, and that simply adding more cops will not solve the problem.

Another example of independent decision-making concerns the pending vote on March 12 about area-wide police authority for the Anchorage Borough. Whether police protection is extended in that manner, or some other way, there is little doubt that Borough residents will have police protection. While there has been due concern voiced as to how the city police will be affected, I have seen no evidence of attempting to project the number of cases these additional 100 policemen will generate, the impact of that caseload on the District Attorney, the Court System, etc. What will probably happen is that the police will be hired, and after their efforts become noticeable, the District Attorney, the Court System, and possibly Corrections and the Public Defender, will then complain about not having enough money and manpower, when the projected impact should have been worked out before the fact, and the legislature presented with some sort of estimate

Hon. Clem Tillion
March 7, 1974
Page Three

of additional system needs.

Fortunately, a solution for both the lack of coordination and the tendency toward independent decision-making seems to exist, but is not yet being fully utilized. Obviously some forum is needed to bring together the justice system agency heads to plan cooperatively, and in the process, affect greater coordination and information exchange. This forum exists now, in the Governor's Commission for the Administration of Justice, set up in 1970 to administer the Federal Law Enforcement Assistance Administration program. With but slight modification, the Commission members, which include all justice system agency heads and some legislators, could expand their activities to embrace the concept of the cooperative decisional process and exchange of information.

The legislature, on the other hand, could materially assist the justice system process by weighing carefully the consequences of resources allocated to only one segment of the system. It seems that an impact statement might be required of the other system components of any proposed legislative assistance program to individual agencies of the system or of new laws that would affect the entire system. Thus before future monies are allocated for police, the courts, or corrections, an impact statement could be required. In the earlier case of the \$350,000 for drugs, a statement could have been required, estimating the additional prosecutors, public defenders, judges, etc., that would be required to handle the anticipated additional caseload, in much the same way that an environmental impact statement is required before pipelines and roads are constructed.

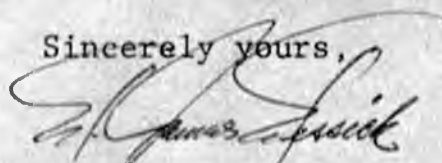
Plea bargaining has both advocates and detractors, and is a subject not generally well understood by the "man on the street". Rather than completely abolish plea bargaining, I would strongly urge that it be authorized only in certain specific situations. It should be used for example when a person has been overcharged (perhaps by frustrated police who hope to get at least one charge to stick), or as a concession to a person who would agree to cooperate with the state in a given case, or to become an informant for the police. Perhaps the only time plea bargaining should not be allowed is when it is used as a device to keep the "system" running. In other words, it should not be permitted simply because we have an inadequate number of prosecutors, or problems with calendaring of cases in the courts, or other similar shortcomings of the justice system. Rather, the system should be flexible enough to handle the increasing caseload, rather than making concessions to an accused simply to get around the problem of inadequate resources. Such action does not meet the problem of inadequate, does not deal firmly with the accused, and certainly does not meet the needs for protecting society. Therefore, I

Hon. Clem Tillion
March 7, 1974
Page Four

suggest retaining some limited plea bargaining, but not permitting it as a means of side-stepping problems of the justice system. Alaskans in general, would be hard-pressed to understand why a person with a valid charge of burglary could end up pleading guilty to trespassing simply because there are inadequate prosecutors to handle the existing caseload.

Hopefully, the foregoing has presented some viable alternatives for legislative consideration, in attempting to improve our justice system machinery. I would be happy to comment further, at your request.

Sincerely yours,



M. James Messick

:pk

February 26, 1974

Representative Clem V. Tillion
Pouch V
Juneau, Alaska 99801

Honorable Sir:

The Alaska Association of Chiefs of Police met February 25, 1974, in Anchorage, Alaska, to discuss the current professional criminal legislation.

The general feeling of the membership was we did not have enough time to carefully analyze each one of the bills dealing with criminal legislation. While some bills were good, others contained severe plans.


The membership felt we should devote our time and efforts to pointing out what we consider major weaknesses in the criminal justice system.

The primary concern of the members is what appears to be a "revolving door policy," in dealing with the repeated criminal offender. We recognize the blame cannot be shouldered by any one agency, but must be shared by all members of the criminal justice system.

In this attached resolution, we have not tried to draft legislation, but merely point out areas of grave concern.

We sincerely hope these matters, as set forth in the resolution, will receive your utmost consideration.

Be assured of our cooperation in matters of mutual concern.



Chief Barry W. Pegram
Secretary/Treasurer
A.A.C.O.P.
Box 3173
Kenai, Alaska 99611

BWP/dl

Attachment

A RESOLUTION OF THE
ALASKA ASSOCIATION OF CHIEFS OF POLICE
CONCERNING THE ADMINISTRATION OF
CRIMINAL JUSTICE IN THE STATE OF ALASKA

WHEREAS, the Legislature of the State of Alaska is currently considering various bills concerning the administration of criminal justice in and the criminal laws of the State of Alaska: and

WHEREAS, the Alaska Association of Chiefs of Police is extremely interested and concerned with the administration of criminal justice in Alaska; and

WHEREAS, the volume of proposed legislation introduced in the Legislature is indicative of the concern felt throughout the State, regarding the administration of criminal justice; and

WHEREAS, the Alaska Association of Chiefs of Police recognizes that the motivation prompting the current proposed criminal legislation is based largely on the concern over the increasing crime rate; and

WHEREAS, recidivism is a prominate factor in the increasing crime rate:


NOW, THEREFORE, the Alaska Association of Chiefs of Police resolve:


1. That the Association urges the Legislature of the State of Alaska to consider the purposes of bail and the current statutes concerning bail, in-as-much as the citizens of the State are not being protected from the repeat criminal while he is out on bail.
2. That Association urges the Legislature to consider amending current State Statutes concerning the charging and sentencing of habitual criminals to provide

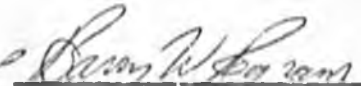
for mandatory charging and sentencing under those Statutes rather than discretionary, as now provided.

3. That the Association urges the Attorney General of the State of Alaska to establish guidelines for the control and exercise of plea-bargaining in criminal prosecutions.
4. That the Association urges the Legislature to make whatever appropriations necessary to insure that the terms and conditions of probation are complied with.
5. That the Association urges the Legislature to provide that the composition of the Board of Parole include as a member a professional in the field of law enforcement and that any pre-parole interview with a prisoner be conducted by a majority of said Board before a decision be made to parole an inmate.
6. That copies of this resolution be sent to both houses of the Alaska Legislature, the Attorney General for the State of Alaska, the Governor of the State of Alaska, news media, mayors and city managers of Alaskan cities and the Justices of the Supreme Court of the State of Alaska.

Passed and approved this 25th day of February, 1974.


President, Alaska Association
of Chiefs of Police


Vice-President, Alaska
Association of Chiefs of
Police


Secretary-Treasurer,
Alaska Association of
Chiefs of Police



Superior Court

State of Alaska

THIRD JUDICIAL DISTRICT

941 FOURTH AVENUE

ANCHORAGE, ALASKA

99501

CHAMBERS OF

C. J. OCCHIPINTI, Presiding Judge

February 21, 1974

House Judiciary Committee
Pouch "V"
Juneau, Alaska 99801

Dear Mr. Chairman:

Your concerned Committee appears to have taken testimony ranging broadly from many witnesses. However, in observing the comments, it reminds me of the story where a group of blind men tried to describe an elephant. Their conclusions were of course limited to the small area of contact which they experienced. Those testifying before your committee appear to have done the same.

One area of testimony touched on the leniency of the Courts as the reason for the escalation of crime in Alaska. Another area faulted placing people in jails, or long sentences. Others blamed the police, probation officers, or the laws themselves. No one, however, in my opinion has brought the combination of factors together to reconcile the various conflicts. I doubt if I can, but would like to make some observations for your consideration.

Initially, the laws themselves as you legislators have passed are substantially adequate with the exception of a need for strong bail requirements, and confirmation as to what is rehabilitation.

A segment of our society feels that rehabilitation is the sole goal of our penal systems. Others feel punishment alone should be the criteria. But neither can adequately or humanely define what they mean. If rehabilitation is interpreted as a series of lectures, or some exposure to psychiatric or psychological treatment, it is obvious that this concept is meaningless. If punishment means warehousing bodies again this can easily be seen as inadequate. Our present system, from the view point of the courts is to combine both punishment and rehabilitation as well as an affirmation to deter others pursuing the same anti-social behavior. Our Supreme Court has set down these concepts, and no one can quarrel with them. The breakdown is in interpreting the methods to accomplish these goals.

Persons pursuing anti-social conduct must be made to understand society will not tolerate such behavior. To accomplish this takes a variety of sanctions. But basically, the message these individuals must get is that "crime does not pay". Once this is established, our system of justice will be respected by all, those it protects as well as those it affects. I believe the reason we have no respect presently may be easily traced to ineffective sentences, and ineffective institutions. No matter what the sentences given by our Courts, it is well known, at least by the judiciary and defense attorneys, as well as the criminals, that the criminal will serve a small part of the sentence. Our system presently allows a defendant to apply for parole immediately upon being sentenced. Although a statute does state that a judge may impose a mandatory service up to one third of the sentence given, this statute has not been followed or upheld as it should be. Thus, a criminal who is given a sentence of 5 years, after a lengthy sentence hearing knows that he can walk out of jail in a few months. How can such a system gain respect? In addition, no matter how long the sentence, work and school releases are doled out without supervision and in most cases, without adequate investigation. It does not take a genius to arrive at the conclusion that a criminal who can obtain such an early release, and actually be further benefited with work or school releases would have little or no respect for the law.

The Courts arrive at a sentence, but have no control thereafter. To further evade what may be considered a reasonable or even lenient sentence makes our system valueless and plays into hands of the criminal. Of all the sentences meted out, none have been fully served, few have served as much as one third, and the vast majority only a token period.

The institution or prisons involved do not function as well as they might because of the failure or complete absence of meaningful programs. Some would suggest clinical type institutions and

almost a one one one ratio for treatment. Assuming this would have value, the cost would be prohibitive, and the element of punishment or persuasion from criminal activity to approved social behavior would be almost totally lacking. Prisons should be completely reorganized, and inmates put to work on projects or industrial vocations. They should be paid regular wages, and part of their wages (25%-50%) used to offset the burden on the taxpayers for their keep. Many products or goods could be manufactured within the prison which could be used by other State agencies. The impact on the private commercial sector would be minimal, and the benefit to all tremendous. Of the earnings, the inmate would then also be able to maintain his family, pay restitution to the victims (forgotten in every way at present), and save, if any funds remain, for his executive release and re-introduction into society.

School programs should be made available in the evening hours within the institutions, not as an escape from prison or alternative to custody as it presently exists. And recreation could be made available, including the companionship of an inmate spouse on a periodic basis. This would tend to eliminate one of the worse conditions existing today, and leading to homosexual or other deviant behavior which frustrates rehabilitation.

Unless sentencing and custodial structures are reinforced, all the well meaning proposals will fall short of accomplishing the aims of our judicial systems. Respect can only be gained by a firm, positive program, to cease making crime pay, to allow the criminal to effecuate some positive expression with the knowledge he has placed himself in the position he finds himself, but allowing him to re-evaluate his values in a positive and dignified manner.

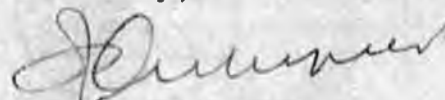
Occasionally we will find the hard core criminal who will scoff at positive programs, and who will probably become institution-alized, or unable to function in society. That person will have to be maintained in a maximum security institution for extended periods of time. At present, however, we do not so segregate, and our costs of maintenance exceed the student fees for our most expensive colleges and universities, and yet the results are negligible.

Finally, a paid professional parole board is essential. Presently, well meaning but ill equiped lay persons are politically appointed. They have other interests, including businesses and various other callings which monopolize their time. A full, professional evaluation is not done, and persons are released with little consideration as to the crimes committed and the impact on society with their early release. Neither can any of the existing board reach any assurance that the person has

learned to function in society, except from recent past behavior in the institution, which is hardly a sufficient basis for evaluation.

I am making these observations to you as a concerned Judge, and do not speak for the entire Court System. Many of my colleagues would agree with me. However, this comes to you as my individual opinion and observation, and is made with a sincere prayer to aid, not to criticize or hinder.

Sincerely,



C. J. Occhipinti

CJO/jm

cc: Senate:

Rettig
Rader
Lewis
Harris
Miller
Groh
Ziegler

House of Representatives:

Fischer
Orsini
McVeigh
Chance
Miller
Fritz
Hartig