

ALASKA LEGISLATURE COMMITTEE FILES 2012

1699 SJ SB 535 - SB 547

acquiring knowledge by closing his eyes (sometimes referred to as "wilful blindness") by providing that "when knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless he actually believes it does not exist."

Whether "knowing" should be defined subjectively or objectively was one of the issues most debated by the Subcommittee. Under the Code the test for knowledge is a subjective one -- the defendant must actually be aware of the fact critical to culpability or of at least a substantial probability of its existence. A defendant who is unaware of the critical fact or of a substantial probability of its existence does not "know," regardless of whether a reasonable man would have been aware. Note, however, that a person who is not aware because he is voluntarily intoxicated is held, nevertheless, to have acted "knowingly", see also [AS 11.81.630, supra].

b. Section 11.81.900(a)(3)-(4). RECKLESSLY AND CRIMINAL NEGLIGENCE

When a statute in the Code provides that a person must recklessly cause a result or disregard a circumstance, criminal liability will result if the defendant "is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists." The test for recklessness is a subjective one -- the defendant must actually be aware of the risk. On the other hand, if criminal negligence is the applicable culpable mental state, the defendant will be criminally liable if he "fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists." The test for criminal negligence is an objective one -- the defendant's culpability stems from his failure to perceive the risk.

Both terms require the risk to "be of such a nature and degree" that either the disregard of it (in the case of recklessness) or the failure to perceive it (in the case of criminal negligence) constitutes a "gross deviation" from the standard of conduct or care that "a reasonable person would observe in the situation." This definition of the applicable risk involved insures that proof of ordinary civil negligence will not give rise to criminal liability.

As with the definition of "knowingly", an intoxicated person who is unaware of a risk which he would have been aware had he not been intoxicated is held to act "recklessly." Since "criminal negligence" is defined objectively, an intoxicated person would be held to act with

criminal negligence if a reasonable person would have been aware of the risk.

See also TD II, 12-19; LR, 13-17.

CROSS REFERENCES

Definition of "intoxicated" - AS 11.81.900(b)
General requirements of culpability - AS 11.81.600
Construction of statutes with respect to culpability -
AS 11.81.610
Intoxication as a defense - AS 11.81.630

SENTENCES OF IMPRISONMENT FOR MISDEMEANORS;
SENTENCES FOR VIOLATIONS

NEW CRIMINAL CODE

Sec. 12.55.135. SENTENCES OF IMPRISONMENT FOR MISDEMEANORS. (a) A defendant convicted of a class A misdemeanor may be sentenced to a definite term of imprisonment of not more than one year.

(b) A defendant convicted of a class B misdemeanor may be sentenced to a definite term of imprisonment of not more than 90 days unless otherwise specified in the provision of law defining the offense.

Sec. 12.55.140. SENTENCES FOR VIOLATIONS. A defendant convicted of a violation may be sentenced to pay a fine of not more than \$300.

PRIOR CRIMINAL CODE

None.

COMMENTARY

From Senate Journal, 156:

Offenses which are misdemeanors and violations are not subject to presumptive sentencing. A defendant convicted of a class A misdemeanor may be sentenced to a definite term of imprisonment of not more than one year. A defendant convicted of a class B misdemeanor may be sentenced to a definite term of imprisonment of not more than 90 days. A defendant convicted of a violation may only be sentenced to pay a fine of not more than \$300. See also § 12.55.035(b)(5).

See also TD VI, 79-81.

CROSS REFERENCES

Definition of "misdemeanors", "violation" -
AS 11.81.900(b)

Classification of offenses - AS 11.81.250

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B

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Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

The portion of Alaska's Code of Civil Procedure which deals with limitation of actions does not contain any provision which specifically establishes a limitation period governing the foreclosure of either legal or equitable mortgages. *Dworkin v. First Nat'l Bank*, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

In a suit to foreclose a mortgage the six-year period of limitation is controlling and the ten-year period pertaining to actions upon sealed instruments is inapplicable. *Dworkin v. First Nat'l Bank*, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

The six-year statute of limitations (this section), which governs the underlying obligation, is determinative of the period of time in which a party is required to commence an action to foreclose a purported equitable mortgage security. *Dworkin v. First Nat'l Bank*, Sup. Ct. Op. No. 499 (File No. 929), 444 P.2d 777 (1968).

Slipping on ice as breach of implied contractual duty.—Where a suit for injuries suffered by plaintiff when she slipped and fell on ice which had accumulated near the entrance to a lodge where she had been a paying guest, plaintiff contended that she was injured by reason of defendants' breach of their implied contractual duty as innkeepers to keep their premises in reasonably safe condition for their guests and therefore, that the six-year statute of limitations should control it was held that the controlling statute of limitations was the two-year statute governing tort actions and not the six-year statute relating to actions on contract. *Silverton v. Miller*, Sup. Ct. Op. No. 114 (File No. 341), 389 P.2d 3 ().

Cited in *Oaks v. Rojewicz*, Sup. Ct. Op. No. 310 (File No. 580), 400 P.2d 839 (1966); *Palfy v. Hepp*, Sup. Ct. Op. No. 511 (File No. 942), 444 P.2d 310 (1968).

Sec. 09.10.055. Certain actions relating to construction in six years. (a) No action, whether in contract (oral or written, sealed or unsealed), in tort or otherwise, to recover damages (1) for a deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property; (2) for injury to property, real or personal, arising out of a deficiency; or (3) for injury to the person or for wrongful death arising out of such deficiency, may be brought against a person performing or furnishing the design, planning, supervision or observation of construction or construction of an improvement more than six years after substantial completion of an improvement.

(b) Notwithstanding the provisions of (a) of this section, in the case of an injury to property or the person or an injury causing wrongful death, which injury occurred during the sixth year after substantial completion, an action in tort to recover damages for the injury may be brought within two years after the date on which the injury occurred. In no event may action be brought more than eight years after the substantial completion of construction of an improvement.

(c) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any action.

(d) The limitation prescribed by this section shall not be asserted by way of defense by a person in actual possession or con-

Title 7
Boroughs

Title 8
Business and Professions

Title 9
Code of Civil Procedure

... as owner, tenant, or otherwise of an improvement at the time a deficiency in an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action.

(e) In this section, "person" means an individual, corporation, partnership, business trust, unincorporated organization, association, or joint-stock company. (§ 2 ch 61 SLA 1967)

Legislative committee report.—For report on ch. 61, SLA 1967 (HB 160), see 1967 House Journal, pp. 365-366.

Sec. 09.10.060. Actions to be brought in three years. (a) No person may bring an action against a peace officer or coroner upon a liability incurred by the doing of an act in his official capacity or by the omission of an official duty, including the nonpayment of money collected upon an execution, unless brought within three years. This section does not apply to an action for an escape.

(b) No person may bring an action upon a statute for penalty or forfeiture where the action is given to the party aggrieved or to that party and the state unless brought within three years, except where the statute imposing it prescribes a different limitation. (§ 1.06 ch 101 SLA 1962)

Sec. 09.10.070. Actions to be brought in two years. No person may bring an action (1) for libel, slander, assault, battery, seduction, false imprisonment, or for any injury to the person or rights of another not arising on contract and not specifically provided otherwise; (2) upon a statute for a forfeiture or penalty to the state; or (3) upon a liability created by statute, other than a penalty or forfeiture; unless commenced within two years. (§ 1.07 ch 101 SLA 1962)

Cross reference.—As to limitation on action against subdivider in contested transactions, see AS 34.55.030-1(f).

The policy of the law is to allow a reasonable but definitely limited time for the bringing of an action after which the matter is put to rest. *Byrne v. Ogle*, Sup. Ct. Op. No. 722 (File No. 1359), 488 P.2d 716 (1971).

The purpose of statutes of limitation is to bar actions and not to suppress or deny matters of defense; and it is a general rule that such statutes are not applicable to defenses, but apply only where affirmative relief is sought. It should be noted, however, that the rule under consideration applies only in the case of strict defense, and, in the absence of statute, does not apply to cases of set-off or counterclaim. *McDonnell v. Hoadley*, 7 Alas. L.J. No. 3, p. 433 (Sept. 20, 1968).

The goal of the statute of limitations and the substituted service procedure is to provide speedy adjudication of claims. *Byrne v. Ogle*, Sup. Ct. Op. No. 722 (File No. 1359), 488 P.2d 716 (1971).

The purpose of statutes of limitations is to encourage promptness in the prosecution of actions and thus avoid the injustice which may result from the prosecution of stale claims. *Byrne v. Ogle*, Sup. Ct. Op. No. 722 (File No. 1359), 488 P.2d 716 (1971).

Section applies to action for unlawful imprisonment. — Allegation that defendant in his capacity as United States Attorney caused plaintiff to be arrested on criminal complaints sworn out by codefendants "without probable cause or investigation" purports to state a claim in tort against defendant subject to a two-year period of limitation under this section. *Williams v. Coughlan*, 17

'79 APR 27 P 1:29

PAUL WILSON,
Plaintiff,

vs.

UNION OIL COMPANY OF
CALIFORNIA, et al.,
Defendants.

JULIE COOPER, Personal
Representative of the Estate
of LEROY COOPER, Deceased,
Plaintiff,

vs.

UNION OIL COMPANY OF
CALIFORNIA, et al.,
Defendants.

PAUL WILSON,
Plaintiff,

vs.

UNION OIL COMPANY OF
CALIFORNIA, et al.,
Defendants.

JULIE COOPER, Personal
Representative of the Estate
of LEROY COOPER, Deceased,
Plaintiff,

vs.

UNION OIL COMPANY OF
CALIFORNIA, et al.,
Defendants.

YOUNG, BELL
AND GAGNON, INC.
ANCHORAGE, ALASKA

Case No. 77-5753
Filed in the Trial Courts
STATE OF ALASKA THIRD DISTRICT

APR 21 1979

Clerk of the Trial Courts
By *[Signature]* Deputy

Case No. 77-5753

Case No. 78-2380

Case No. 78-2382
Consolidated

DECISION AND ORDER

ON MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant EARL LIGHT, INC., has moved for partial summary judgment dismissing it from these consolidated actions arguing that A.S. 09.10.055 precludes any claim. Plaintiff opposes, arguing that A.S. 09.10.055 is unconstitutional because

1.
it denies equal protection of the law and, as well, constitutes
a grant of a special immunity.² This court concludes that
the statute is unconstitutional under equal protection standards³
and that the motion for partial summary judgment should be
denied.

A.S. 09.10.055 creates a special immunity from contract
or tort liability for a certain class of persons by limiting
the time for bringing such an action after "substantial completion
of construction of an improvement" to real property, after
which time the action is barred. The particular class of
persons protected are those in charge of the "design, planning,
supervision or observation of construction or construction of an
improvement to real property." A.S. 09.10.055. Unless the
statute is invalid, the parties agree that EARL & WRIGHT, INC.
is a member of the protected class, and thus, plaintiffs' claim
is untimely.

As a result of State v. Erickson 574 P.2d 1, 12 (Alaska 1978),
equal protection claims must be evaluated by a single test;
that is, the classification must bear a fair and substantial
relation to a legitimate governmental objective. This test
requires analysis of the purpose of the legislation, whether
the purpose is within the legitimate police power of the State,

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1. Alaska Const. Art I, §1.
 2. Alaska Const. Art I, §15.
 3. This court does not reach the special
immunity issue, although it appears
that the standard of analysis
approximates that of the equal
protection model.


whether the means substantially further the purpose, and finally, whether the means chosen outweigh the infringement of the right.⁵

The constitutionality of statutes similar to A.S. 09.10.055 has been adjudicated in many jurisdictions⁶ utilizing many differing standards of equal protection analysis. Some statutes have been declared constitutional under less demanding standards (Regents etc. v. Hartford Acc. & Indem. Co. 581 P.2d 197 (Cal. 1978); Rosenberg v. Town of North Bergen 293 A.2d 662 (N.J. 1972), and under standards which appear similar to that employed by the Alaska Supreme Court. Howell v. Burke 568 P.2d 214 (N.M. App. 1977), N.M. cert. denied 569 P.2d 413. However, other statutes have been deemed violative of equal protection standards which seem equivalent to that of Alaska (Fujioka v. Kam 514 P.2d 568 (Ha. 1973) or less rigorous than that applied in this jurisdiction. Kallas Millwork Corp. v. Square D. Co. 225 N.W. 2d 454 (Wis. 1975).

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4. This standard is flexible, depending on nature of the right involved. Thus, a heavier burden satisfying the strictest standard of scrutiny is placed on a party seeking to justify a classification affecting nonfederal fundamental rights or nonfederal suspect categories under the Alaska Constitution. See Lowell Thomas et al. v. Edgar Bailey (Op. No. 1835, April 10, 1979) concurring opinion of Rabinowitz at 46. Here, however, no fundamental rights or suspect categories are involved and the least exacting standard is appropriate. This lesser standard requires that
the means used must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. Wylie v. State 516 P.2d 142, 145 (Alaska 1973), quoted in Isakson v. Richey 550 P.2d 359, 362 (Alaska 1976).
Isakson v. Richey, supra, at 362, also declares that the judiciary of this state will no longer hypothesize facts in order to sustain legislation.
 5. Considerations similar to those noted in footnote 4 appear applicable to the balancing analysis.
 6. See Reply memorandum of EARL & WRIGHT, INC., dated January 31, 1979, Appendix A.

The court has reviewed the prior state court decisions on this issue and, based on that examination, concludes that the better view requires invalidation of the statute. Skinner v. Anderson 231 N.E. 2d 588 (Ill. 1967); Fujioka v. Kam, supra; Kailas Millwork Corp. v. Square D. Co., supra. That is, the granting of the special immunity to the protected class, but denial to others similarly situated (e.g., materialmen, owners), does not rest on a ground of difference having a fair and substantial relation to the object of the legislation.⁷ Since the Alaska Statute does not withstand equal protection scrutiny, the defendant EARL & WRIGHT, INC.'S motion for partial summary judgment is denied. This order is not a final judgment within the meaning of Civil Rule 54(b).

DATED at Anchorage, Alaska this 24TH day of April, 1979.


MARK C. ROWLAND
Superior Court Judge

I certify that on 4-25-79
a copy of this document was sent to:
 Attorney(s) of Record, or
 Other: _____
at address of record.
D.O.E. _____
Deputy Clerk

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7. The parties have not been able to provide any legislative history which indicates that the purposes underlying the Alaska Statute differ markedly from the purposes discussed in several of the state court adjudications reviewed by this court.

IN THE SUPREME COURT OF THE STATE OF ALASKA

EARL & WRIGHT, INC.,)
)
Petitioner,)
)
vs.)
)
PAUL WILSON and JULIE COOPER,)
personal representative of the)
Estate of LEROY COOPER,)
Deceased,)
)
Respondents.)

File No. 4664

ANSWER TO PETITION FOR REVIEW

RICE, HOPNER, HEDLAND
FLEISCHER & INGRAHAM
1016 W 6th, #400
Anchorage, Alaska 99501

Attorneys for Respondents

Filed this ____ day of May,
1979, in the Supreme Court
of the State of Alaska

ROBERT BACON
CLERK OF THE SUPREME COURT

BY: _____
 DEPUTY CLERK

P.
SUBJECT INDEX

	<u>Page</u>
Alaska Constitution, Article I, Sections 1 and 15	ii
Statute	iii
Statement of Questions Presented for Review	iv
Review Should be Denied at This Point in the Litigation	1
Statement of the Case	1
I. A.S. 09.10.055 is an Unconstitutional Grant of a Special Immunity in Violation of the Alaska Constitution, Article I, Section 15	1
II. A.S. 09.10.055 is an Unconstitutional Denial of Equal Protection Under the Alaska Constitution	3
A. Designers of Chattels, for Purposes of the Statute, are not Distinguishable from Architects	5
B. Owners and Occupiers of Land, for Purposes of the Statute, are not Distinguishable from Architects.	8
C. The Statute does not Perform its Alleged Function, and Therefore, its Classification of Tortfeasors is Irrational	10
Conclusion	13

ALASKA CONSTITUTION, ARTICLE I, §1 AND §15

ARTICLE I: Declaration of Rights

Section 1: Inherent Rights. This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the State.

Section 15: Prohibited State Action. No bill of attainder or ex post facto law shall be passed. No law impairing the obligation of contracts, and no law making any irrevocable grant of special privileges or immunities shall be passed. No conviction shall work corruption of blood or forfeiture of estate.

STATUTE

A.S. 09.10.055

Certain actions relating to construction in six years. (a) No action, whether in contract (oral or written, sealed or unsealed), in tort or otherwise, to recover damages (1) for a deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property; (2) for injury to property, real or personal, acting out of a deficiency; or (3) for injury to the person or for wrongful death arising out of such deficiency, may be brought against a person performing or furnishing the design, planning, supervision or observation of construction, or construction of an improvement more than six years after substantial completion of an improvement.

(b) Notwithstanding the provisions of (a) of this section, in the case of an injury to property or the person or an injury causing wrongful death, which injury occurred during the sixth year after substantial completion, an action in tort to recover damages for the injury may be brought within two years after the date on which the injury occurred. In no event may action be brought more than eight years after the substantial completion of construction of an improvement.

(c) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any action.

(d) The limitation prescribed by this section shall not be asserted by way of defense by a person in actual possession or control, as owner, tenant, or otherwise of an improvement at the time a deficiency in an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action.

(e) In this section, "person" means an individual, corporation, partnership, business trust, unincorporated organization, association, or joint-stock company.

P.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

(1) Is interlocutory review appropriate at this stage in the litigation?

(2) Does A.S. 09.10.055 grant a special immunity to architects in violation of the Alaska Constitution, Article I, Section 15?

(3) Does the architects' immunity from suit, under A.S. 09.10.055, six years after substantial completion, deny respondents the equal protection of the law, in violation of the Alaska Constitution, Article I, Section 1?

F.

REVIEW SHOULD BE DENIED
AT THIS POINT IN THE LITIGATION

As discussed herein, A.S. 09.10.055, the Alaskan immunity for architects and contractors (referred to together herein as "architects") is clearly unconstitutional under the standards enunciated in Isakson v. Rickey, 550 P.2d 359 (Alaska 1977). An interlocutory appeal at this point in the litigation will simply delay trial of the matter in superior court.

Further, despite the plaintiffs' best efforts, petitioner Earl & Wright may prevail at the trial of this matter, not because of the immunity statute, but because plaintiffs may not adequately prove the liability of Earl & Wright. Were this event to occur, obviously Earl & Wright would have no need to secure review of the decision of the superior court. Cf. Johnson v. State, 577 P.2d 706 (Alaska 1978).

STATEMENT OF THE CASE

For purposes of the Petition for Review by Earl & Wright and respondents' Answer thereto, respondents Cooper and Wilson adopt the petitioner's statement of the case, at page 2 of its Petition, with the following clarifications. First, Earl & Wright has previously admitted in this matter that it did design all or part of the King Salmon Platform, and not just the structural drawings necessary for construction of the Fuller Compressor Room. Secondly, Cooper and Wilson do not have adequate knowledge from which to determine that the entire King Salmon Platform was completed and operational in 1969, but will assume it was so completed for purposes of this Answer.

I. A.S. 09.10.055 IS AN UNCONSTITUTIONAL
GRANT OF A SPECIAL IMMUNITY IN VIOLATION OF THE
ALASKA CONSTITUTION, ARTICLE I, SECTION 15

Art. I, §15 of the Alaska Constitution states in part,
". . . [N]o law making any irrevocable grant of special privileges

or immunities shall be passed. . . ."

Statutes of limitation usually encourage plaintiffs to enforce their rights in a timely fashion. Statutes of limitation penalize plaintiffs who sit on their rights. See Byrne v. Ogle, 488 P.2d 716, 718 (Alaska 1971). The architect's statute, A.S. 09.10.055, however, extinguishes certain plaintiffs' rights even before those rights come into existence, without regard to whether the plaintiffs were, or would have been, diligent in pressing their claims in a timely fashion. Such a statute is in fact a grant of immunity. Fujioka v. Kam, 514 P.2d 568, 570, 571 (Haw. 1973); Pacific Indem. Co. v. Thompson-Yeager, Inc., 260 N.W. 2d 548, 555 (Minn. 1977). The Alaska Statute is similar to the former Illinois statute which provided:

No action to recover damages for any injury to property, real or personal, or for injury to the person, or for bodily injury or for wrongful death, arising out of the defective and unsafe condition of an improvement to real estate, nor any action for contribution or indemnity for damages sustained on account of such injury, shall be brought against any person performing or furnishing the design, planning, supervision or construction or construction of such improvement to real property, unless such cause of action shall have accrued within four years after the performance or furnishing of such services and construction. This limitation shall not be available to any owner, tenant or person in actual possession and control of the improvement at the time such cause of action accrues.

Ill. Rev. Stat. 1965, Ch. 83, para 24(f). The Illinois Supreme Court noted that, "the effect of [the section] of the Limitations Act is to grant to architects and contractors a special or exclusive immunity." Skinner v. Anderson, 231 N.E.2d 588, 590 (Ill. 1967). The Illinois constitutional prohibition forbade the "granting to any corporation, association or individual any

P.

special or exclusive privilege, immunity or franchise whatever." Id at 590. (emphasis supplied.) The Illinois constitutional language is remarkably similar to Alaska's prohibition against any "grant of special privileges or immunities." See also Pacific Indem. Company v. Thompson-Yeager, Inc., 260 N.W. 2d 548, 555 (Minn. 1977).

A.S. 09.10.055 is an unconstitutional irrevocable grant of a special immunity to architects and contractors in violation of Article I, Section 15 of the State Constitution. Thus, defendant Earl & Wright's motion for summary judgment based on the statute was properly denied.

II. A.S. 09.10.055 IS AN UNCONSTITUTIONAL DENIAL OF EQUAL PROTECTION UNDER THE ALASKA CONSTITUTION

The denial by A.S. 09.10.055 of equal access to the courts might be tested under either the "compelling state interest test" or the "rational basis" test. See Bush v. Reid, 516 P.2d 1215, 1220-21 (Alaska 1973).

Assuming simply for the sake of argument that the appropriate constitutional test is not the compelling state interest test, the right of redress for tortious conduct and the right of access to a judicial forum for the adjudication of liability and damages arising from tortious conduct are important rights invoking the "fair and substantial relationship" test. Concurring opinion of Justice Rabinowitz and Chief Justice Boochever, DeHussor v. City of Anchorage, 583 P.2d 791, 793-98 (Alaska 1978). The test of the statute is more particularly described in Isakson v. Rickey, 550 P.2d 359, 362 (Alaska 1976) as follows:

Under the rational basis test, in order for a classification to survive judicial scrutiny, the classification 'must be reasonable, not arbitrary, and must rest upon some difference having a fair and

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substantial relationship to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'

It is this more flexible and more demanding standard which will be applied in future cases if the compelling state interest test is found inappropriate. (Citation omitted) (Emphasis supplied)

As a part of this standard, the Supreme Court "will no longer hypothesize facts which would sustain otherwise questionable legislation. . ." Id. at 362.

The DeHusson concurring opinion involved different procedural requirements for claims asserted against governmental and non-governmental defendants. The concurring opinion notes that the fortuity or ill luck of being injured by a non-governmental or, instead, a governmental tortfeasor makes no difference to the injured party; the injury and the need for recompense are the same. Access to a judicial forum for litigation of liability and damages is important to the injured party regardless of the governmental or non-governmental status of the tortfeasor. It follows that an injured party has an equal interest in access to a judicial forum regardless of whether his harm was caused by one type of non-governmental tortfeasor or another type of non-governmental tortfeasor, whether architect or non-architect.

The Alaska immunity statute for contractors and architects, A.S. 09.10.055, totally prohibits suits against persons performing or furnishing the design, planning, supervision or observation of construction, or construction of improvements to real property if the injury occurs or cause of action accrues, more than six years after substantial completion of the improvement, unless injury occurs in the sixth year itself, even though the building itself is designed and constructed to last and be used for a longer period. Significantly, the immunity does not extend to owners or tenants occupying the property, or to persons supplying materials used in the construction of the improvement,

or to individuals who design, plan, supervise, observe or construct various personal property items such as motor vehicles, airplanes and construction equipment.

From the victim's point of view, the arbitrary quality of this classification is well noted in this example:

If, for example, four years after a building is completed a cornice should fall because the adhesive used was defective, the manufacturer of the adhesive is granted no immunity. And so it is with all others who furnish materials used in constructing the improvement. But if the cornice fell because of defective design or construction for which an architect or contractor was responsible, immunity is granted. It cannot be said that one event is more likely than the other to occur within four years after construction is completed.

Skinner v. Anderson, 231 N.E.2d 588, 591 (Ill. 1967).

A. Designers of Chattels, for Purposes of the Statute, are not Distinguishable from Architects.

There is no rational reason for discrimination between architects, on the one hand, and designers and manufacturers of chattels on the other hand. Whatever justification architects might advance to support A.S. 09.10.055, the same justifications would extend equally to the designers and builders of chattels. Some, including Earl & Wright, have argued that modern developments in tort law have so expanded the potential liability of architects that some counterbalance in protection such as the Alaska immunity statute is required. If this rationale is used to justify the immunity, the focus of inquiry should be on the liability of architects in Alaska, in particular, and not on trends and developments elsewhere in the country. To the extent which, for example, Rosenberg v. Town of North Bergen, 293 A.2d 662 (N.J. 1972) or Regents of Univ. of California v. Hartford Accident & Indem. Co., 131 Cal. Rptr. 112 (Cal. App. 1976) seem

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persuasive, they should be viewed in the context of the imposition by New Jersey and California courts of strict liability on some builders in some situations. See Schipper v. Levitt & Sons, Inc., 207 A.2d 314 (N.J. 1964) and Kriegler v. Eichler Homes Inc., 74 Cal. Rptr. 225 (Cal. App. 1969).^{1/} Respondents Cooper and Wilson have found no Alaska cases imposing strict liability on architects, either within or after six years of substantial completion. One would assume then that Alaska requires only that architects exercise the reasonable care generally expected of those in this skilled business. See 5 Am. Jur. 2d, Architects §23; 19 Am. Jur. Trials, Architectural Malpractice §10; 25 ALR 2d 1085, Defective Plans, §3 and §5. Some legislatures may have found a need to change or shift liability from architects because of other rules, such as strict liability, imposed in their states. Alaska's choice not to enforce strict liability on architects or contractors suggests less need for A.S. 09.10.055 than that of other states.

Though it has imposed strict liability on manufacturers of chattels, Clary v. Fifth Avenue Chrysler Center, Inc., 454 P.2d 244 (Alaska 1969), Alaska has not limited the liability of chattel manufacturers to the six-year period beginning on the date of completion of the chattel. If either class of defendants needed an absolute six-year limit on liability, chattel manufacturers would need it more than architects because of the strict liability imposed on chattel manufacturers. The benefit of A.S. 09.10.055, however, is given by the legislature to the less deserving class.

Most courts considering similar statutes have focused

^{1/} Further the California statute upheld in Regents, supra, did not apply to personal injury or wrongful death.

on the arbitrary distinction between architects on the one hand and materialmen and occupiers of land on the other. In striking a similar Minnesota statute, the Minnesota Supreme Court saw,

"no basis for including within the protection of the statute persons who construct or design improvements to real estate, and excluding other persons against whom third parties might bring claims should they incur injury, such as owners and material suppliers."

Pacific Indem. Co. v. Thompson-Yeager, Inc., 260 N.W. 2d 548, 555 (Minn. 1977). See also Kallas Millwork Corp. v. Square D Co., 225 N.W.2d 454 (Wisc. 1975) wherein the Wisconsin Supreme Court found its state's statute unconstitutional even though the test which it used in measuring constitutionality appears to be only that of whether there is any rational justification for the statute. This Wisconsin test indeed looks less demanding of the statute than that suggested by Isakson v. Rickey, 550 P.2d 359 (Alaska 1977).

Petitioner Earl & Wright has attempted to distinguish architects from materialmen and designers and manufacturers of chattels. Earl & Wright suggests that the mass production engaged in by those who design and produce chattels somehow sets them apart from architects. This distinction is certainly not as clear as Earl & Wright suggests. A drive through many housing developments in Anchorage will reveal many identically designed residences. It is obviously not uncommon for an architect to sell the same blueprints to many home builders, or to a developer who will repeat the design over and over. See e.g., Schipper v. Levitt & Sons, Inc., supra. Similarly, a contractor can mass-produce prefabricated housing modules for later transportation to homeowners' lots. Yet, despite the ability of the architects and contractors who engage in these practices to insure the quality control which Earl & Wright claims it cannot insure, A.S. 09.10.055 limits their liability to the six year period after substantial completion.

P.
Petitioner Earl & Wright acknowledges that materialmen-- a class of designers and manufacturers of chattels--are excluded from the benefit of A.S. 09.10.055. See Petition at 10. Petitioner notes, "The same manufactured item may be both a component of a structure and a chattel." Respondents agree. The chattel may be attached to the realty as a fixture, though the designer of the chattel will not necessarily know how its product will ultimately be used. The designer and its insurance actuary will not know how to plan for future liability. Will they get some advantage under the six-year limit because the product became a fixture, or will liability continue for two years from the date of injury, whenever that may be, because the product is a chattel? This possibility undermines Earl & Wright's arguments that A.S. 09.10.055 is a rational allocation of insurance risks.

B. Owners and Occupiers of Land, for Purposes of the Statute, are not Distinguishable From Architects.

Earl & Wright argues that the owner's acceptance and exercise of control over the realty improvements should, at some arbitrary point in time, absolve the architect of further liability. If this shifting of the liability occurs, the statute performs the shift not only for patent defects known to the owner, but also for latent defects never suspected by the owner. Since the owner's duty to third parties is only that of reasonable care, Webb v. City and Borough of Sitka, 561 P.2d 731 (Alaska 1977), the owner is probably not liable for unknown defects. Thus six years after substantial completion, plaintiffs injured by latent design defects have no remedy whatsoever. Webb absolves the owner, and A.S. 09.10.055 immunizes the architect. To that extent, architects and owners are treated equally, while the rest of the public suffers.

F.

If the rationale for a distinction between designers, planners, and others, on the one hand and owners and occupiers on the other hand, is based on some supposed meaningful difference between the status of owners and occupiers and those who designed and built the structure, this rationale fails to support the statute. If the rationale is at all valid and if owners and occupiers should be treated differently, then they should be treated differently as soon as the structure is completed and accepted, as well as six years after substantial completion. If the owner or the occupier stands in some relation to the property such that he alone should be responsible, then his exclusive liability should begin as soon as he accepts the project from the designers and builders. As Earl & Wright says in its Petition for Review at 8, ". . . [A]cceptance of the premises by the owner implies an acceptance of responsibility for conditions thereon." There is no reason for a delay of six years in imposition of sole liability upon the owner. In other words, there is no rational reason for the existence of the statute.

If the purpose of the statute is to protect architects and contractors from stale claims, the statute is unnecessary. If a building collapses, the evidence of its original design and construction is just as old and hard to find for the plaintiff as it is for the defendant. Since the plaintiff will not even have any mental recollection of how the building was designed, and since the plaintiff will certainly have no written records, the plaintiff suffers at the outset a disadvantage compared to a defendant, the employees of which may have mental recollections as well as written records of the design of the building. Further, since the plaintiff bears the burden of proof and the evidence is equally old for both parties, plaintiff bears more of

a disadvantage than architectural or contractual defendants, since they do not bear any burden of proof. The statute thus is overly solicitous of the supposed needs of architect and contractor.

The concurring opinion of Justice Rabinowitz and Chief Justice Boochever in DeHusson v. City of Anchorage, 583 P.2d 791 (Alaska 1978) considered and rejected various proposed justifications for discrimination between governmental and non-governmental tortfeasors. The concurring opinion noted at 797:

All tort-feasors have a similar interest in the prompt investigation of claims; all victims have a similar interest in obtaining redress for their injuries.

. . .there is no greater need to know of hazards in order to repair and avoid further injuries solely because the entity responsible is a governmental unit.

These considerations apply also to all classes of nongovernmental tortfeasors. Further, with reference to the need to budget and plan for potential liability years in the future, owners of real property, suppliers of materials used in the improvement of real property, and designers and manufacturers of chattels have similar needs to budget or insure for future possible liability.

C. The Statute Does not Perform its Alleged Function, and Therefore, Its Classification of Tortfeasors is Irrational.

If the rationale supporting the Alaska statute is one of giving to the architect and its insurer a finite period of time within which to plan for liability, the statute fails of its purpose. The statute provides that no cause of action may be brought against one who designs, plans, supervises, observes, or constructs improvements to real property more than six years after substantial completion of the improvement. Most parties who are given the benefit of this immunity, however, have no control

over when the project is substantially completed. The architect, for example, cannot insure that the owner secures adequate financing to finish the project, or that the contractor performs on schedule, or that suppliers deliver materials when requested. If the architect's only involvement was in drafting plans and specifications and not in providing on-site supervision, the architect is powerless to predict, much less control, the period of his malpractice exposure under A.S. 09.10.055. He cannot control the date of "substantial completion." If the owner, for example, is forced to cease construction temporarily because of financial difficulties, the six-year immunity does not even begin to run during the cessation of construction. A temporary halt to construction could last for six years, all of which would be added to time spent in construction and the six years' period of the statute. The statute thus does not necessarily provide that limited period of exposure which Petitioner Earl & Wright claims is required by architects and their insurance actuaries. See Petition for Review at 9. Contrary to Petitioner's assertion, at 5 of its Petition, the statute does not provide an absolute limitation of six years.

Constitutional questions aside, the legislature could have provided the definitive immunity sought by Earl & Wright simply by changing the language of the statute. The legislature could have drafted the statute so the six years began to run from the time when each architect completed its particular performance or portion of the project. This would have provided the insurance actuaries a time-certain six year period. Indeed, the legislatures of New Jersey, North Carolina, Virginia and other states have done so. See Appendix A to Petition for Review. The Alaska legislature chose not to begin the six year period on

each individual's finishing of his own performance. This choice by the Alaska legislature implies that the purpose of the statute is not to provide a definite, absolute immunity of a fixed term of years.

Since the statute does not provide a fixed, definite six year limitation, and since the legislature ignored statutory language of other states which, constitutional questions aside, might have provided such a fixed limit, it cannot be said that the statute is reasonable in its classification of architects for special immunity. Since the statute does not do what it and Earl & Wright claims it must do, the statute can hardly be considered rational. Its only and obvious purpose is to grant irrevocable special privileges and immunities to some architects and contractors, but not to other architects, contractors, owners, tenants or designers and manufacturers of chattels. The statute thus violates the Alaska Constitution, Article I, §1 and §15.

If the insurance actuarial problem of architects is real and not hypothetical, Earl & Wright could have documented the justification for the statute with statistics. Earl & Wright might have attempted to show that a large number of architectural malpractice claims are filed more than six years after substantial completion. If we assume instead that, for example, 98% of all claims are made within six years, then the uncertainty generated by a small number of claims after six years will not likely be a significant factor in the computation of insurance premiums. To the extent that Earl & Wright relies upon insurance actuarial problems as a rationale for A.S. 09.10.055, Earl & Wright is requesting the Court to hypothesize facts which the legislature may have had in mind, contrary to Isackson's forbearance of such guesswork.

CONCLUSION

The immunity provided to architects and contractors by A.S. 09.10.055 excludes many similarly situated persons from its protection. Further, as an inept attempt to create benefits for a class of individuals, the statute's failure to provide the alleged benefits in a clear, predictable manner shows the absence of a fair and substantial relationship between the class differentiated and the supposed object of the legislation.

Review should be denied, or, if granted, the judgment of the Superior Court should be summarily affirmed.

RESPECTFULLY SUBMITTED this 21st day of May, 1979.

RICE, HOPNER, HEDLAND,
FLEISCHER & INGRAHAM
Counsel for Respondents
Cooper and Wilson

By: _____
EDWARD P. NOLDE

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

THE CITY OF YAKUTAT, a municipal corporation; and YAKUTAT FISHERMEN'S COOPERATIVE, INC., an Alaska corporation,

Plaintiffs,

vs.

WITCO CHEMICAL CORPORATION, a Delaware corporation, et al.,

Defendants.

Filed in the Trial Courts STATE OF ALASKA THIRD DISTRICT

NOV 21 1979

Clerk of the Trial Courts By [Signature] Deputy

Case No. 3AN-79-1134 Civil

ORDER

The Court, having heard argument and reviewed the briefing by the parties of plaintiff City of Yakutat's Motion to Strike the Affirmative Defense of the Statute of Limitations, and of motions by defendants KPFF, Inc., KPFF-Alaska, Inc., and Chris Berg, Inc. for summary judgment based on AS 09.10.055, grants plaintiff's Motion to Strike, and Denies defendants' Motion for Summary Judgment, on the ground that AS 09.10.055 is violative of the equal protection clauses of the Alaska and United States Constitutions. The reasoning of the court in this regard has been extensively set forth on the record.

Further, the respective motions of KPFF, Inc., KPFF-Alaska, Inc., and Chris Berg, Inc. for summary judgment based on estoppel, quasi estoppel, and waiver, are denied.

DATED at Anchorage, Alaska this 21st day of November, 1979.

[Signature] MILTON SOUTER Judge of the Superior Court

I certify that on 11-23-79

NOV 21 1979

TABLE OF CONTENTS

STATUTE ii

STATEMENT OF FACTS 1

STATEMENT OF THE CASE 2

ARGUMENT 3

 I. THE ORDER HOLDING AS 09.10.055 UN-
 CONSTITUTIONAL SHOULD NOT BE REVIEWED
 AT THIS TIME. 3

 II. AS 09.10.055 IS VIOLATIVE OF THE EQUAL
 PROTECTION CLAUSE OF THE ALASKA
 CONSTITUTION. 5

 A. The City of Yakutat Has Standing
 to Challenge the Statute. 5

 B. The Equal Protection Standards
 Announced in Isakson and Erickson
 Apply to this Case. 6

 C. The Statute Violates Equal
 Protection. 6

CONCLUSION. 14

AS 09.10.055 provides:

Certain actions relating to construction in six years. (a) No action, whether in contract (oral or written, sealed or unsealed), in tort or otherwise, to recover damages (1) for a deficiency in the design, planning, supervision or observation of construction or construction of an improvement to real property; (2) for injury to property, real or personal, arising out of a deficiency; or (3) for injury to the person or for wrongful death arising out of such deficiency, may be brought against a person performing or furnishing the design, planning, supervision or observation of construction, or construction of an improvement more than six years after substantial completion of an improvement.

(b) Notwithstanding the provisions of (a) of this section, in the case of an injury to property or the person or an injury causing wrongful death, which injury occurred during the sixth year after substantial completion, an action in tort to recover damages for the injury may be brought within two years after the date on which the injury occurred. In no event may action be brought more than eight years after the substantial completion of construction of an improvement.

(c) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any action.

(d) The limitation prescribed by this section shall not be asserted by way of defense by a person in actual possession or control, as owner, tenant, or otherwise of an improvement at the time a deficiency in an improvement constitutes the proximate cause of the injury or death for which it is proposed to bring an action.

(e) In this section, "person" means an individual, corporation, partnership, business trust, unincorporated organization, association, or joint-stock company.

In the latter 1960's the City of Yakutat undertook to construct a fish processing and cold storage facility. The City delegated the project to an architectural and engineering consortium, petitioners KPFF, Inc. and KPFF-Alaska, Inc. (hereinafter KPFF). KPFF ignored laws of physics and failed to specify any insulation for the roof of the prefabricated metal structure. By December of 1970 the general contractor, petitioner Chris Berg, Inc. (hereinafter CBI) notified KPFF that, due to condensation on the inside of the roof, rain inside the building made finish work impractical. (Kelly Depo., pp. 17-18.)

KPFF thus faced a dilemma of its own making, and sought to extricate itself as quickly and economically as possible. It precipitously seized upon a relatively new product, sprayed-in-place polyurethane foam, as a solution. Albert Kelly, president of KPFF and design supervisor for the project, was not knowledgeable about the product and did not research its flammability, because he was solely concerned with rectifying an omission, minimizing expense to a client of very limited means, and timely completing the project for the spring fishing season. (Id. at 24-25.)

A change order was issued by KPFF to CBI; CBI then subcontracted with defendant Vertecs, Inc., a foam insulation applicator. In January and February of 1971, Vertecs personnel sprayed foam products purchased from defendants Reichhold Chemicals, Inc. and Witco Chemical Corp. onto the metal ceiling. The building was substantially completed by the spring of 1971 and formally accepted by the City on April 23, 1971. Six years and two weeks later, a boiler explosion ignited the exposed urethane foam, which thereupon

burned with such speed and intensity that firemen were helpless.

Based on small scale tests inapplicable to real life, foam manufacturers long touted their product as nonburning or self-extinguishing. (Loper Depo., pp. 30-31.) In fact, the product typically burns almost as rapidly and explosively as rapalm and emits toxic fumes and heavy smoke as well. By 1973, Reichhold alerted Vertecs that urethane foam should never be applied without an overlaid thermal barrier. (Id. at 62.) By 1974, Vertecs had so informed CBI, (Id. at 55, 57-60) and Mr. Kelly of KPFF had independently learned of the hazard. (Kelly Depo., pp. 14-16, 26.) Witco had signed an FTC consent order which obligated it to warn prior consumers. The City of Yakutat alleges neither Reichhold, Witco, KPFF, CBI, or Vertecs ever gave warning of the potential for disaster before the catastrophic fire.

STATEMENT OF THE CASE

The City of Yakutat and its lessee, the Yakutat Fishermen's Cooperative, Inc., filed their amended complaint for damages in May of 1979. The KPFF defendants asserted a special statute of limitations, AS 09.10.055, as an affirmative defense. The City of Yakutat moved to strike the defense pursuant to Civil Rule 12(f), and alternatively for partial summary judgment under Rule 56, on the ground that the statute was unconstitutional. KPFF then itself moved for complete summary judgment, and was eventually joined by CBI. The City of Yakutat in its opposition noted that complete summary judgment was inappropriate, because even if AS 09.10.055 were upheld, a cause of action had been pleaded for the failure of KPFF and CBI to warn the City when,

some years after completion of the structure, they received notice of the peril; therefore, this cause of action would not be time barred by AS 09.10.055. This latter contention was not reached by the superior court, which simply ruled that AS 09.10.055 was violative of equal protection under the United States and Alaska constitutions.

ARGUMENT

I. THE ORDER HOLDING AS 09.10.055 UNCONSTITUTIONAL SHOULD NOT BE REVIEWED AT THIS TIME.

The constitutionality of AS 09.10.055 has now been passed upon by two superior court judges, Judge Souter in the instant case, and Judge Rowland in Earl & Wright, Inc. v. Wilson, Super.Ct. No. 78-2382, review denied, Sup.Ct. No. 4464 (August 16, 1979). No superior court has ruled to the contrary, so no conflict between lower courts is presented. Judge Souter's ruling is reasonable on its face, and is supported by substantial and well reasoned authority from at least ten other jurisdictions. His decision is consistent with the tenor of previous equal protection decisions by this court.

To prevail on its motion for complete summary judgment, KPFF must overcome two substantial impediments. First, it must convince this Court that AS 09.10.055, which favors architects, engineers and contractors over the world at large, withstands equal protection scrutiny. Second, it must sustain the argument that, as a matter of statutory construction, AS 09.10.055 attenuates and eventually abrogates the duty to warn, Restatement (Second) of Torts, §321; under this construction, KPFF would no longer have a duty to warn under any circumstances, no matter how egregious, after six years, irrespective of the peril to life and property.

If review is denied, the risk that KPFF will be subjected to unjustified expense at trial is slight. Defense against either the design negligence or failure to warn theory involves the same basic core of evidence regarding polyurethane foam. If KPFF is right on constitutionality but wrong on warnings, its burden and presentation of proof at trial would not be materially affected. Review is correspondingly less urgent.

Ultimate resolution of both issues will be materially advanced by the existence of a complete factual record. As this court noted in Johnson v. State, 577 P.2d 706 at 709 (Alaska 1978), the general rule of finality

is designed to insure that the questions presented on appeal have a full factual and legal setting in which the practical effect of the parties' contentions may be weighed. Piecemeal adjudication of some, but not all points of law governing a case carries the risk that important considerations may be overlooked which would have been perceived had the entire case been presented.

This argument applies with particular force to the effect of AS 09.10.055 on the duty to warn. This case is young, and discovery is incomplete. Only the barest outline of the negligence of KPFF in failing to warn, a single admission by its president, was presented to the trial court. Upon trial of this case, the record will be augmented, not only with respect to KPFF but as to parties similarly situated but not before the Court, such as Vertecs, Inc., the foam applicator. Among the factors expected to be illumined are the degree of potential hazard to life and property, the clarity of all defendants' notice of the hazard, their degree of culpability in terms of negligence, recklessness or intent,

the effect of continued contacts between plaintiff and some defendants, and the ease of discharge of duty by warning. KPFF's statutory construction argument (KPFF⁷ Petit., pp. 5-6) is based on an arid exegesis of the statute. Its conclusion is far from obvious, and is unsupported by a coherent policy rationale. The City of Yakutat contends that the statute is silent on the subject and leaves the common law undisturbed. Questions of public policy loom large, and they should not be resolved on so scant a record.

Because of the probable integrity of Judge Souter's ruling, the low exposure of KPFF to undue hardship, and the particular applicability to this case of the general policy mandating finality of judgment, review should be denied.

II. AS 09.10.055 IS VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE ALASKA CONSTITUTION.

A. The City of Yakutat Has Standing to Challenge the Statute.

KPFF makes the specious argument that a litigant disadvantaged by disparate treatment lacks standing because if all were treated equally unfairly, no advantage would be gained thereby. (KPFF Petit., 6-7.) Under this rationale, the appellant in DeHusson v. City of Anchorage, 583 P.2d 791 (Alaska 1978) lacked equal protection standing because the state could theoretically have treated her as shabbily as the city, eliminating "unfairness." Clearly the City of Yakutat, which will suffer economic injury if its claim is time barred, possesses "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for elimination of difficult . . . questions." Baker v. Carr, 369 U.S. 186, 204, 7 L.Ed.2d 663,

B. The Equal Protection Standards Announced in Isakson and Erickson Apply to This Case.

Defendant KPFF argues that the equal protection test announced in Isakson v. Rickey, 550 P.2d 359 (Alaska 1976) should not apply to statutes enacted before that date. (KPFF Petit., 9-10.) While rules of law may be restricted to prospective application in future cases, respondent is aware of no court which has announced a new controlling constitutional standard and a simultaneous unwillingness to apply that standard to any statute currently in force. Such an approach has been overruled sub silentio in the equal protection decisions of this Court since Isakson.

C. The Statute Violates Equal Protection.

Rules of law which arbitrarily deny access to courts for redress of injury to aggrieved victims regularly lead to harsh and distasteful results. Perhaps the quintessential example is the doctrine of sovereign immunity where the fortuity of injury by a governmental tortfeasor forecloses liability for negligence. In the past few decades, an overwhelming judicial trend has abrogated that doctrine because of its invidious distinctions. See, Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 Univ.Colo.L.Rev. 1 (1972).

In contrast, one segment of the building trades industry has been able to secure passage of special protective legislation which arbitrarily forecloses access to courts. The operative effect of AS 09.10.055 is to create artificial classifications among victims injured by negligent conduct, and among tortfeasors who are in essence similarly

situated. Under the statute, an arbitrary six year limit controls the viability of a victim's cause of action, even as to personal injury or wrongful death. In the instant case, the fire which destroyed the Yakutat Cold Storage Facility occurred two weeks after the statutory six years.

It has been argued that an innocent third-party victim, unrelated to either the architect or owner, is not injured by the statute because such a victim retains an action against the owner in possession. (CBI Petit., p. 10.) Setting aside issues of financial ability to respond to a judgment, this argument ignores the fact that the liability for damages of an architect and of an owner are not co-extensive. The architect must meet the standard of care of his profession, with its superior knowledge. Put simply, the owner is merely liable for defects which he ought reasonably to have discovered and warned against. For example, a bystander injured in the Yakutat fire would probably have no viable action against the City of Yakutat, which itself had no way of knowing that polyurethane foam was a hazardous substance. If on particular facts the owner were found liable, he would be denied under the statute any action for indemnity against the responsible architect or contractor.

Petitioners present no substantial justification for granting absolution to architects, engineers and contractors after six years. The factor which most saliently distinguishes this special interest group from other sections of industry or human endeavor is their perspicacity in drafting a model act and lobbying for its passage. Under the act they receive protections afforded to no other class

of tortfeasor. Persons who supply material to construction sites but who do not themselves participate in construction are not protected. Manufacturers of chattels, which, like a supertanker, may be highly complex, individualized, and long-lived, receive no corresponding protection. Doctors and other professionals with potential liabilities of long duration are not protected. In defense of this state of affairs, proponents of the challenged legislation attempt to hypothesize strained bases to differentiate the building trades.

The controversy has generated a split of authority among the states. The authority upholding similar statutes has been adequately argued by petitioners. In contrast, a substantial line of authority finds the special protection afforded architects and contractors, but not suppliers of building materials, to be irrational. The leading case is Skinner v. Anderson, 231 N.E.2d 588, 591 (Ill. 1967):

The arbitrary quality of the statute clearly appears when we consider that architects and contractors are not the only persons whose negligence in the construction of the building or other improvement may cause damage to property or injury to persons. If, for example, four years after a building is completed a cornice should fall because the adhesive used was defective, the manufacturer of the adhesive is granted no immunity. And so it is with all others who furnish materials used in constructing the improvement. But if the cornice fell because of defective design or construction for which an architect or contractor was responsible, immunity is granted. It cannot be said that the one event is more likely than the other to occur within four years after construction is completed.

Using similar analysis, the Supreme Court of Wisconsin termed the distinction between the liability of architects and contractors on one hand, and the suppliers of building material on the other hand, a "ludicrous" construct:

[T]here appears no reason why only a very restricted class of those thus occupied is protected by the statute. Kallas Millwork Corp. v. Square D Company, 225 N.W.2d 454 at 459 (Wisc. 1975).

The Hawaii court found the distinction between the special interest class, and those excluded such as material suppliers, to be an arbitrary and capricious discrimination violative of equal protection. Fujioka v. Kam, 514 P.2d 568 (Hawaii 1973). Accord, Pacific Indemnity Company v. Thompson-Yaeger, Inc. 260 N.W.2d 548 (Minn. 1977); Broome v. Truluck, 241 S.E.2d 739 (S.C. 1978); Muzar v. Metro Townhouses, Inc., 266 N.W.2d 850 (Mich.App. 1978).

In addition, courts have noted the basic unfairness of a statute which leaves the liability of an owner or occupier intact but forecloses recovery against the actively negligent architect or contractor:

However, the plaintiff may recover damages from the owners, and the owners will have no right to have the engineer and the contractor reimburse or contribute to them the amount of damages they are required to pay the plaintiff. We are unable to see any rational basis for treating the engineer and the contractor differently from the owners under the same circumstances. Fujioka v. Kam, 514 P.2d 568 at 571 (Hawaii 1973).

Accord, Loyal Order of Moose Lodge 1785 v. Cavaness, 563 P.2d 143 (Okla. 1977) ("[I]f one class of defendants, owners and tenants, is excluded from this protection, the Fourteenth Amendment of the United States Constitution is violated and

the legislation is not valid."); Kallás Millwork Company v. Square D Company, supra; Pacific Indemnity Company v. Thompson-Yaeger, Inc., supra; Skinner v. Anderson, supra.

A very recent decision of the Florida Supreme Court addresses the oft made argument that the passage of time uniquely disfavors architects and contractors. While the decision of the Florida court was made pursuant to a constitutional provision guaranteeing equal access to courts, the court's analysis clearly applies to equal protection of the laws:

We recognize the problems which inhere in exposing builders and related professionals to potential liability for an indefinite period of time after an improvement to real property has been completed. Undoubtedly, the passage of time does aggravate the difficulty of producing reliable evidence, and it is likely that advances in technology tend to push industry standards inexorably higher. The impact of these problems, however, is felt by all litigants. Moreover, the difficulties of proof would seem to fall at least as heavily on injured plaintiffs, who must generally carry the initial burden of establishing that the defendant was negligent. In any event, these problems are not unique to the construction industry, and they are not sufficiently compelling to justify the enactment of legislation which, without providing an alternative means of redress, totally abolishes an injured person's cause of action. The legislation impermissibly benefits only one class of defendants, at the expense of an injured party's right to sue, and in violation of our constitutional guaranty of access to courts. Overland Construction Company, Inc. v. Sirmons, 369 So.2d 572 at 574 (Fla. 1979), (emphasis added).

Other courts, while evincing judicial displeasure with such statutes, have struck them down on grounds not directly implicated in this Petition for Review. Plant v. R. L.

Reid, Inc., 313 So.2d 518, (Ala. 1975) (void for vagueness); Bagby Elevator & Electric Company, Inc. v. McBride, 291 So.2d 306 (Ala. 1974) (purpose of act not clearly expressed in title); Saylor v. Hall, 497 S.W.2d 218 (Ky.App. 1973) (state constitution prohibits legislative abolition of common law rights of action).

Judge Souter's ruling in the instant case placed particular emphasis on the similarity of position of designers and fabricators of real property, and manufacturers of complex chattels such as aircraft and ships. Petitioner KPFF argues that the serial repetitive nature of the manufacturing process affords greater opportunity for deficiencies to manifest themselves early. (KPFF's Petition, p. 14.) While it is arguable that a repetitious manufacturing process may lend itself in particular circumstances to sophisticated quality control, that fact alone does not lead ineluctably to the conclusion that quality control is significantly more difficult within the building trades. The vast majority of structures built are, as a practical matter, repetitions ad infinitum of other structures. The Yakutat Cold Storage building was a prefabricated metal structure which had doubtless been erected hundreds of thousands of times throughout the country. The average tract home is such a product of repetition that its design and construction in some jurisdictions have been subjected to strict liability ⁱⁿ ~~of~~ tort. Cf., Kriecler v. Eichler Homes, Inc., 74 Cal.Rptr. 225 (Cal.App. 1969). The low volume nature of building projects makes them particularly conducive to individual inspection and attention. Undoubtedly, both in manufacturing and in construction,

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instances occur where the design, use or intended environment of a product, place it on the cutting edge of innovative technology, but such instances must be recognized as rare. Architects and contractors should not be relieved from liability, where materialmen, manufacturers of chattels, or tortfeasors at large are not, merely because of some imagined romanticism of the building trades. While such hypothetical thought processes have been used to sustain legislation in other jurisdictions, such analysis has been abandoned in Alaska. In Isakson v. Rickey, 550 P.2d 359 (Alaska 1976) this Court stated that it would:

[N]o longer hypothesize facts which would sustain otherwise questionable legislation as was the case under the traditional rational basis standard. Thus, under the new test 'judicial deference to a broad range of conceivable legislative purposes and to imaginable facts that might justify classifications is strikingly diminished. Judicial tolerance of over-inclusive and under-inclusive classifications is notably reduced. Legislative leeway for unexplained pragmatic experimentation is substantially narrowed. Id. at 362 (footnote omitted).

Application of Alaska's equal protection standard requires that the nature and importance of the interest impinged upon be scrutinized:

Based on the nature of the right, a greater or lesser burden will be placed on the State to show that the classification has a fair and substantial relation to legitimate governmental objective. State v. Erickson, 574 P.2d 1 (Alaska 1978).

The challenged statute drastically attenuates one of the most basic rights of a society governed by law: access to the courts for redress of injuries. The Washington Supreme Court in the case of Hunter v. North Mason High School, 539

The right to be indemnified for personal injuries is a substantial property right, not only of monetary value but in many cases fundamental to the injured person's physical well being and ability to continue to live a decent life.

In his concurring opinion in DeHusson v. City of Anchorage, 583 P.2d 791 (Alaska 1978) Justice Rabinowitz, joined by Justice Boochever, examined the legitimacy of foreshortening tort redress by means of a municipal notice of claims provision. Justice Rabinowitz found a provision barring access to the court a burdensome encroachment supportable only by highly significant state interest:

I deem it sufficient to note that important rights of redress of persons harmed by governmental conduct are involved, as well as equally significant concomitant rights of access to judicial forums for the adjudication of liability and damage issues flowing from such governmental conduct. Given that these rights are important, I have concluded appellant has demonstrated that the distinctions drawn by the charter's notice of claim provision between governmental and private tortfeasors are arbitrary and that the resultant categories are suspect. Consequently, the City of Anchorage must meet a significant burden Id. at 796.

The state interest in the challenged statute of limitations can only be characterized as meager. The statute confers a minor benefit, much less valuable than a tax incentive, to a minor portion of industry and enterprise. The benefit is conferred, not by spreading the cost broadly over the entire population, as with a tax incentive, but by imposing the cost on a narrow group of injured victims who are least able to bear the cost. Thus, on one side of the balance is a niggardly benefit to a limited section of the

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economy capriciously exacted from the victims of the beneficiary's negligence. On the other side of the balance is the violence done to the concept of equal treatment under law when a limited class is singled out and penalized to benefit a special interest group which is in the final analysis indistinguishable in a meaningful sense from other interest groups.

CONCLUSION

Given the likelihood that the courts below were correct in declaring AS 09.10.055 unconstitutional, and the desirability of a full record prior to ultimate adjudication by this Court, the petition for review should be denied. If this Court should elect to review the constitutionality of AS 09.10.055, respondent should be allowed to further develop the facts surrounding the failure to warn claim through discovery, and to present these facts for a decision in the first instance by the superior court, which has never reached the issue.

S

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COMMITTEE REPORT

SENATE

5/4/81

FURTHER: None

Date: JANUARY 20, 1982

Mr. President:

The Committee on JUDICIARY has had SB 545
release after conviction of an offense

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

- do pass do not pass
- do pass with attached amendments(s) same title
- replace with CS for _____ new title
- and recommends _____
- AND attaches a "Letter of Intent" New Fiscal Note
- reports it back without recommendation
- referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

[Signature]

CHAIRMAN

A M E N D M E N T

OFFERED IN THE SENATE:

By: The Judiciary Committee

To: _____ SENATE BILL No. 545

HOUSE BILL No. _____

PAGE: 1

LINE: 12

pt. 12 BETWEEN THE WORD "KIDNAPPING" AND THE PHRASE

"A CLASS A FUGITIVE", INSERT THE WORD "OR"

pt. 12 DELETE THE PHRASE "OR A CLASS B FUGITIVE"

Aug 13

Introduced: 5/4/81
Referred: Judiciary

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IN THE SENATE

BY BENNETT

SENATE BILL NO. 545

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWELFTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to release after conviction of an offense."

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

* Section 1. AS 12.30.040(b) is amended to read:

(b) Notwithstanding the provisions of (a) of this section, if the offense a person has been convicted of is murder [IN THE FIRST DEGREE, ROBBERY IN THE FIRST DEGREE], kidnapping, ~~a class A felony, or a class B felony~~ (SEXUAL ASSAULT IN THE FIRST DEGREE UNDER AS 11.41.410(a)(1)), he may not be released on bail either before sentencing or pending appeal.

Senator [Signature] moves NOBSENATE

File 8B545

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

MEMORANDUM

February 16, 1982

SUBJECT: Meaning of "conviction" under AS 12.30.040(b)
TO: Senator Patrick M. Rodey
FROM: Edward H. Hein
Legislative Counsel

You have asked when a person is "convicted for purposes of AS 12.30.040(b).

The term "conviction" is not defined in the statutes or Alaska case law. What constitutes a conviction varies depending upon the context in which the term is used.

In the context of denying or revoking bail under AS 12.-30.040(b), the Alaska Supreme Court has equated "conviction" with adjudication of guilt. State v. Wassillie, 606 P.2d 1279 (Alaska 1980).

Wassillie had been found guilty of rape and was released until sentencing. The trial court denied the state's request that Wassillie be returned to custody before sentencing and entry of a judgment of conviction. The Supreme Court reversed the trial court in part because of its agreement with the state's contention that the right to bail under Article I, Sec. 11 of the Alaska Constitution and AS 12.30.040(b) extends only to the adjudication of guilt or innocence.

Thus, under AS 12.30.040(b) a person has been convicted upon the rendering of a guilty verdict.

EHH:ljb



Official Business

Alaska State Legislature

Senate

Committee on Judiciary

Pouch V
State Capitol
Juneau, Alaska 99811

MEMORANDUM

DATE: January 19, 1982
TO: Senate Judiciary Committee
FROM: Kevin K. Bruce *KB*
RE: SB 545

On January 18th, I contacted Mr. Richard Delaplain, Director of Technical Operations of the Court System, and requested the number of unclassified, Class A and B felons that were on bail awaiting appeal.

He indicated that the court does not normally collect that information, but he was willing to try to select it from Anchorage case files.

In Anchorage alone, for the years 1980 and 1981, he was able to identify 49 cases which were on appeal from a Class A or B felony. Of these, only two were granted a bail continuance following sentencing. One case was an A felony (attempted murder) and the other a B felony (perjury).

STERN:

DAVIS - REPORTS OF SEXUAL ASSAULT RELEASED ON BAIL - COMMITTED
REQUESTS NUMBER OF CASES IN BARRENS

Avoid CONSTITUTIONAL PROBLEM BY

Jim Sternberg - HPDCA - FAVORS SB545

CASE EXAMPLE - SEXUAL ASSAULT / RELEASED AND COMMITTED



Official Business

Alaska State Legislature

Senate

Committee on Judiciary

Pouch V
State Capitol
Juneau, Alaska 99811

MINUTES OF THE SENATE JUDICIARY COMMITTEE

OF

JANUARY 18, 1982

Butrovich Committee Room, State Capitol Juneau, Alaska

Legislation Before Committee:

- CSSB 399 "An Act relating to adoption; and providing for an effective date."
- SB 535 "An Act relating to the criminal laws of the state."
- SB 545 "An Act relating to release after conviction of an offense."

The meeting of the Senate Judiciary Committee was called to order by Chairman Rodey at 1:40 P.M. Committee members present were: Senators Rodey, Ray, and Parr. Senators Bennett and Hohman were absent.

SB 545 was brought before the committee by Chairman Rodey and after hearing testimony from Barry Stern of the Department of Law, Chairman Rodey held the bill over at the request of Senator Ray for purposes of amendment.

CSSB 399 was brought before the committee by Chairman Rodey. Testimony was heard from Joan Brooks, Department of Health and Social Services. Senator Parr moved adoption of the Committee Substitute as amended. Chairman Rodey and Senator Parr signed do pass. Senator Ray signed no recommendation.

SB 535 was brought before the committee by Chairman Rodey. Barry Stern, Dept. of Law, gave an overview of the bill. Senator Ray suggested amending pg. 1, line 15 to read, "he causes physical injury to any person other than himself by means of a dangerous instrument." The amendment was adopted with no objection.

Testimony was also heard from Gordon Evans, representing Multivisions of Anchorage, regarding Section 5. Chairman Rodey directed Mr. Bruce to work with Gordon Evans, representing Multivisions, for language changes to Sec. 5. to meet committee approval.

Chairman Rodey adjourned the meeting at 2:25 P.M.

Sec. 12.30.040. Release after conviction. (a) A person who has been convicted of an offense and is awaiting sentence, or who has filed an appeal shall be treated in accordance with the provisions of AS 12.30.020 unless the court has reason to believe that no one or more conditions of release will reasonably assure the appearance of the person as required or prevent the person from posing a danger to other persons and the community. If that determination is made, the person may be remanded to custody. This section does not affect the right of a person appealing from a judgment of conviction from a district court to the superior court to be released on bail pending appeal under Rule 2(c) of the District Court Rules of Criminal Procedure.

(b) Notwithstanding the provisions of (a) of this section, if the offense a person has been convicted of is murder in the first degree, robbery in the first degree, kidnapping, or sexual assault in the first degree under AS 11.41.410(a)(1), he may not be released on bail either before sentencing or pending appeal. (§ 1 ch 20 SLA 1966; am § 3 ch 24 SLA 1966; am § 3 ch 39 SLA 1974; am § 36 ch 102 SLA 1980)

Effect of amendment. — The 1980 amendment substituted "murder in the first degree, robbery in the first degree, kidnapping, or sexual assault in the first degree under AS 11.41.410(a)(1)" for "first degree murder, armed robbery, kidnapping, or rape (as defined in AS 11.15.130)" in subsection (b).

Legislative history reports. — For report on ch. 20, SLA 1966, see 1966 House Journal, pp. 110, 111. For report on ch. 102, SLA 1980 (HCS CSSB 511), see 1980 Senate Journal Supplement, No. 44 (May 29, 1980) or 1980 House Journal

Supplement, No. 79 (May 29, 1980).

Application of section is limited. — This section, which provides for release after trial, is limited in application to convicted persons awaiting sentence or whose appeal is pending. *Martin v. State*, Sup. Ct. Op. No. 983 (File No. 1785), 517 P.2d 1389 (1974).

Application of Alaska Constitution bail clause. — The bail clause of the Alaska Constitution does not apply after the conviction of a person accused of a crime. *State v. Wassillie*, Sup. Ct. Op. No. 2028 (File No. 3603), 606 P.2d 1279 (1980).

HISTORY OF OFFENSES ON OR/BAIL PENDING FINAL DISPOSITION OF APPEAL



Alaska Judicial Council

NON ATTORNEY MEMBERS
MARY JANE FATE
JOHN E. LONGWORTH
ROBERT H. MOSS

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NICHOLAS MAROULES

ATTORNEY MEMBERS
MARCUS R. CLAPP
JAMES B. BRADLEY
JOSEPH L. YOUNG

CHAIRMAN, EX OFFICIO
EDMOND W. BURKE
CHIEF JUSTICE
SUPREME COURT

January 15, 1982

Kevin Bruce
Office of Senator Rodey
Senate Judiciary Committee
Pouch V
Juneau, Alaska

Dear Kevin:

The following statistics are in response to your request for information regarding the number of violent felony offenders who are free, either on their own recognizance or on bail, after judgement has been entered against them.

The data used in this analysis includes all violent felony offenses committed in Anchorage, Fairbanks or Juneau in 1980 that resulted in conviction. (This definition of "violent felonies" corresponds to offenses classified as Class I or II by the Judicial Council in its sentencing studies.) The custodial status of the offender is determined as of the time of sentencing.

The distributions provided in the table indicate that the proportion of offenders incarcerated at the time of sentencing is greatest among the unclassified (and most serious) felonies. The proportion of offenders free on bail on their own recognizance, conversely, increases as the severity of the class of offense decreases.

Please do not hesitate to contact me if I can be of any further assistance.

Sincerely,

Nicholas Maroules
Executive Director

Enclosures: as stated

<u>Class of Offense:</u>	<u>Offender's Custodial Status At Sentencing:</u>			
	<u>Own Recog.</u>	<u>Bail</u>	<u>Jail *</u>	<u>Totals</u>
<u>Unclassified</u>	0% (0)	11.1% (1)	88.9% (8)	100% (9)
<u>"A" Felony</u>	12.1% (4)	30.3% (10)	57.6% (19)	100% (33)
<u>"B" Felony</u>	12.2% (5)	26.8% (11)	60% (25)	100% (41)
<u>"C" Felony</u>	21.2% (7)	42.4% (14)	36.4% (12)	100% (33)

* Includes cases where offender sent to custody of API



Alaska Judicial Council

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January 14, 1982

CHAIRMAN EX OFFICIO
EDMOND W. BURKE
CHIEF JUSTICE
SUPREME COURT

Melissa Fouse
Office of Senator Sturgulewski
Pouch V
Juneau, Alaska 99811

Dear Melissa:

This is to confirm the statistical information I provided you in our telephone conversation of January 14, regarding the number of serious felony offenders released on their own recognizance. As I explained to you on the phone, the Judicial Council's data includes information on custodial status -- i.e., own recognizance, bail, etc. -- at the time of sentencing. The data includes all offenses committed in 1980 that were originally charged as a felony that resulted in a conviction in Anchorage, Fairbanks, and Juneau.

<u>Offense</u>	<u>Number of Cases</u>	<u>N</u>	<u>Number cases on own recogn. at sentencing % of all cases</u>
Murder 1	5	0	0%
Murder 2	3	0	0%
Kidnapping	1	0	0%
Manslaughter	3	0	0%
Assault 1	10	2	20%
Sex. Assault 1	10	2	0%

Missou Fouse
January 14, 1982
Page Two

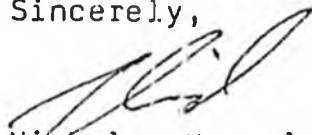
<u>Offense</u>	<u>Number of Cases</u>	<u>N</u>	<u>Number cases on own recogn. at sentencing % of all cases</u>
Robbery 1	13	0	0%
Assault 2	23	3	13%
Sex. Assault 2	1	0	0%
Robbery 2	8	1	12%
Negligent Homocide	1	1	100%

I have enclosed three recent Judicial Council reports that you may find helpful. They include, (1) Alaska Felony Sentences: 1976-1979, (2) "Preliminary Report on Fish and Game Offense Sentences", and (3) "Preliminary Report of 1980 Felony Sentencing Patterns"

I hope the information I have included, above, is helpful. Please do not hesitate to contact me if we can be of any further assistance.

I look forward to meeting with you in Juneau in the near future.

Sincerely,



Nicholas Maroules
Executive Director

Enclosures: as stated



Alaska Judicial Council

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JOSEPH L. YOUNG

CHAIRMAN EX OFFICIO
EDMOND W. BURKE
CHIEF JUSTICE
SUPREME COURT

January 15, 1982

Ms. Julia Coster
House Judiciary Committee
Pouch V
Juneau, AK 99811

Dear Julia:

This is in response to your request for statistical information concerning the relationship between the custodial status (own recognizance, bail, etc.) of felony offenders and income.

The data used in this analysis includes all felony offenses committed in Anchorage, Fairbanks and Juneau in 1980 that resulted in a conviction. Also, the custodial status variable relates to the time of sentencing. Finally, the analysis is limited to violent felony offenses, including those cases described by the Judicial Council in its "Preliminary Report of 1980 Felony Sentencing Patterns" as Class 1 and 2 offenses.

TABLE I
 Custodial Status at Time of
Sentencing by Level of Monthly Income
 (1980 Violent Felonies)

<u>Monthly Income</u>	<u>Custodial Status</u>			<u>Totals</u>
	<u>Own Recogn.</u>	<u>Bail</u>	<u>Jailed</u>	
Less Than \$500	15.8% (16)	28.7% (29)	55.5% (56)	100% n=101
\$500-\$1200	35.7% (5)	57.2% (8)	7.1% (1)	100% n=14
Over \$1200	17.9% (5)	42.9% (12)	39.2% (11)	100% n=28
Totals	(26)	(49)	(68)	N=143

The above distributions indicate that offenders with the lowest monthly income (under \$500) are most likely (55.5%) to have been jailed at the time of sentencing -- i.e., they did not make bail and were not released on their own recognizance. Conversely, offenders with a monthly income over \$500 (including the "\$500 - \$1200" and "Over \$1200" groups) were most likely to have been free on bail at the time of sentencing.

Overall, only 26 or 18% of all violent offenders were free on their own recognizance at the time of sentencing.

Table II, below, provides a distribution of custodial status by race.

Ms. Julia Coster
January 15, 1982
Page Three

TABLE II

Custodial Status at Time of
Sentencing by Defendant's Race
(1980 Violent Felonies)

<u>Defendant's Race</u>	<u>Own Recogn.</u>	<u>Bail</u>	<u>Jaile.</u>	<u>Totals</u>
Black	7.1% (1)	57.1% (8)	35.8% (5)	100% n=14
Native	17.0% (8)	31.9% (15)	51.1% (24)	100% n=47
Caucasian	27.2% (22)	30.9% (25)	41.9% (34)	100% n=81
Other Minority	23.1% (3)	30.8% (4)	46.1% (6)	100% n=13
Totals	(34)	(52)	(69)	

These distributions indicate that Caucasian offenders were most likely, and Black offenders least likely, to have been released on their own recognizance at the time of sentencing. Black offenders, however, were also most likely to have been released on bail at the time of sentencing. Finally, Native and minority offenders were proportionately more likely than Black and Caucasian offenders to have been jailed at the time of sentencing.

I hope these figures are of some help to you. I have also enclosed a copy of a letter I recently sent to Melissa Fouse, Senator Sturgulewski's aide, which includes further information on the topic of custodial status.

Please do not hesitate to contact me if I can be of any further assistance.

Sincerely,



Nicholas Maroules
Executive Director

Enclosure

TERMS OF IMPRISONMENT AND AUTHORIZED FINES IN REVISED CRIMINAL CODE

	FIRST FELONY CONVICTION	SECOND FELONY CONVICTION	THIRD FELONY CONVICTION
"A" Felony	0-20 3-[6]*-20	5-[10]-20	7 1/2-[15]-20
"B" Felony	0-10	0-[4]-10	3-[6]-10
"C" Felony	0-5	0-[2]-5	0-[3]-5

MAXIMUM FINES - PERSONS

Murder or kidnaping - \$75,000
 A, B, or C Felony - \$50,000
 A misdemeanor - \$ 5,000
 B misdemeanor - \$ 1,000
 Violation - \$ 300

MAXIMUM FINES - ORGANIZATIONS

All offenses - \$100,000 or
 3 X pecuniary gain
 - whichever is greater

KEY

Number in bracket is presumptive sentence.
 Number to left is lowest mitigated
 sentence. Number to right is highest
 aggravated sentence.

Six year presumptive term applies if first
 A felony conviction, other than manslaughter,
 and defendant used or possessed a firearm
 during the offense or caused serious physical
 injury.

MAXIMUM TERMS OF IMPRISONMENT
 FOR MISDEMEANORS

A misdemeanor - 1 year
 B misdemeanor - 90 days

CLASSIFICATION OF OFFENSES IN REVISED CRIMINAL CODE

UNCLASSIFIED FELONIES

Murder in the First Degree

AS 11.41.100

20-99 years

X Murder in the Second Degree

AS 11.41.110

5-99 years

Kidnapping

AS 11.41.300

5-99 years

CLASSIFIED FELONIES

2-2

A	B	C
X Attempted Murder or Kidnapping AS 11.31.100(d)(1)	Attempted A felony AS 11.31.100(d)(2)	Attempted B felony AS 11.31.100(d)(3)
X Solicitation of Murder or Kidnapping AS 11.31.110(c)(1)	Solicitation of A felony AS 11.31.110(c)(2)	Solicitation of B felony AS 11.31.110(c)(3)
X Manslaughter AS 11.41.120	Assault II AS 11.41.210	Criminally Negligent Homicide AS 11.41.130
Assault I AS 11.41.200	Sexual Assault II AS 11.41.420	Custodial Interference I AS 11.41.320
Sexual Assault I AS 11.41.410	Unlawful Exploitation of a Minor AS 11.41.455	Sexual Assault III AS 11.41.430

CLASSIFIED FELONIES

A	B	C
Robbery I AS 11.41.500	Robbery II AS 11.41.510	Sexual Abuse of a Minor AS 11.41.440
X Arson I AS 11.46.400	Extortion AS 11.41.520	Incest AS 11.41.450
X Escape I AS 11.56.300	Theft I AS 11.46.120	Coercion AS 11.41.530
X Criminal Possession of Explosives with Intent to Commit Murder or Kidnapping AS 11.61.240(b) (1)	Issuing a Bad Check, \$25,000 or more AS 11.46.280(d) (1)	Theft II AS 11.46.130
2-3	Burglary I AS 11.46.300	Concealment of Merchandise, \$500 or more AS 11.46.220(c) (1)
	Arson II AS 11.46.410	Removal of Identification Marks, \$500 or more AS 11.46.260(b) (1)
	Criminal Mischief I AS 11.46.480	Unlawful Possession (of Altered Property), \$500 or more AS 11.46.270(b) (1)
	Forgery I AS 11.46.500	Issuing a Bad Check, \$500 or more AS 11.46.280(d) (2)
	Scheme to Defraud AS 11.46.600	Fraudulent Use of a Credit Card, \$500 or more AS 11.46.285(b) (1)
	Defrauding Creditors, \$25,000 or more AS 11.46.730(c) (1)	

CLASSIFIED FELONIES

B

Bribery
AS 11.56.100

Receiving a Bribe
AS 11.56.110

Perjury
AS 11.56.200

Escape II
AS 11.56.310

Interference with
Official Proceedings
AS 11.56.510

Receiving a Bribe by a
Witness or Juror
AS 11.56.520

Criminal Possession of
Explosives with Intent
to Commit A felony
AS 11.61.2(b)(2)

Promoting Prostitution I
AS 11.66.110

C

Obtaining a Credit Card by
Fraudulent Means
AS 11.46.290(a)(1),(2)

Burglary II
AS 11.46.310

Criminal Mischief II
AS 11.46.482

Forgery II
AS 11.46.505

Criminal Possession of Forgery
Device
AS 11.46.520

Criminal Simulation \$500 or
more
AS 11.46.530(b)(1)

Offering a False Instrument
for Recording
AS 11.46.550

Falsifying Business Records
AS 11.46.630

Commercial Bribe Receiving
AS 11.46.660

Commercial Bribery
AS 11.46.670

CLASSIFIED FELONIES

C

Defrauding Creditors, \$500
- \$25,000
AS 11.46.730(c)(2)

Endangering Welfare of Minor
AS 11.51.100

Perjury by Inconsistent State-
ments
AS 11.56.230

Escape III
AS 11.56.320

Permitting an Escape
AS 11.56.370

Promoting Contraband I
AS 11.56.375

Jury Tampering
AS 11.56.590

Misconduct by a Juror
AS 11.56.600

Tampering with Physical Evidence
AS 11.56.610

Hindering Prosecution I
AS 11.56.770

Terroristic Threatening
AS 11.56.810

2-5

2-5

CLASSIFIED FELONIES

C

Riot

AS 11.61.10

Misconduct Involving Weapons I

AS 11.61.200

Criminal Possession of Explosives with Intent to Commit

B Felony

AS 11.61.240(b)(3)

Unlawful Furnishings of Explosives

AS 11.61.250

Promoting Prostitution II

AS 11.66.120

Promoting Gambling I

AS 11.66.210

Possession of Gambling Records I

AS 11.66.230

2-6

that had been criticized by another of panel of that court.

Petition for rehearing granted; decision of Superior Court reversed.

Courts ⇌ 95(1)

In deciding case under law of Texas, Supreme Court could not, in absence of decision on the question by Texas Supreme Court, consider as a "controlling decision" a decision of one panel of the Texas Court of Civil Appeals that had been criticized by another panel of that court.

Millard Ingraham, Rice, Hoppner, Hedland, Fleischer & Ingraham, Fairbanks, for appellant.

Andrew J. Kleinfeld, Fairbanks, for appellee.

Before CONNOR, BURKE and MATTHEWS, JJ., and DIMOND, Senior Justice.

PER CURIAM.

The Bank has petitioned for a rehearing. The petition is granted.

In its petition for rehearing, the Bank argues that in our determining that the Bank was not a holder in due course of Wear's promissory note, we overlooked a controlling decision. The decision the Bank refers to is *First Nat'l Bank v. Bell*, 28 S.W.2d 119 (Tex.Civ.App.—Fort Worth 1935). The *Bell* decision was criticized as not being a sound construction of the Negotiable Instruments Law by another panel of the Texas Civil Court of Appeals in *Estrada v. River Oaks Bank & Trust Co.*, 550 S.W.2d 719, 726 (Tex.Civ.App., Houston [14th District] 1977). Thus, in the absence of a decision by the Texas Supreme Court on this question, the *Bell* decision cannot be considered as a "controlling decision," as the Bank asserts.

In reaching our decision that the Bank was not a holder in due course of Wear's

note in 1963, we applied the Uniform Commercial Code, which was adopted by the State of Texas in 1966. A holding that the Bank did become a holder in due course would be inconsistent, in our opinion, with Texas statutory law in 1968. We will presume that the *Estrada* view in 1977, and not that in the *Bell* case in 1935, regarding the question of written contracts to assignments as endorsements of notes, would be the view that the Supreme Court of Texas would have adopted in 1968 if the matter had been presented to it.

The Bank also reiterates its argument that Wear forfeited his right to commissions by "twisting," i. e., by inducing Century policyholders to cancel their Century policies and insure instead with another insurance company represented by Wear so that he could get the higher first-year commissions. As we held in the original opinion in this case, that argument is untenable and without merit.

We adhere to our original decision which reverses the judgment of the superior court.

RABINOWITZ, C. J., and BOOCHEVER, J., not participating.



STATE of Alaska, Petitioner,

v.

Teddy WASSILLIE, Respondent.

No. 3603.

Supreme Court of Alaska.

Feb. 29, 1980.

The State petitioned for review of decision of the Superior Court, Fourth Judicial

District, Christopher R. Cook, J., denying its motion for an order revoking convicted defendant's presentencing release. The Supreme Court, Matthews, J., held that bail clause in Alaska Constitution does not afford a right to postconviction bail.

So held.

Rabinowitz, J., dissented and filed opinion.

Bail ⇐42

Bail clause in Alaska Constitution does not afford a right to postconviction bail. Const. art. 1, § 11.

Norman A. Cohen, Legal Intern, Victor C. Krumm, Dist. Atty., Bethel, Avrum M. Gross, Atty. Gen., Juneau, for petitioner.

Allan Beiswenger, Asst. Public Defender, Bethel, Brian Shortell, Public Defender, Anchorage, for respondent.

Before BOOCHEVER, C. J., and RABINOWITZ, CONNOR, BURKE and MATTHEWS, JJ.

OPINION

MATTHEWS, Justice.

Respondent Teddy Wassillie was indicted for the crimes of assault with a dangerous weapon, assault with intent to commit rape, and rape. Guilty verdicts were returned as to each count. The superior court then ordered that a presentence investigation be

conducted and a presentence report filed. Sentencing was scheduled to be held in approximately thirty days.

Following the return of the jury's verdicts, Wassillie requested that he be continued on release status until sentencing. The request was granted. Shortly thereafter, the state moved for an order revoking Wassillie's release and remanding him to custody. The state based its motion on the provisions of AS 12.30.040(b). That statute provides:

Notwithstanding the provisions of (a) of this section, if the offense a person has been convicted of is first degree murder, armed robbery, kidnapping, or rape (as defined in AS 11.15.130), he may not be released on bail either before sentencing or pending appeal.

The superior court denied the state's motion on the ground that the statute "as applied to this case . . . is an unconstitutional infringement of the right to bail" and upon the further ground that under Alaska Rule of Criminal Procedure 41(a), it was vested with discretion to continue Wassillie on release status.¹

Thereafter the state petitioned for review, asserting that the constitutional right to bail terminated upon the adjudication of guilt and that Alaska Rule of Criminal Procedure 41(a),² mandates that AS 12.30.040(b) apply. We have granted review in full recognition of the fact that Wassillie has now been sentenced.³ Substantively, this petition "involve[s] [an] important recurring issues of law which may be capable of evading review."⁴ We have therefore decided to exercise our discretionary review

was then immediately remanded to custody to begin serving his term of imprisonment. An opinion was issued in connection with the state's sentence appeal from the sentence given Wassillie. See *State v. Wassillie*, 578 P.2d 971 (Alaska 1978).

1. Alaska R.Crim.P. 3(a) provides in relevant part that "[f]ollowing sentence the court may commit the defendant or continue or alter the bail."

2. Alaska R.Crim.P. 41(a) provides that "[t]he defendant in a criminal proceeding is entitled to be admitted to bail pursuant to AS 12.30.010-12.30.080."

3. On September 23, 1977, Wassillie was sentenced to a term of imprisonment of eight years with six and a half years suspended. He

4. *Martin v. State*, 517 P.2d 1389, 1391 (Alaska 1974) (footnote omitted). See *Doe v. State*, 487 P.2d 47 (Alaska 1971); *In re G.M.B.*, 163 P.2d 1006 (Alaska 1971); *RLR v. State*, 487 P.2d 27 (Alaska 1971).

authority despite the fact that the case is moot as to Wassillie.

We limit our review to the question whether the bail clause of the Alaska Constitution applies after the conviction of a person accused of a crime.⁵ The alternative basis for the decision of the superior court, that the court has the discretionary power to admit one convicted of rape to bail under Alaska Rule of Criminal Procedure 32(a), involves the question whether the right to bail is procedural within the meaning of article IV, section 15 of the Alaska Constitution,⁶ and, if so, whether Alaska Rule of Criminal Procedure 41(a) which was promulgated in 1973 may be interpreted as encompassing subsequent changes in the statutes which it has incorporated. The briefing on these points is entirely inadequate, and therefore this aspect of the superior court's decision will not be reviewed.⁷

5. Alaska Const. Art. I, § 11 provides:

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

6. Alaska Const. Art. IV, § 15 provides:

Rule-Making Power. The supreme court shall make and promulgate rules governing the administration of all courts. It shall make and promulgate rules governing practice and procedure in civil and criminal cases in all courts. These rules may be changed by the legislature by two-thirds vote of the members elected to each house.

7. The state's "Petition for Review" does not mention these issues at all. In its "Supplemental Petition for Review" the entire treatment given them is as follows:

The legislature has the authority to extend bail to convicted individuals, and it has done so on certain limited situations. This right of bail is statutory, not constitutional, in origin. It is also substantive in nature, so that courts

In *Martin v. State*,⁸ we held that the right to bail does not extend to probation revocation proceedings. We stated: "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."⁹ In distinguishing the two types of proceedings we noted that "[a] probation revocation hearing is not a criminal prosecution looking toward an adjudication of guilt or innocence."¹⁰ Although this language lends support to the state's position that the right to bail extends only to the "adjudication of guilt or innocence," it is not dispositive of this petition.¹¹

The right to bail was not an original concept of the framers of the Alaska Constitution. Provisions establishing bail as a matter of constitutional right are contained in the constitutions of most, and perhaps

do not have authority to disregard the plain words of the statute, or alter the statute by procedural rules.

This court has repeatedly stated that inadequately briefed issues will not be considered. See e. g., *L.E. Spitzer Co. v. Barron*, 581 P.2d 213, 218 (Alaska 1978); *Wetzler v. Wetzler*, 570 P.2d 741, 742 n.2 (Alaska 1977); *Kristich v. State*, 550 P.2d 796, 804 (Alaska 1976); *Wernberg v. Matanuska Elec. Ass'n*, 494 P.2d 790, 794 (Alaska 1972); *Lewis v. State*, 469 P.2d 689, 691-92 n.2 (Alaska 1970).

8. 517 P.2d 1389, 1398 (Alaska 1974).

9. *Id.* (footnote omitted).

10. *Id.* (footnote omitted). *Martin* was cited in *Gilbert v. State*, 540 P.2d 485, 486 (Alaska 1975) for the proposition that "an order denying bail to one accused of a crime, but not yet convicted," was in violation of Alaska Const. art. I, § 11.

11. This court's definition of "criminal prosecution" as used in Alaska Const. art. I, § 11 does not indicate at what point the right to bail terminates. See, e. g., *Alexander v. City of Anchorage*, 490 P.2d 910 (Alaska 1971); *RLR v. State*, 487 P.2d 27 (Alaska 1971); *State v. Browder*, 486 P.2d 925 (Alaska 1971); *Baker v. City of Fairbanks*, 471 P.2d 386, 397 (Alaska 1970).

all, American states.¹² The usual provision reads, with slight variations from state to state: "All persons shall be bailable by sufficient sureties, except for capital offenses, when the proof of guilt is evident, or the presumption thereof is great."¹³

Such clauses are similar to the bail clause contained in article I, section 11 of the Alaska Constitution which provides: "The accused is entitled . . . to be released on bail, except for capital offenses when the proof is evident or the presumption great . . ." If anything, they lend themselves more readily to a construction that they apply to post conviction bail than does our bail clause, since they refer to "all persons" and ours is limited to "the accused." However, the uniform interpretation they had received when the Alaska Constitution was drafted and approved was that they applied only to bail before a conviction.¹⁴ There is no indication either in the language of the constitution or the minutes of the constitutional convention that the framers of the Alaska Constitution

meant to deviate from this broadly accepted interpretation.¹⁵ If a result at variance with the historic experience of our sister states were intended, the framers would have found the words to express it. Far from doing so, they chose largely customary phraseology which everywhere else had been taken to be a grant of the right to bail only before a conviction. It is plain to us that the framers of our constitution intended the same result.

We reject the argument expressed by the dissenting opinion that each of the rights enumerated in article I, section 11 of the Alaska Constitution must terminate at the same point in the course of a criminal case. We see no compelling reasons why, for example, the right to counsel, the speedy trial right, and the right to bail should share the same point of termination because these rights serve separate and largely unrelated purposes. Moreover, even under the dissenting opinion, they do not share a common termination point because the right to

12. See *State v. Flowers*, 330 A.2d 146, 147 (Del.1974). See also Annot. 19 A.L.R. 807 (1922) and Annot. 77 A.L.R. 1237 (1932).

13. *Ex Parte Herndon*, 18 Okl.Cr. 68, 192 P. 820 (1920). See, e. g., *In re Podesto*, 15 Cal.3d 921, 127 Cal.Rptr. 97, 544 P.2d 1297 (1976); *State v. Flowers*, 330 A.2d 146 (Del.1974); *Ex Parte Heath*, 227 Mo. 393, 126 S.W. 1031 (1910); *Ex Parte Halsey*, 124 Ohio St. 318, 178 N.E. 271 (1931); *State v. Helton*, 72 Wyo. 105, 261 P.2d 46 (1953).

14. "The constitutional provision . . . does not refer to cases wherein a conviction has been had in a court of competent jurisdiction." *Ex Parte Herndon*, 18 Okl.Cr. 68, 192 P. 820, 821 (1920). See e. g., *Ex Parte Voli*, 4 Cal. 29 (1871); *Ex Parte Schriber*, 19 Idaho 531, 114 P. 29 (1911); *Braden v. Lady*, 276 S.W.2d 664 (Ky.1955); *Ex Parte Heath*, 227 Mo. 393, 126 S.W. 1031 (1910); *State v. Bradsher*, 189 N.C. 401, 127 S.E. 349 (1955); *Ex Parte Halsey*, 124 Ohio St. 316, 178 N.E. 271 (1931); *City of Sioux Falls v. Marshall*, 48 S.D. 378, 204 N.W. 999 (1925); *Hicks v. State*, 179 Tenn. 601, 168 S.W.2d 781 (1943); *Ex Parte Berry*, 198 Wash. 317, 88 P.2d 427 (1939); *State v. Helton*, 72 Wyo. 105, 261 P.2d 46 (1953). *Contra*, *New Orleans v. Lucoste*, 169 La. 717, 125 So. 865 (1930) (This decision is based on an express

provision of the Louisiana Constitution providing for post conviction bail as a matter of right).

15. In fact the minutes of the constitutional convention reflect a desire to follow the experience of the other states concerning the right to bail. Thus delegate Victor Fischer stated, in virtually the only recorded comment made to the constitutional convention concerning the bail clause:

The language in the Federal Constitution reads generally to the effect that excessive bail shall not be required. A number of states have changed that language to provide more or less the language we have, that the accused may be released on bail except for capital offenses. But in practically every case where this new language is used, the words "when, proof is evident and the presumption great" [sic] and that is a necessary protection for the accused and we should 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. [Emphasis added].

2 Proceedings of the Alaska Constitutional Convention 1344-45 (Jan. 6, 1956).

counsel continues through an appeal¹⁶ while, according to the dissent, the right to bail terminates when sentencing has been completed.

For these reasons we hold that the bail clause in our constitution does not afford a right to post-conviction bail.

RABINOWITZ, Justice, dissenting.

I disagree with the majority's holding that the right to bail under the Alaska Constitution extends only to adjudication of guilt. I also disagree with the majority that it need not consider the other basis for the superior court's denial of the state's motion to return Wassillie to custody pending sentencing.

Here the majority concludes that the relevant clause in the Alaska Constitution should be construed in conformity with the bail provisions of most other states. But these jurisdictions have separate sections in their constitution pertaining to the subject of bail. Generally, these provisions regarding the right to bail, as the majority notes, provide that: "All persons shall be bailable by sufficient sureties, except for capital offenses, when the proof of guilt is evident, or the presumption thereof is great."¹

The Alaska constitutional provision is not of this form. Only in Alaska and Connecticut² is the right to bail made part of the constitutional provision enumerating the

various rights of an accused. The Alaska Constitution, article I, section 11 provides:

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

I am convinced that this distinctive context calls forth other principles of constitutional construction in determining issues raised in the instant matter.³ For "[t]he general rule in constitutional construction is to give import to every word and make none nugatory." *Hootch v. Alaska State Operated School System*, 536 P.2d 793, 801 (Alaska 1975) (footnote omitted).

It is clear that of the enumerated rights in this section of Alaska's Constitution, other than the right to bail, neither the accused's right to counsel nor the right to a speedy trial is extinguished once a determination of guilt has been made.⁴ Under the Sixth Amendment to the Constitution of

vention made on the floor of the convention to the effect that the Alaska language is similar to that found in the majority of the state constitutions. I find the delegate's remarks are obtuse and directed toward different purposes so that, in my view, they fail to shed any light on the present controversy.

16. *Douglas v. California*, 372 U.S. 353, 356, 13 S.Ct. 814, 816, 9 L.Ed.2d 811, 814 (1963).

1. For a compilation of the state constitutional provisions on the right to bail, see W. Duker, *The Right to Bail: A Historical Inquiry*, 42 Albany L.Rev. 33, 73 n.373 (1971).

2. Conn.Const. art. I, § 8. Connecticut case law suggests that in that state the right to bail terminates at conviction. See *State v. Chisholm*, 29 Conn.Sup. 339, 287 A.2d 389, 390 (1971); *State v. Vaughan*, 71 Conn. 457, 42 A. 640 (1899). However, this interpretation appears to be based on earlier versions of the Connecticut constitution which took the form found in other states as already mentioned. See Conn.Const. art. I, § 14 (1955); Conn. Const. art. I, § 14 (1816).

3. The majority also attaches weight to the remarks of a delegate to the constitutional con-

4. Using the time of adjudication of guilt as a termination point for certain constitutional rights of an accused would have no impact on the rights to be informed of the nature of the accusation or to have an impartial jury. However, the adoption of such a termination point would arguably impinge upon the accused's right to be confronted with the witnesses against him, to a public trial, and to have compulsory process for obtaining witnesses, at least as these rights pertain to sentencing hearings.

the United States, it is provided that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." In *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), the Supreme Court held that the right to counsel in a state criminal prosecution exists at every stage in the proceeding. Subsequently, in *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967), the Court explicitly recognized that sentencing is a critical stage of a criminal prosecution in which the presence of counsel is required.⁶ Concerning the right to a speedy trial, we noted in *Gonzales v. State*, 582 P.2d 630 (Alaska 1978), that the language of the Sixth Amendment to the United States Constitution and article 1, section 11 of the Alaska Constitution is identical. We held in *Gonzales* that sentencing delays are governed by both the federal and Alaska constitutional guarantees of a speedy trial.⁷ These decisions dealing with an accused's rights to a speedy trial and to the assistance of counsel in my opinion point to an appropriate resolution of this petition.

Relevant judicial precedent is sparse. None of the cases I have reviewed treat specifically the phraseology of the "accused" in a "criminal prosecution." Those jurisdictions which have considered the question of bail during the period between an adjudication of guilt and sentencing focus upon "conviction" and not on the mean-

ing of the terms "the accused" in a "criminal prosecution."⁸ Judicial decisions which have adopted the interpretation that one is no longer an "accused" after a determination of guilt has taken place have been based on the following grounds: that the major reasons for pre-trial release, the presumption of innocence and assistance in preparation of defense, are extinguished at this point; that the risk that an accused who has been found guilty will not make future appearances is increased, since the imposition of sanctions is now certain; and that the concern regarding the possibility of punishing one who has not been found guilty is eliminated with the adjudication of guilt.⁹

Judicial precedent holding that the right to bail extends through the sentencing stage of a criminal proceeding emphasize that the presumption of innocence should continue until the court has imposed sentence. After a guilty verdict, the court is not necessarily bound by the verdict and may act to terminate the prosecution or to set aside the adjudication of guilt in response to a variety of authorized post-trial motions. Until sentencing takes place, it remains uncertain whether the sentencing sanction will include any period of incarceration. Even though there is an increased risk to the public that the accused will flee after there has been an adjudication of guilt, the recognition of a right to bail does

5. The text of article 1, section 11 of the Alaska Constitution parallels that of the Federal Sixth Amendment.

6. See also *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); Cohen, *Sentencing, Probation, and the Rehabilitative Ideal: The View from Mempa v. Rhay*, 47 Texas L.Rev. 1, 3 (1968).

7. Our analysis in *Gonzales* did not involve a construction of the particular constitutional text but relied on considerations of policy. In *Gonzales*, we concluded that while not all the policy considerations which support the right to a speedy trial are strictly relevant to sentencing delays, enough are so that the right to a

speedy trial was held to encompass sentencing delays. *Gonzales v. State*, 582 P.2d 630, 632-33 (Alaska 1978).

8. See *State v. Quinn*, 10 Ariz.App. 552, 460 P.2d 658, 661 (1969); *Ex parte Brown*, 68 Cal. 176, 8 P. 829, 830-33 (1885); cf. *State v. Christiana*, 249 La. 247, 186 So.2d 580, 587 (1966), cert. denied, 385 U.S. 835, 87 S.Ct. 77, 17 L.Ed.2d 68 (1967).

9. See, e.g., *State v. Flowers*, 330 A.2d 146, 148 (Del.1974); *Commonwealth v. Fowler*, 451 Pa. 505, 304 A.2d 124, 129-30 (1973).

not foreclose the sentencing court from altering the conditions of the accused's bail to reduce the risk of flight.¹⁰

Additionally, I think it appropriate to note that in *Bradley v. United States*, 410 U.S. 605, 93 S.Ct. 1151, 35 L.Ed.2d 528 (1973), the Supreme Court was confronted with the problem of determining the meaning of "prosecution" in a savings clause, section 103(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, providing that prosecutions, prior to the effective date of the statute, would not be affected. The Supreme Court stated:

Rather than using terms in their everyday sense, '[t]he law uses familiar legal sense.' The term 'prosecution' clearly imports a beginning and an end.

In *Berman v. United States*, 302 U.S. 211, 82 L.Ed. 204, 58 S.Ct. 164 (1936), this Court said, 'Final judgment in a criminal case means sentence. The sentence is the judgment.' In the legal sense, a prosecution terminates only when sentence is imposed. (citations omitted)¹¹

Given the foregoing, I conclude that an accused's right to bail in a criminal prosecution under the wording of article 1, section 11 of the Alaska Constitution extends beyond an adjudication of guilt and continues until sentencing has been completed. Admittedly, the policy considerations both for and against this conclusion are closely balanced. Nevertheless, I think the right to bail under article 1, section 11, of the Alas-

ka Constitution must be so construed to bring it in harmony with other rights which are granted an accused in a criminal prosecution. Interpreting the terms "accused" in a "criminal prosecution" in their familiar legal sense leads to the conclusion that an accused retains the status of an accused until a judgment of conviction is entered,¹² and that a criminal prosecution remains a criminal prosecution which is terminated by the entry of a judgment of conviction, not by an adjudication of guilt.

I thus would hold that insofar as AS 12.30.040(b) purports to limit the right to bail of an accused in a criminal prosecution after an adjudication of guilt, but prior to sentencing, it conflicts with and is contrary to the right to bail as embodied in article 1, section 11 of the Alaska Constitution.

Furthermore, assuming arguendo that the constitutional right to bail does not extend to sentencing, I cannot agree with the majority's conclusion that the legislature may limit the court's discretion to grant bail.

The order of the superior court in denying the state's motion to return Wassillie to custody not only held that AS 12.30.040(b) was in violation of the Alaska Constitution but that the court was obligated to follow the applicable criminal rules pertaining to bail, which supersede any procedural provisions of any inconsistent statute unless the statute was enacted for the specific purpose of changing a court rule.¹³ The superior

10. *People ex rel. Moffitt v. Quinlan*, 69 Misc.2d 1088, 332 N.Y.S.2d 447 (1972).

11. *Bradley v. United States*, 410 U.S. 605, 609, 93 S.Ct. 1151, 1154, 35 L.Ed.2d 528, 532. The footnote to the quoted text in the original reads:

These cases involve determining whether a judgment in a criminal case is final for the purpose of appeal and determining whether the function of the trial judge has been concluded so that he may not alter the sentence previously imposed to include probation. The precise issues are, of course, different from the issue in this case. But these cases do show the point at which a prosecution terminates, and that is the issue here.

12. Black's Law Dictionary at page 38 (4th Ed. 1968) defines "accused" in the following manner:

'Accused' is the general name for the defendant in a criminal case. . . . [t]he person against whom an accusation is made; one who is charged with a crime or misdemeanor. (citation omitted)

13. See Alaska R.Crim.P. 52, which provides:

These rules are promulgated pursuant to constitutional authority granting rule making power to the supreme court, and to the extent that they are inconsistent with any procedural provisions of any statute not enacted

court in its bail decision noted the discretion granted the court by virtue of the provisions of Criminal Rule 32(a), which provides that: "[p]ending sentence the court may commit the defendant or continue or alter the bail." The superior court further held that AS 12.30.040(b), in removing its discretion to continue or alter bail as to certain offenses, was not specifically intended to modify Criminal Rule 32(a) and thus has no effect and is void.

The majority concludes that it need not consider this issue because it was inadequately briefed. This conclusion, I think, fails to consider the procedural context of this case. The superior court ordered Wassillie released from custody and then denied the state's motion to have him returned to custody. The state petitioned for review of the superior court's denial. Thus, once review is granted of the superior court's order releasing Wassillie, it is incumbent upon us to consider both grounds upon which the motion was granted. I do not think that we can selectively permit review of one ground only and not consider others, if they exist.

On appeal, the state does not contend that AS 12.30.040(b) was specifically intended to change Rule 32(a) but that Criminal Rule 41(a) is dispositive procedurally of the matter. This latter rule provides:

The defendant in a criminal proceeding is entitled to bail pursuant to AS 12.30.010-12.30.080.

for the specific purpose of changing a rule, shall supersede such statute to the extent of such inconsistency.

Article IV, section 15, of the Alaska Constitution provides, in part, that this court's rules "may be changed by the legislature by two-thirds vote of the members elected to each house." See *City of Valdez v. Valdez Dev. Co.*, 506 P.2d 1279 (Alaska 1973); *Leege v. Martin*, 379 P.2d 447 (Alaska 1963).

14. "The court of King's bench had the right to bail after, as well as before, conviction." *State v. Flowers*, 330 A.2d 146, 148 n.2 (Del.1974), quoting *Ex parte Ezell*, 40 Tex. 451 (1874). See also *United States v. Stanley*, 152 U.S.App.D.C. 170, 175, 469 F.2d 576, 581 (D.C.Cir.1972) ("application for release pending appeal is a function historically committed to trial judges");

Wassillie notes that Criminal Rule 41(a) was amended prior to the enactment of AS 12.30.040(b) in 1974. Rule 41(a) took its present form by amendment through Supreme Court Order 157, effective February 15, 1973. Although the wording is somewhat ambiguous, I think that Rule 41(a) does not encompass the subsequent change in the Bail Reform Act that resulted with the enactment of AS 12.30.040(b). Reading Criminal Rules 32(a) and 41(a) together precludes alteration by subsequent legislation, absent an express purpose to change the rules. This analysis is based on the assumption that bail is a matter of procedure.

At common law, the question whether an accused was to be released on bail at any stage of the proceedings was one left to be answered by the court in its discretion.¹⁴ It is still generally recognized that courts have the inherent power to make determinations as to bail and bail conditions or revocation when such actions are appropriate to the orderly process of criminal justice, even in the absence of specific statutory authorization. As one court stated:

It is our conclusion that a specific statute granting the trial court authority to revoke bail is not necessary, since a court with jurisdiction over a criminal has the power to enforce its orders as to bail just as it has control over other orders.¹⁵

Despite this traditionally accepted power of the courts with respect to release on bail, most jurisdictions seem to adhere to the

DeAngelis v. State of South Carolina, 330 F.Supp. 889, 891 (D.S.C.1971) ("At common law, courts had the inherent power to grant bail."); *Rose v. Nickeson*, 29 Conn.Sup. 81, 271 A.2d 855, 856 (1970) ("Since bail is not the handmaiden of custody, the power to admit to bail is inherent in the court so long as the prisoner is in its custody.");

15. *Mello v. Superior Court*, 117 R.I. 578, 370 A.2d 1262, 1265 (1977). See also *United States v. Smith*, 441 F.2d 61, 62 (8th Cir. 1971), cert. denied, 405 U.S. 977, 92 S.Ct. 1205, 31 L.Ed.2d 253, 822 (1972); *United States v. Stanley*, 449 F.Supp. 467, 469 (N.D.Cal.1978); *People ex rel. Hemingway v. Elrod*, 60 Ill.2d 74, 322 N.E.2d 837, 840-43 (1975).

view that the legislature may define the scope of non-constitutional rights to bail and those classes of offenses to which those rights apply.¹⁶ One court, for instance, has termed it a "time-honored rule" that "bail is not allowed in any case except in pursuance of some statute."¹⁷ Yet this same court relied on a judicially created doctrine to hold that "a citizen cannot arbitrarily be denied a bail hearing solely because of a lack of statutory authority for release."¹⁸ In *People ex rel. Hemingway v. Elrod*, 60 Ill.2d 74, 322 N.E.2d 837 (1975), the Illinois Supreme Court rejected the Illinois Assembly's attempt to define "capital offenses" subject to only discretionary pre-trial release, in the wake of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, reh. denied, 409 U.S. 902, 92 S.Ct. 89, 34 L.Ed.2d 163 (1972). The Assembly substituted the offenses "murder, aggravated kidnapping or treason" for offenses where "death is a possible punishment" in its statutory provisions defining "capital offenses."¹⁹ The Illinois Court rejected this attempt at "classifications" of offenses, stating:

In our opinion the constitutional right to bail must be qualified by the authority

16. See *Carlson v. Landon*, 342 U.S. 524, 545-46, 72 S.Ct. 525, 536-37, 96 L.Ed. 547, 563 (1952) (eighth amendment does not prevent Congress from classifying offenses into those in which an accused is entitled to bail as a matter of right and those in which bail is discretionary); *Mastrian v. Hedman*, 326 F.2d 708, 710 (8th Cir. 1964), cert. denied, 376 U.S. 965, 84 S.Ct. 1128, 11 L.Ed.2d 982 (1964); *Turco v. State of Maryland*, 324 F.Supp. 61, 63 (D.Md. 1971), aff'd, 444 F.2d 56 (4th Cir. 1971); *People v. Sanders*, 185 Colo. 153, 522 P.2d 735, 736 (1974); *State v. Flowers*, 330 A.2d 146, 149 (Del. 1974); *Critchlow v. State*, 264 Ind. 458, 346 N.E.2d 591, 599-600 (1976); *Hanson v. Gladden*, 34 Or. 494, 426 P.2d 465 (1967).

17. *West v. Janing*, 449 F.Supp. 548, 552 (D.Neb. 1978), quoting *United States v. Curran*, 297 F. 946, 952 (2d Cir. 1924). See also *United States v. Sine*, 461 F.Supp. 565, 567 (D.S.C. 1978); *Emery v. Fenton*, 266 N.W.2d 6, 7 (Iowa 1978).

18. *West v. Janing*, 449 F.Supp. at 552. The court found a judicially-based right to release pending appeal for an "interstate fugitive"

of the courts, as an incident of their power to manage the conduct of proceedings before them, to deny or revoke bail when such action is appropriate to preserve the orderly process of criminal procedure.²⁰

The court held that pre-trial bail release questions were "within the inherent power of the court" and its "inherent authority to enforce its orders and to require reasonable conduct from those over whom it has jurisdiction."²¹

While this conflict, with its overtones of constitutional interpretation, was somewhat weighted in favor of the judicial branch, other cases reveal the difficult nature of this question of governmental power, veiled in "substance" and "procedure."²² A much more relevant case to Wassillie's argument is the decision of the Washington Supreme Court in *State v. Smith*, 84 Wash.2d 498, 527 P.2d 674 (1974), which dealt with the source of authority for the right to release after conviction and pending appeal. The Washington court, finding no constitutional limits on bail in that context, held that the provisions of a criminal rule promulgated by the court, and not a conflicting legisla-

challenging extradition proceedings. The asylum state had no statutory provisions authorizing release in that context.

19. *People ex rel. Hemingway v. Elrod*, 60 Ill.2d 74, 322 N.E.2d 837, 839 (1975).

20. *Id.* 322 N.E.2d at 840.

21. The court adopted various ABA Standards Relating to Pretrial Release (1968) as the law in Illinois. *Id.* 322 N.E.2d at 841-43.

22. See *Smiloff v. State*, 579 P.2d 28, 33 n.19 (Alaska 1978) (recognizing "that the line between substance and procedure is an elusive one.") See also *Padie v. State*, 566 P.2d 1024, 1029-30 (Alaska 1977); *Thomas v. State*, 566 P.2d 630, 636-38 (Alaska 1977); *Gieffels v. State*, 552 P.2d 661, 667-68 (Alaska 1976); *Winegardner v. Greater Anchorage Area Borough*, 534 P.2d 541, 545-46 (Alaska 1975); *Channel Flying, Inc. v. Bernhardt*, 451 P.2d 570, 576 (Alaska 1969); *Ware v. City of Anchorage*, 439 P.2d 793, 794 (Alaska 1968).

tive enactment, were controlling as to questions of bail pending appeal. The Supreme Court of Washington based its conclusion on the distinction between substantive and procedural authority, reasoning that:

Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law[s], rights, and remedies are effectuated.

Since the inherent power to fix bail is grounded in the power to hold a defendant, and thus relates to the manner of ensuring that the alleged offense will be heard by the court, we believe it to be implicit that the right to bail is essentially procedural in nature.

Since the promulgation of rules of procedure is an inherent attribute of the Supreme Court and an integral part of the judicial process, such rules cannot be abridged or modified by the legislature. Thus, the right to bail (and release) after verdict and pending appeal . . . is governed solely by the provisions of [the criminal rule].²³

In so holding, *Smith* gave effect to a criminal rule which provided:

Release After Verdict. A defendant (1) who is charged with a capital offense, or (2) who has been found guilty of a felony and is either awaiting sentence or has filed an appeal, shall be released pur-

23. *State v. Smith*, 84 Wash.2d 498, 527 P.2d 674, 677 (1974) (citations omitted).

24. *Id.* 527 P.2d at 676. The *Smith* court also noted the fact that the legislature had delegated the power to prescribe rules for bail pending appeal was "a second and alternative rationale, but not the principle or basic one." *Id.* 527 P.2d at 677. The legislature could, of course, remove that basis for the court's asserted authority.

25. *People ex rel. Stamos v. Jones*, 40 Ill.2d 62, 237 N.E.2d 495, 496 (1968).

26. *Id.* 237 N.E.2d at 498. Other cases also assert a judicial power to define the right to

suant to this Rule, unless the court finds that the defendant may flee the state or pose a substantial danger to another or to the community. If such a risk of flight or danger exists, the defendant may be ordered detained.

In contrast, the legislative enactment invalidated in *Smith* required that bail be set on appeal in all except capital cases, a provision more charitable than the court's rule.²⁴ Thus, while the *Smith* decision might be seen as consistent with the traditionally inherent power of the courts to deny or revoke bail, it contravenes the principle of legislative authority in defining the right to release on bail.

The Illinois Supreme Court, in *People ex rel. Stamos v. Jones*, 40 Ill.2d 62, 237 N.E.2d 495 (1968), also invalidated a statutory provision which conflicted with its adopted procedural rules. The court's rules provided that a convicted defendant "may be admitted to bail and the sentence . . . stayed by a judge of the trial or reviewing court." The statute provided that one convicted of a forcible felony "shall not be entitled to a continuation of his bail and the sentence of imprisonment shall not be stayed by the trial court."²⁵ The court held that its rules were controlling because "the constitution has placed responsibility for rules governing appeal in the Supreme Court, and not in the General Assembly."²⁶

The *Jones* context parallels the situation presented in the instant case and furnishes support for the invalidation of AS 12.30-

bail. In *Commonwealth v. Fowler*, 451 Pa. 505, 304 A.2d 124 (1973), the Pennsylvania Supreme Court held that the existing state law as to bail after conviction was that embodied in the court's criminal rules. *Id.* 304 A.2d at 126. After an analysis of the societal values involved, the court concluded;

In the exercise of our supervisory capacity we hold that bail should not be granted to one convicted of murder in the first degree between entry of the verdict and the imposition of formal sentence.

Unlike the situation in *Smith* and *Jones*, the *Fowler* court noted no statutes in conflict with either its criminal rules as to bail or its "supervisory" holding.

040(b) on the grounds that it encroaches on an "inherently judicial function" by completely eliminating the possibility of release on bail pending appeal, with regard to enumerated offenses.²⁷

The argument for judicial discretion is strong in the case of release pending sentencing. It is anomalous to allow a court to decide not to impose a term of confinement as a sentence for these offenses (a result contemplated by both the relevant statutes and case law, though unlikely in most cases for these offenses), and yet not allow that same court the discretion to release the convicted person pending imposition of that sentence. This would effectively result in a mandatory minimum sentence of confinement for the several weeks or months often necessary to obtain the information necessary for sentencing. Further, there is also the possibility that a court might set aside the verdict and grant a new trial, creating a situation in which the defendant was unjustly incarcerated for at least some period of time as a result of the unavailability of an individual consideration of bail.

I am persuaded that the matter of bail is a procedural power inherent in the judicial function. As the District of Columbia Court of Appeals noted in *United States v. Stanley*, 152 U.S.App.D.C. 170, 175, 469 F.2d 576, 581 (D.C.Cir.1972) (footnotes omitted):

Not surprisingly, then, initial resolution of an application for release pending appeal is a function historically committed to trial judges. It cannot be gainsaid

27. Florida has gone through various changes with respect to this question. The Florida Supreme Court, in *Greene v. State*, 238 So.2d 296 (Fla.1970), recited the statutory basis of bail rights. However, a later opinion, *Bernhardt v. State*, 288 So.2d 490 (Fla.1974), invalidated statutory provisions which precluded bail in certain probation and parole revocation situations on the grounds that bail in that context was essentially procedural in nature and, thus, amenable only to court rule-making authority.

Several Florida intermediate appellate court cases interpreted *Bernhardt* as necessarily invalidating a statute which eliminated bail on appeal for one with a prior felony conviction, in contrast to the discretionary language provided

that "the keynote to successful administration of any system of bail is the adequacy of the information upon which the decisions are based." The need for ample information is particularly acute in investigations of potential danger to the community, findings relative to which, as has aptly been said, "must rest on a 'scrupulous inquiry' into appellant's past, his prospects if released, and conditions of release to mitigate the danger." The trial court is not only the traditional but also the superior tribunal for the kind of information-gathering which a sound foundation for a bail ruling almost inevitably requires. For it is there that, at a hearing, the judge can come face-to-face with the primary informational sources, and probe for what is obscure, trap what is elusive, and settle what is controversial. It is there, too, that the judge has at his disposal "the judicial machinery necessary to marshal the facts typically relevant to the release inquiry."

Findings on the risks of danger or flight, and on the efficiency of particular conditions of release to sufficiently minimize those risks, are obviously enriched by a feel of the case that comes only from participation in the live trial. The respect we customarily accord the district judge's determinations attests the value of his appraisal of the intangibles which ultimately make or break the case for bail.

for bail in precisely that context in the court's rules of criminal procedure. See *Rolle v. State*, 314 So.2d 624 (Fla.App.1975); *State ex rel. Harrington v. Genung*, 300 So.2d 271 (Fla.App.1974); *Bamber v. State*, 300 So.2d 269 (Fla.App.1974). The principle in these cases was subsequently cited with approval by both the majority and the dissent in *Johnson v. State*, 336 So.2d 93 (Fla.1976).

However, the legislature, pursuant to its authority under Florida law, repealed the conflicting court rules, and the Florida Supreme Court subsequently conformed the rules to the statute. *The Florida Bar re Florida Rules of Criminal Procedure*, 343 So.2d 247, 1250, 1267 (Fla.1977).

Though this court has recognized that the legislature has more than minimal authority to define the nature of the right to post-conviction release in Alaska,²⁸ I think the complete abolition of individualized judicial determination of the suitability for release cannot be accomplished without an explicit statutory revision of the applicable rules²⁹ of criminal procedure pertaining to bail.

Thus, even if the constitutional right to bail does not extend until sentencing, I am

28. See *Carman v. State*, 564 P.2d 361, 363 (Alaska 1977) ("Through subsequent amendments of Alaska's Bail Reform Act, in determining bail and conditions of release, our courts are now empowered to take into consideration whether the person charged with an offense 'will pose a danger to other persons and

convinced that Criminal Rule 32(a) mandates individualized bail decisions.



the community'"); *Martin v. State*, 517 P.2d 1389, 1395 (Alaska 1974) ("In addition to the constitutional guarantee of bail, a right to bail is found in the Alaska Statutes.").

29. See note 17 *supra*.

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Introduced: 5/5/81
Referred: Judiciary

~~BY BRADLEY, DANKWORTH, ELIASON,
FISCHER, GILMAN, KELLY AND STIMSON~~
DANK AND FISHER

1 IN THE SENATE

2 (S) SENATE BILL NO. ~~577~~ ⁴⁴⁶ (JUDICIARY)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 TWELFTH LEGISLATURE - FIRST SESSION

5 A BILL

6 For an Act entitled: "An Act permitting the videotaping of, or the exclu-
7 sion of the public during, testimony of young victims
8 of sexual assault or sexual abuse of a minor; and
9 changing Rule 804, Alaska Rules of Evidence relating
to exceptions to the hearsay rule."

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

12 * Section 1. AS 12.45 is amended by adding new sections to read:

13 Sec. 12.45.047. VIDEOTAPING OF TESTIMONY BY YOUNG VICTIM OF
14 SEXUAL ASSAULT OR SEXUAL ABUSE. (a) Af er notice to the defendant,
15 the state may apply to the court for an order allowing videotaping of
16 the testimony of a child who is the alleged victim of sexual assault in
17 any degree or who is the alleged victim of sexual abuse of a minor.

18 The order may be granted if the court finds that [↑]

19 (1) the child was 16 years of age or younger at the time [of]
20 ~~the sexual assault; and~~ ^{TESTIMONY IS GIVEN}

21 (2) there is a substantial likelihood that the child will
22 suffer severe emotional distress if required to testify in open court
23 at the trial; there is a presumption that a child who is under the age
24 of 16 at the time of an alleged sexual assault or sexual abuse will
25 suffer severe emotional distress if required to testify in open court,
26 which may only be overcome by the presentation of evidence to the
27 contrary at the time the application for an order ~~excluding the public~~ ^{excluding videotaping}
28 is considered.

29 (b) If the order is granted, the trial judge shall preside at the

WCEST
11.41.458
11.41.455
UNLAWFUL
EXPOSURE
OF A MINOR

Judge Rules which INDIVIDUALS
ARE PRESENT BUSINESS Δ AND Δ's ATTORNEY

IS IT POSSIBLE TO REQUIRE THE COURT TO VIDEOTAPE THE TESTIMONY UNINTERFERED AND THEN RULE ON WHICH SECTIONS WILL BE ADMITTED?

1 videotaping, proceeding and shall rule on all questions as if at trial.
2 The defendant shall be afforded all rights applicable to defendants
3 during trial, including the right to an attorney and the right to
4 confront and cross-examine the witness.

5 (c) Videotaped evidence taken in accordance with this section is
6 admissible in evidence in the criminal trial for sexual assault in any
7 degree or for sexual abuse of a minor.

8 ~~Sec. 12.45.048.~~ EXCLUSION OF PUBLIC FROM TRIAL DURING TESTIMONY
9 BY YOUNG VICTIM OF SEXUAL ASSAULT OR SEXUAL ABUSE. (a) After notice
10 to the defendant, the state may apply to the court for an order exclud-
11 ing the public from the courtroom during the testimony of a child who
12 is the alleged victim of sexual assault in any degree or who is the
13 alleged victim of sexual abuse of a minor. The order may be granted if
14 the court finds that

15 (1) the child was 16 years of age or younger at the time of
16 the ~~alleged sexual assault or sexual abuse~~ ^{TESTIMONY REGARDING THE} and

17 (2) there is a substantial likelihood that the child will
18 suffer severe emotional distress if required to testify in open court
19 at the trial; there is a presumption that a child who is under the age
20 of 16 at the time of ~~an alleged sexual assault or sexual abuse~~ ^{TESTIMONY REGARDING AN} will
21 suffer severe emotional distress if required to testify in open court,
22 which may only be overcome by the presentation of evidence to the
23 contrary at the time the application for an order excluding the public
24 is considered.

25 (b) In this section "public" means all persons except

- 26 (1) the judge presiding over the trial;
- 27 (2) the members of the jury;
- 28 (3) the defendant and his counsel;
- 29 (4) counsel for the state;

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- (5) counsel for the child;
- (6) the parents or legal guardians of the child; and
- (7) court personnel essential for the taking of the testimony.

* Sec. 2. AS 12.45.047 added by sec. 1 of this Act has the effect of changing Rule 804, Alaska Rules of Evidence by adding the videotaped evidence of a young victim of sexual assault or sexual abuse of a minor to the list of exceptions to the hearsay rule.

VIDEOTAPE IS TRANSCRIBED AT THE CONCLUSION
OF THE APPELLATE PROCESS AND DESTROYED

COMMITTEE REPORT

SENATE

FURTHER: None

5/5/81

Date: Jan. 29 1982

Mr. President:

The Committee on JUDICIARY has had SB 547 permitting videotaping of, or the exclusion of the public during testimony of young victims of sexual assault

under consideration and (a majority of the committee) (the committee) reports it back with the following recommendations:

do pass [] do not pass

[] do pass with attached amendments(s)

replace with CS for SB 547 [] same title new title

and recommends _____

[] AND attaches a "Letter of Intent" [] New Fiscal Note

[] reports it back without recommendation

[] referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATION

CHAIRMAN