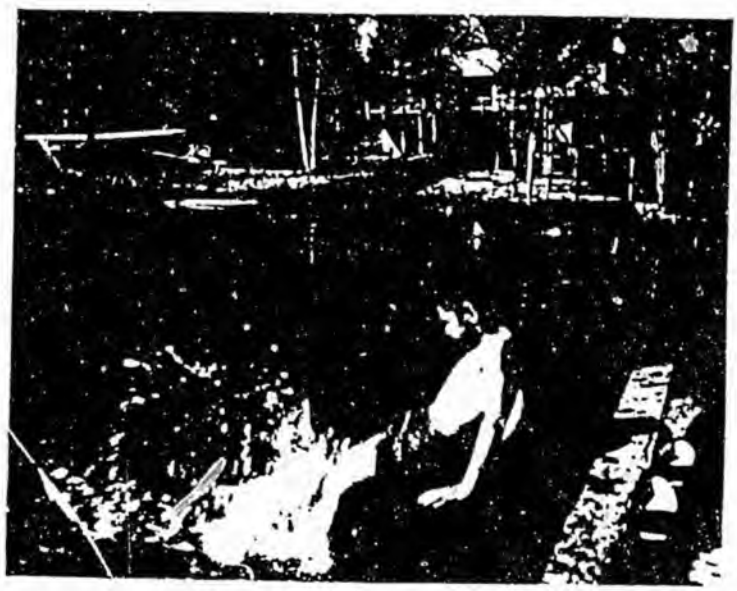
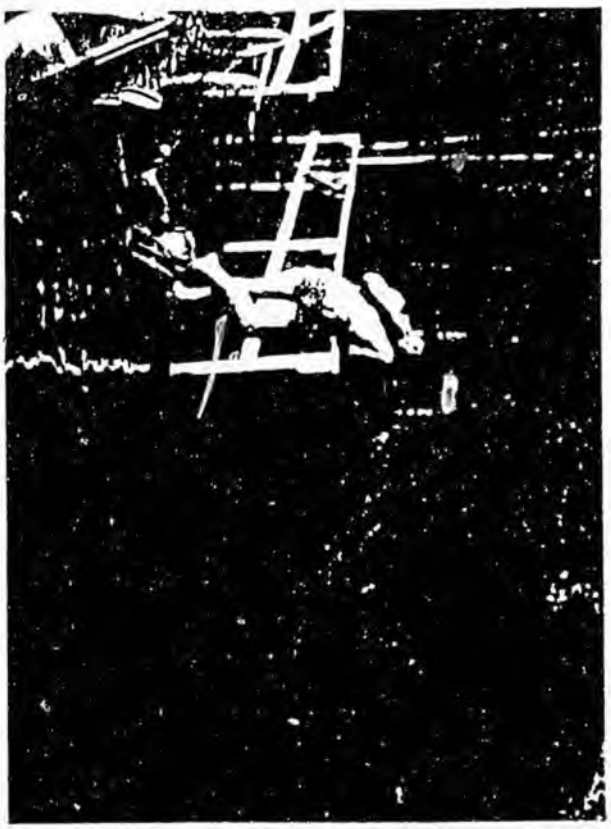
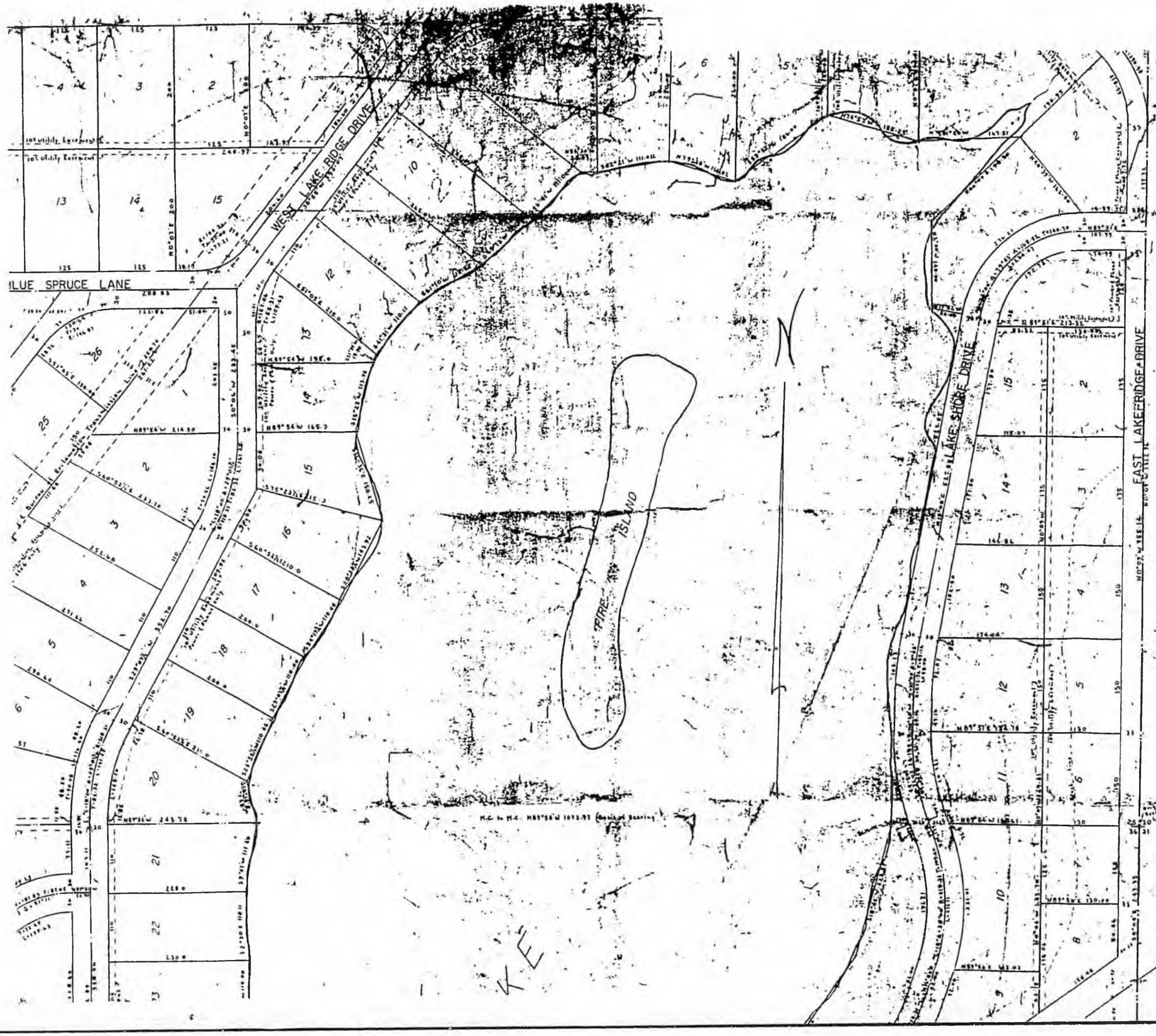
1969 - Note H_2O level @ dock



1977 - Note H_2O level

1979 - Same dock





and that we hereby adopt this plan of subdivision with our free consent and dedicate all streets, walks, easements or other open spaces to public or private use as noted.

July 12, 1960.

James R. Bluffko
Owner

Donald V. Bogy
Owner

David W. Lewis
Owner

Owner

Owner

NOTARY'S ACKNOWLEDGEMENT:
Subscribed and sworn to before me on this 26 day of July of the year 1960.

Notary
Notary for Alaska
My Commission Expires 11-02-63

CERTIFICATE OF REGISTERED SURVEYOR
I hereby certify that I am a registered professional Land Surveyor and that this Plat represents a survey made by me and the monuments and corners shown hereon actually exist as located, and that all dimensions and other details are correct.

June 29, 1960
Date

E. H. Fenn
Registration No. 4071-S

LEGEND
+ General Land Office or Bureau of Land Management Brass Cap
⊙ Alaska State Department of Lands Brass Cap
● Iron Rod Set this survey
——— Subdivision Boundary
——— Aliquote part of Section or Section Line
——— Centerline

NOTES
1 All lot corners, P.C., P.T., and angle points are marked by one of the following: Axe and Tack, 3/8 Iron Rod or 1" Rod.

Hein
2/24/86 ✓

Original sponsor: Rules/Governor

(4)

IN THE SENATE BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 95 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to supervision of safety of dams and reservoirs; and providing for an effective date."

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

* Section 1. AS 11.56.800(a) is amended to read:

(a) A person commits the crime of making a false report if the person knowingly

(1) gives false information to a peace officer with the intent of implicating another in a crime;

(2) makes a false report to a peace officer that a crime has occurred or is about to occur; [OR]

(3) makes a false report or gives a false alarm that a fire or other incident dangerous to life or property calling for an emergency response has occurred or is about to occur; or

(4) makes a false report to the Department of Natural Resources concerning the condition of a dam or reservoir under AS 46.-17.

* Sec. 2. AS 46 is amended by adding a new chapter to read:

CHAPTER 17. SUPERVISION OF SAFETY OF DAMS AND RESERVOIRS.

Sec. 46.17.010. PURPOSE. It is the purpose of this chapter to provide for the regulation, supervision, and periodic inspection by the commissioner of privately or state owned dams, reservoirs, and appurtenant works in order to ensure that the design, construction, enlargement, alteration, repair, maintenance, operation, and removal of dams and reservoirs is consistent with the protection of life and

property.

Sec. 46.17.020. ADMINISTRATION AND STAFFING. The supervision of the safety of dams or reservoirs is the responsibility of the commissioner. The commissioner shall employ a licensed and qualified engineer, experienced in the design and construction of dams and reservoirs, and other employees necessary for performing the duties outlined in this chapter. The commissioner may contract with engineering consultants not employed by the state when necessary to assist in the performance of duties under this chapter.

Sec. 46.17.030. REGULATIONS AND ORDERS. The commissioner shall adopt regulations and issue orders necessary for carrying out the provisions of this chapter.

Sec. 46.17.040. APPROVAL REQUIRED. (a) Except in the performance of routine maintenance and operations not affecting structure safety, a person may not construct, enlarge, repair, alter, remove, maintain, operate or abandon a dam or reservoir without the approval of the commissioner.

(b) The owner of a dam or reservoir that was constructed or was in operation before the effective date of this Act shall file an application with the commissioner for the approval of the dam or reservoir, in accordance with regulations adopted by the commissioner.

(c) This chapter does not exempt an applicant under this section from the requirements of other statutes.

Sec. 46.17.050. INSPECTIONS. At least once every five years, the commissioner shall inspect every dam and reservoir subject to this chapter. The commissioner may inspect a dam or reservoir more frequently than every five years to protect public safety.

Sec. 46.17.060. ENTRY UPON PRIVATE PROPERTY. In taking an action under this chapter, the commissioner, after giving two weeks'

written notice and being refused the right of entry, may seek a search warrant to allow inspection of a dam or reservoir. The commissioner, after being refused inspection of drawings, operational records, or other information concerning a dam or reservoir, may seek an administrative subpoena compelling production of the drawings, operational records, or other information. If the commissioner has reason to believe the dam or reservoir may be unsafe or presents an imminent threat to life or property, the commissioner may enter the dam or reservoir premises without notice.

Sec. 46.17.070. DETERMINING DANGER. In determining whether a dam or reservoir or proposed dam or reservoir constitutes or would constitute a danger to life or property, the commissioner shall, at a minimum, consider the possibility that the structural integrity of the dam or reservoir might be endangered by overtopping, seepage, settlement, erosion, cracking, earth movement, earthquakes, or the failure of bulkheads, flashboards, gates, or conduits. Upon determining that the dam or reservoir is unsafe, the commissioner shall order the owner to take action the commissioner considers necessary to ensure the protection of life and property.

Sec. 46.17.080. INJUNCTION AND DAMAGES. With the assistance of the attorney general, the commissioner may seek an injunction and damages in the enforcement of the commissioner's orders or the provisions of this chapter.

Sec. 46.17.090. JUDICIAL REVIEW. A final action of the commissioner under this chapter is subject to judicial review as provided in the Administrative Procedure Act (AS 44.62).

Sec. 46.17.100. VIOLATION OF THIS CHAPTER IS A MISDEMEANOR. A person who knowingly violates a provision of this chapter, or knowingly violates the terms of an approval, order, regulation, or

requirement of the commissioner made under this chapte , or knowingly obstructs, hinders, or prevents the commissioner's agents or employees from performing duties under this chapter, is guilty of a class A misdemeanor; upon conviction, the person is punishable by imprisonment under AS 12.55.135(a), or by a fine of not more than $10,000, or by both. Each day that a violation continues constitutes a separate offense.

Sec. 46.17.110. OTHER GOVERNMENT AGENCIES. (a) A municipality organized under AS 29 may not regulate, supervise, inspect, or provide for the regulation, supervision, or inspection of a dam or reservoir in this state, or provide for the construction, maintenance, operation, or removal or abandonment of them, or limit the size of a dam or reservoir or the amount of water that may be stored in them, if its action would conflict with the powers and duties vested in the commissioner. The commissioner may enter into cooperative agreements with municipalities and other state and federal agencies to carry out the purpose of this chapter.

(b) This chapter does not apply to a federally owned or operated dam or reservoir.

(c) This chapter does not affect the powers of the Department of Environmental Conservation or the Department of Fish and Game.

Sec. 46.17.120. ACTION AGAINST STATE FOR DAMAGES. (a) Except as provided in (b) of this section, a person may not bring an action against the state, the commissioner, or agents or employees of the state, for the recovery of damages caused by the partial or total failure of a dam or reservoir, or by the operation of a dam or reservoir, or by an act or omission in connection with any of the following:

(1) approval of the construction of a dam or reservoir, or

approval of flood-handling plans during or after construction;

(2) issuance or enforcement of orders relating to maintenance or operation of the dam or reservoir;

(3) control or regulation of the dam or reservoir;

(4) measures taken to protect against failure of the dam or reservoir during an emergency; or

(5) investigations or inspections authorized under this chapter.

(b) A person may bring an action against the state for the recovery of damages caused by an action undertaken by a dam owner that was negligently ordered by the state over the owner's objection.

Sec. 46.17.130. DUTIES OF OWNER. This chapter does not relieve an owner of a dam or reservoir of the duties or liabilities incident to the ownership or operation of the dam or reservoir.

Sec. 46.17.900. DEFINITIONS. In this chapter, unless the context requires otherwise,

(1) "alterations" or "repairs" means only those alterations or repairs that may directly affect the safety of the dam or reservoir, as determined by the commissioner;

(2) "appurtenant works" includes structures such as spillways, either in a dam or separate from it; a reservoir and its rim; low level outlet works; and water conduits such as tunnels, pipelines, or penstocks, whether running through the dam or through its abutments;

(3) "commissioner" means the commissioner of natural resources;

(4) "dam" includes any artificial barrier and appurtenant works that may impound or divert water and that

(A) has or will have an impounding capacity at maximum

water storage elevation of 50 acre-feet and is at least 10 feet in height measured from the lowest point at either toe of the dam to the crest of the dam;

(B) is at least 20 feet in height measured from the lowest point at either toe of the dam to the crest of the dam; or

(C) poses a threat to lives and property as determined positively by the commissioner;

(5) "enlargement" means an alteration to an existing dam or reservoir that raises or is capable of raising the water storage elevation of the water, or that increases the quantity of water impounded by the dam or reservoir;

(6) "owner" means a person who owns, controls, operates, maintains, manages, or proposes to construct a dam or reservoir, and includes the following:

(A) the state and its agencies and political subdivisions;

(B) a public utility; and

(C) the appointed or authorized agents, employees, lessees, receivers or trustees of any owner;

(7) "person" has the meaning given in AS 01.10.060, and, in addition, includes the state and its agencies and political subdivisions;

(8) "reservoir" means a basin appurtenant to a dam that may impound water.

* Sec. 3. This Act takes effect immediately in accordance with AS 01.-10.070(c).

Hein
2/24/86 ✓

Original sponsor: Rules/Governor

IN THE SENATE BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 95 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to supervision of safety of dams and reservoirs; and providing for an effective date."

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

* Section 1. AS 11.56.800(a) is amended to read:

(a) A person commits the crime of making a false report if the person knowingly

(1) gives false information to a peace officer with the intent of implicating another in a crime;

(2) makes a false report to a peace officer that a crime has occurred or is about to occur; [OR]

(3) makes a false report or gives a false alarm that a fire or other incident dangerous to life or property calling for an emergency response has occurred or is about to occur; or

(4) makes a false report to the Department of Natural Resources concerning the condition of a dam or reservoir under AS 46.17.

* Sec. 2. AS 46 is amended by adding a new chapter to read:

CHAPTER 17. SUPERVISION OF SAFETY OF DAMS AND RESERVOIRS.

Sec. 46.17.010. PURPOSE. It is the purpose of this chapter to provide for the regulation, supervision, and periodic inspection by the commissioner of privately or state owned dams, reservoirs, and appurtenant works in order to ensure that the design, construction, enlargement, alteration, repair, maintenance, operation, and removal of dams and reservoirs is consistent with the protection of life and

property.

Sec. 46.17.020. ADMINISTRATION AND STAFFING. The supervision of the safety of dams or reservoirs is the responsibility of the commissioner. The commissioner shall employ a licensed and qualified engineer, experienced in the design and construction of dams and reservoirs, and other employees necessary for performing the duties outlined in this chapter. The commissioner may contract with engineering consultants not employed by the state when necessary to assist in the performance of duties under this chapter.

Sec. 46.17.030. REGULATIONS AND ORDERS. The commissioner shall adopt regulations and issue orders necessary for carrying out the provisions of this chapter.

Sec. 46.17.040. APPROVAL REQUIRED. (a) Except in the performance of routine maintenance and operations not affecting structure safety, a person may not construct, enlarge, repair, alter, remove, maintain, operate or abandon a dam or reservoir without the approval of the commissioner.

(b) The owner of a dam or reservoir that was constructed or was in operation before the effective date of this Act shall file an application with the commissioner for the approval of the dam or reservoir, in accordance with regulations adopted by the commissioner.

(c) This chapter does not exempt an applicant under this section from the requirements of other statutes.

Sec. 46.17.050. INSPECTIONS. At least once every five years, the commissioner shall inspect every dam and reservoir subject to this chapter. The commissioner may inspect a dam or reservoir more frequently than every five years to protect public safety.

Sec. 46.17.060. ENTRY UPON PRIVATE PROPERTY. In taking an action under this chapter, the commissioner, after giving two weeks'

written notice and being refused the right of entry, may seek a search warrant to allow inspection of a dam or reservoir. The commissioner, after being refused inspection of drawings, operational records, or other information concerning a dam or reservoir, may seek an administrative subpoena compelling production of the drawings, operational records, or other information. If the commissioner has reason to believe the dam or reservoir may be unsafe or presents an imminent threat to life or property, the commissioner may enter the dam or reservoir premises without notice.

Sec. 46.17.070. DETERMINING DANGER. In determining whether a dam or reservoir or proposed dam or reservoir constitutes or would constitute a danger to life or property, the commissioner shall, at a minimum, consider the possibility that the structural integrity of the dam or reservoir might be endangered by overtopping, seepage, settlement, erosion, cracking, earth movement, earthquakes, or the failure of bulkheads, flashboards, gates, or conduits. Upon determining that the dam or reservoir is unsafe, the commissioner shall order the owner to take action the commissioner considers necessary to ensure the protection of life and property.

Sec. 46.17.080. INJUNCTION AND DAMAGES. With the assistance of the attorney general, the commissioner may seek an injunction and damages in the enforcement of the commissioner's orders or the provisions of this chapter.

Sec. 46.17.090. JUDICIAL REVIEW. A final action of the commissioner under this chapter is subject to judicial review as provided in the Administrative Procedure Act (AS 44.62).

Sec. 46.17.100. VIOLATION OF THIS CHAPTER IS A MISDEMEANOR. A person who knowingly violates a provision of this chapter, or knowingly violates the terms of an approval, order, regulation, or

requirement of the commissioner made under this chapter, or knowingly obstructs, hinders, or prevents the commissioner's agents or employees from performing duties under this chapter, is guilty of a class A misdemeanor; upon conviction, the person is punishable by imprisonment under AS 12.55.135(a), or by a fine of not more than $10,000, or by both. Each day that a violation continues constitutes a separate offense.

Sec. 46.17.110. OTHER GOVERNMENT AGENCIES. (a) A municipality organized under AS 29 may not regulate, supervise, inspect, or provide for the regulation, supervision, or inspection of a dam or reservoir in this state, or provide for the construction, maintenance, operation, or removal or abandonment of them, or limit the size of a dam or reservoir or the amount of water that may be stored in them, if its action would conflict with the powers and duties vested in the commissioner. The commissioner may enter into cooperative agreements with municipalities and other state and federal agencies to carry out the purpose of this chapter.

(b) This chapter does not apply to a federally owned or operated dam or reservoir.

(c) This chapter does not affect the powers of the Department of Environmental Conservation or the Department of Fish and Game.

Sec. 46.17.120. ACTION AGAINST STATE FOR DAMAGES. (a) Except as provided in (b) of this section, a person may not bring an action against the state, the commissioner, or agents or employees of the state, for the recovery of damages caused by the partial or total failure of a dam or reservoir, or by the operation of a dam or reservoir, or by an act or omission in connection with any of the following:

(1) approval of the construction of a dam or reservoir, or

approval of flood-handling plans during or after construction;

(2) issuance or enforcement of orders relating to maintenance or operation of the dam or reservoir;

(3) control or regulation of the dam or reservoir;

(4) measures taken to protect against failure of the dam or reservoir during an emergency; or

(5) investigations or inspections authorized under this chapter.

(b) A person may bring an action against the state for the recovery of damages caused by an action undertaken by a dam owner that was negligently ordered by the state over the owner's objection.

Sec. 46.17.130. DUTIES OF OWNER. This chapter does not relieve an owner of a dam or reservoir of the duties or liabilities incident to the ownership or operation of the dam or reservoir.

Sec. 46.17.900. DEFINITIONS. In this chapter, unless the context requires otherwise,

(1) "alterations" or "repairs" means only those alterations or repairs that may directly affect the safety of the dam or reservoir, as determined by the commissioner;

(2) "appurtenant works" includes structures such as spillways, either in a dam or separate from it; a reservoir and its rim; low level outlet works; and water conduits such as tunnels, pipelines, or penstocks, whether running through the dam or through its abutments;

(3) "commissioner" means the commissioner of natural resources;

(4) "dam" includes any artificial barrier and appurtenant works that may impound or divert water and that

(A) has or will have an impounding capacity at maximum

water storage elevation of 50 acre-feet and is at least 10 feet in height measured from the lowest point at either toe of the dam to the crest of the dam;

(B) is at least 20 feet in height measured from the lowest point at either toe of the dam to the crest of the dam; or

(C) poses a threat to lives and property as determined positively by the commissioner;

(5) "enlargement" means an alteration to an existing dam or reservoir that raises or is capable of raising the water storage elevation of the water, or that increases the quantity of water impounded by the dam or reservoir;

(6) "owner" means a person who owns, controls, operates, maintains, manages, or proposes to construct a dam or reservoir, and includes the following:

(A) the state and its agencies and political subdivisions;

(B) a public utility; and

(C) the appointed or authorized agents, employees, lessees, receivers or trustees of any owner;

(7) "person" has the meaning given in AS 01.10.060, and, in addition, includes the state and its agencies and political subdivisions;

(8) "reservoir" means a basin appurtenant to a dam that may impound water.

* Sec. 3. This Act takes effect immediately in accordance with AS 01.-10.070(c).

Hein
2/5/86

(3)

Original sponsor: Rules/Governor

IN THE SENATE BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 95 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to supervision of safety of dams and reservoirs; and providing for an effective date."

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

* Section 1. AS 11.56.800(a) is amended to read:

(a) A person commits the crime of making a false report if the person knowingly

(1) gives false information to a peace officer with the intent of implicating another in a crime;

(2) makes a false report to a peace officer that a crime has occurred or is about to occur; [OR]

(3) makes a false report or gives a false alarm that a fire or other incident dangerous to life or property calling for an emergency response has occurred or is about to occur; or

(4) makes a false report to the Department of Natural Resources concerning the condition of a dam or reservoir under AS 46.17.

* Sec. 2. AS 46 is amended by adding a new chapter to read:

CHAPTER 17. SUPERVISION OF SAFETY OF DAMS AND RESERVOIRS.

Sec. 46.17.010. PURPOSE. It is the purpose of this chapter to provide for the regulation, supervision, and periodic inspection by the commissioner of privately or state owned dams, reservoirs, and appurtenant works in order to ensure that the design, construction, enlargement, alteration, repair, maintenance, operation, and removal of dams and reservoirs is consistent with the protection of life and

property.

Sec. 46.17.020. ADMINISTRATION AND STAFFING. The supervision of the safety of dams or reservoirs is the responsibility of the commissioner. The commissioner shall employ a licensed and qualified engineer, experienced in the design and construction of dams and reservoirs, and other employees necessary for performing the duties outlined in this chapter. The commissioner may contract with engineering consultants not employed by the state when necessary to assist in the performance of duties under this chapter.

Sec. 46.17.030. REGULATIONS AND ORDERS. The commissioner shall adopt regulations and issue orders necessary for carrying out the provisions of this chapter.

Sec. 46.17.040. APPROVAL REQUIRED. (a) Except in the performance of routine maintenance and operations not affecting structure safety, a person may not construct, enlarge, repair, alter, remove, maintain, operate or abandon a dam or reservoir without the approval of the commissioner.

(b) The owner of a dam or reservoir that was constructed or was in operation before the effective date of this Act shall file an application with the commissioner for the approval of the dam or reservoir, in accordance with regulations adopted by the commissioner.

(c) This chapter does not exempt an applicant under this section from the requirements of other statutes.

Sec. 46.17.050. INSPECTIONS. At least once every five years, the commissioner shall inspect every dam and reservoir subject to this chapter. The commissioner may inspect a dam or reservoir more frequently than every five years to protect public safety.

Sec. 46.17.060. ENTRY UPON PRIVATE PROPERTY. In taking an action under this chapter, the commissioner, after giving two weeks'

written notice and being refused the right of entry, may seek a search warrant to allow inspection of a dam or reservoir. The commissioner, after being refused inspection of drawings, operational records, or other information concerning a dam or reservoir, may seek an administrative subpoena compelling production of the drawings, operational records, or other information. If the commissioner has reason to believe the dam or reservoir may be unsafe or presents an imminent threat to life or property, the commissioner may enter the dam or reservoir premises without notice.

Sec. 46.17.070. DETERMINING DANGER. In determining whether a dam or reservoir or proposed dam or reservoir constitutes or would constitute a danger to life or property, the commissioner shall, at a minimum, consider the possibility that the structural integrity of the dam or reservoir might be endangered by overtopping, seepage, settlement, erosion, cracking, earth movement, earthquakes, or the failure of bulkheads, flashboards, gates, or conduits. Upon determining that the dam or reservoir is unsafe, the commissioner shall order the owner to take action the commissioner considers necessary to ensure the protection of life and property.

Sec. 46.17.080. INJUNCTION AND DAMAGES. With the assistance of the attorney general, the commissioner may seek an injunction and damages in the enforcement of the commissioner's orders or the provisions of this chapter.

Sec. 46.17.090. JUDICIAL REVIEW. A final action of the commissioner under this chapter is subject to judicial review as provided in the Administrative Procedure Act (AS 44.62).

Sec. 46.17.100. VIOLATION OF THIS CHAPTER IS A MISDEMEANOR. A person who knowingly violates a provision of this chapter, or knowingly violates the terms of an approval, order, regulation, or

requirement of the commissioner made under this chapter, or knowingly obstructs, hinders, or prevents the commissioner's agents or employees from performing duties under this chapter, is guilty of a class A misdemeanor; upon conviction, the person is punishable by imprisonment under AS 12.55.135(a), or by a fine of not more than $10,000, or by both. Each day that a violation continues constitutes a separate offense.

Sec. 46.17.110. OTHER GOVERNMENT AGENCIES. (a) A municipality organized under AS 29 may not regulate, supervise, inspect, or provide for the regulation, supervision, or inspection of a dam or reservoir in this state, or provide for the construction, maintenance, operation, or removal or abandonment of them, or limit the size of a dam or reservoir or the amount of water that may be stored in them, if its action would conflict with the powers and duties vested in the commissioner. The commissioner may enter into cooperative agreements with municipalities and other state and federal agencies to carry out the purpose of this chapter.

(b) This chapter does not apply to a federally owned or operated dam or reservoir.

(c) This chapter does not affect the powers of the Department of Environmental Conservation or the Department of Fish and Game.

Sec. 46.17.120. ACTION AGAINST STATE FOR DAMAGES. (a) Except as provided in (b) of this section, a person may not bring an action against the state, the commissioner, or agents or employees of the state, for the recovery of damages caused by the partial or total failure of a dam or reservoir, or by the operation of a dam or reservoir, or by an act or omission in connection with any of the following:

(1) approval of the construction of a dam or reservoir, or

(b) new Halford language

approval of flood-handling plans during or after construction;

(2) issuance or enforcement of orders relating to maintenance or operation of the dam or reservoir;

(3) control or regulation of the dam or reservoir;

(4) measures taken to protect against failure of the dam or reservoir during an emergency; or

(5) investigations or inspections authorized under this chapter.

(b) A dam owner may bring an action against the state for damages caused by gross negligence in the exercise of state responsibilities under this chapter.

Sec. 46.17.130. DUTIES OF OWNER. This chapter does not relieve an owner of a dam or reservoir of the duties or liabilities incident to the ownership or operation of the dam or reservoir.

Sec. 46.17.900. DEFINITIONS. In this chapter, unless the context requires otherwise,

(1) "alterations" or "repairs" means only those alterations or repairs that may directly affect the safety of the dam or reservoir, as determined by the commissioner;

(2) "appurtenant works" includes structures such as spillways, either in a dam or separate from it; a reservoir and its rim; low level outlet works; and water conduits such as tunnels, pipelines, or penstocks, whether running through the dam or through its abutments;

(3) "commissioner" means the commissioner of natural resources;

(4) "dam" includes any artificial barrier and appurtenant works that may impound or divert water and that

(A) has or will have an impounding capacity at maximum

water storage elevation of 50 acre-feet and is at least 10 feet in height measured from the lowest point at either toe of the dam to the crest of the dam;

(B) is at least 20 feet in height measured from the lowest point at either toe of the dam to the crest of the dam; or

(C) poses a threat to lives and property as determined positively by the commissioner;

(5) "enlargement" means an alteration to an existing dam or reservoir that raises or is capable of raising the water storage elevation of the water, or that increases the quantity of water impounded by the dam or reservoir;

(6) "owner" means a person who owns, controls, operates, maintains, manages, or proposes to construct a dam or reservoir, and includes the following:

(A) the state and its agencies and political subdivisions;

(B) a public utility; and

(C) the appointed or authorized agents, employees, lessees, receivers or trustees of any owner;

(7) "person" has the meaning given in AS 01.10.060, and, in addition, includes the state and its agencies and political subdivisions;

(8) "reservoir" means a basin appurtenant to a dam that may impound water.

* Sec. 3. This Act takes effect immediately in accordance with AS 01.-10.070(c).

Hein
2/4/86

Original sponsor: Rules/Governor

IN THE SENATE BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 95 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to supervision of safety of dams and reservoirs; and providing for an effective date."

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

* Section 1. AS 11.56.800(a) is amended to read:

(a) A person commits the crime of making a false report if the person knowingly

(1) gives false information to a peace officer with the intent of implicating another in a crime;

(2) makes a false report to a peace officer that a crime has occurred or is about to occur; [OR]

(3) makes a false report or gives a false alarm that a fire or other incident dangerous to life or property calling for an emergency response has occurred or is about to occur; or

(4) makes a false report to the Department of Natural Resources concerning the condition of a dam or reservoir under AS 46.-17.

* Sec. 2. AS 46 is amended by adding a new chapter to read:

CHAPTER 17. SUPERVISION OF SAFETY OF DAMS AND RESERVOIRS.

Sec. 46.17.010. PURPOSE. It is the purpose of this chapter to provide for the regulation, supervision, and periodic inspection by the commissioner of privately or state owned dams, reservoirs, and appurtenant works in order to ensure that the design, construction, enlargement, alteration, repair, maintenance, operation, and removal of dams and reservoirs is consistent with the protection of life and

property.

Sec. 46.17.020. ADMINISTRATION AND STAFFING. The supervision of the safety of dams or reservoirs is the responsibility of the commissioner. The commissioner shall employ a licensed and qualified engineer, experienced in the design and construction of dams and reservoirs, and other employees necessary for performing the duties outlined in this chapter. The commissioner may contract with engineering consultants not employed by the state when necessary to assist in the performance of its duties under this chapter.

Sec. 46.17.030. REGULATIONS AND ORDERS. The commissioner shall adopt regulations and issue orders necessary for carrying out the provisions of this chapter.

Sec. 46.17.040. APPROVAL REQUIRED. (a) Except in the performance of routine maintenance and operations not affecting structure safety, a person may not construct, enlarge, repair, alter, remove, maintain, operate or abandon a dam or reservoir without the approval of the commissioner.

(b) The owner of a dam or reservoir that was constructed or was in operation before the effective date of this Act shall file an application with the commissioner for the approval of the dam or reservoir, in accordance with regulations adopted by the commissioner.

(c) This chapter does not exempt an applicant under this section from the requirements of other statutes.

Sec. 46.17.050. INSPECTIONS. At least once every five years, the commissioner shall inspect every dam and reservoir subject to this chapter. The commissioner may inspect a dam or reservoir more frequently than every five years to protect public safety.

Sec. 46.17.060. ENTRY UPON PRIVATE PROPERTY. In taking an action under this chapter, the commissioner, after giving two weeks'

requirement of the commissioner made under this chapter, or knowingly obstructs, hinders, or prevents the commissioner's agents or employees from performing duties under this chapter, is guilty of a class A misdemeanor; upon conviction, the person is punishable by imprisonment under AS 12.55.135(a), or by a fine of not more than $10,000, or by both. Each day that a violation continues constitutes a separate offense.

Sec. 46.17.110. OTHER GOVERNMENT AGENCIES. (a) A municipal corporation organized under AS 29 may not regulate, supervise, inspect, or provide for the regulation, supervision, or inspection of a dam or reservoir in this state, or provide for the construction, maintenance, operation, or removal or abandonment of them, or limit the size of a dam or reservoir or the amount of water that may be stored in them, if its action would conflict with the powers and duties vested in the commissioner. The commissioner may enter into cooperative agreements with municipal corporations and other state and federal agencies to carry out the purpose of this chapter.

(b) This chapter does not apply to a federally owned or operated dam or reservoir.

(c) This chapter does not affect the powers of the Department of Environmental Conservation or the Department of Fish and Game.

Sec. 46.17.120. ACTION AGAINST STATE FOR DAMAGES. A person may not bring an action against the state, the commissioner, or agents or employees of the state, for the recovery of damages caused by the partial or total failure of a dam or reservoir, or by the operation of a dam or reservoir, or by an act or omission in connection with any of the following:

(1) approval of the construction of a dam or reservoir, or approval of flood-handling plans during or after construction;

(2) issuance or enforcement of orders relating to maintenance or operation of the dam or reservoir;

(3) control or regulation of the dam or reservoir;

(4) measures taken to protect against failure of the dam or reservoir during an emergency; or

(5) investigations or inspections authorized under this chapter.

Sec. 46.17.130. DUTIES OF OWNER. This chapter does not relieve an owner of a dam or reservoir of the duties or liabilities incident to the ownership or operation of the dam or reservoir.

Sec. 46.17.900. DEFINITIONS. In this chapter, unless the context requires otherwise,

(1) "alterations" or "repairs" means only those alterations or repairs that may directly affect the safety of the dam or reservoir, as determined by the commissioner;

(2) "appurtenant works" includes structures such as spillways, either in a dam or separate from it; a reservoir and its rim; low level outlet works; and water conduits such as tunnels, pipelines, or penstocks, whether running through the dam or through its abutments;

(3) "dam" includes any artificial barrier and appurtenant works that may impound or divert water and that

(A) has or will have an impounding capacity at maximum water storage elevation of 50 acre-feet and is at least 10 feet in height measured from the lowest point at either toe of the dam to the crest of the dam;

(B) is at least 20 feet in height measured from the lowest point at either toe of the dam to the crest of the dam; or

(C) poses a threat to lives and property as determined

positively by the commissioner;

(4) "commissioner" means the commissioner of natural resources;

(5) "enlargement" means an alteration to an existing dam or reservoir that raises or is capable of raising the water storage elevation of the water, or that increases the quantity of water impounded by the dam or reservoir;

(6) "owner" means a person who owns, controls, operates, maintains, manages, or proposes to construct a dam or reservoir, and includes the following:

(A) the state and its agencies and political subdivisions;

(B) a public utility; and

(C) the appointed or authorized agents, employees, lessees, receivers or trustees of any owner;

(7) "person" has the meaning given in AS 01.10.060, and, in addition, includes the state and its agencies and political subdivisions;

(8) "reservoir" means a basin appurtenant to a dam that may impound water.

* Sec. 3. This Act takes effect immediately in accordance with AS 01.-10.070(c).

(1)

Offered: 3/28/85
Referred: Judiciary and Finance

Original sponsor: Rules/Governor

AP work copy

DNR proposed changes

IN THE SENATE BY THE RESOURCES COMMITTEE

CS FOR SENATE BILL NO. 95 (Resources)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to supervision of safety of dams and reservoirs; and providing for an effective date."

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

* Section 1. AS 11.56.800(a) is amended to read:

(a) A person commits the crime of making a false report if the person knowingly

(1) gives false information to a peace officer with the intent of implicating another in a crime;

(2) makes a false report to a peace officer that a crime has occurred or is about to occur; [OR]

(3) makes a false report or gives a false alarm that a fire or other incident dangerous to life or property calling for an emergency response has occurred or is about to occur; or

(4) makes a false report to the Department of Natural Resources concerning the condition of a dam or reservoir under AS 46.17.

* Sec. 2. AS 46 is amended by adding a new chapter to read:

CHAPTER 17. SUPERVISION OF SAFETY OF DAMS AND RESERVOIRS.

Sec. 46.17.010. PURPOSE. It is the purpose of this chapter to provide for the regulation, supervision, and periodic inspection by the commissioner of privately or state owned dams, reservoirs, and appurtenant works in order to ensure that the design, construction, enlargement, alteration, repair, maintenance, operation, and removal of dams and reservoirs is consistent with the protection of life and

property.

Sec. 46.17.020. ADMINISTRATION AND STAFFING. The supervision of the safety of dams or reservoirs is the responsibility of the commissioner. The commissioner shall employ a licensed and qualified engineer, experienced in the design and construction of dams and reservoirs, and other employees necessary for performing the duties outlined in this chapter. The commissioner may contract with engineering consultants not employed by the state when necessary to assist in the performance of its duties under this chapter.

Sec. 46.17.030. REGULATIONS AND ORDERS. The commissioner shall adopt regulations and issue orders necessary for carrying out the provisions of this chapter.

Sec. 46.17.040. APPROVAL REQUIRED. (a) Except in the performance of routine maintenance and operations not affecting structure safety, a person may not construct, enlarge, repair, alter, remove, maintain, operate or abandon a dam or reservoir without the approval of the commissioner.

amend #1 delete

(b) The commissioner shall adopt regulations under AS 46.17.030 to establish minimum safety standards for specified classes of low hazard dams up to 20 feet high, including mining dams. Dams in these classes constructed to the minimum standards do not require separate prior approval.

(c) The owner of a dam or reservoir that was constructed or was in operation before the effective date of this Act shall file an application with the commissioner for the approval of the dam or reservoir, in accordance with regulations adopted by the commissioner.

(d) Nothing in this chapter exempts an applicant under this section from the requirements of other statutes.

Sec. 46.17.050. INSPECTIONS. The commissioner shall inspect at

least once every five years every dam and reservoir subject to this chapter. [Upon receipt of a written complaint alleging that the person or property of the complainant is endangered by the construction, enlargement, repair, alteration, maintenance, or operation of a dam or reservoir, the commissioner shall physically inspect the dam or reservoir, unless the data, records, and inspection reports on file with the commissioner are adequate to determine that the complaint has no foundation.] #2

Sec. 46.17.060. ENTRY UPON PRIVATE PROPERTY. [In taking an action under this chapter the commissioner, after giving two weeks' written notice to the owner, may enter the dam or reservoir premises as necessary for inspection purposes.] If the commissioner has reason to believe the dam or reservoir may be unsafe or presents an imminent threat to life or property, the commissioner may enter the dam or reservoir premises without notice. #3

Sec. 46.17.070. DETERMINING DANGER. In determining whether a dam or reservoir or proposed dam or reservoir constitutes or would constitute a danger to life or property, the commissioner shall, at a minimum, consider the possibility that the structural integrity of the dam or reservoir might be endangered by overtopping, seepage, settlement, erosion, cracking, earth movement, earthquakes, or the failure of bulkheads, flashboards, gates, or conduits. If the commissioner determines that the dam or reservoir is unsafe, it shall order the owner to take action the commissioner considers necessary to ensure the protection of life and property.

Sec. 46.17.080. INJUNCTION AND DAMAGES. With the assistance of the attorney general, the commissioner may seek an injunction and damages in the enforcement of the commissioner's orders or the provisions of this chapter.

Sec. 46.17.090. JUDICIAL REVIEW. A final action of the commissioner under this chapter is subject to judicial review as provided in the Administrative Procedure Act, AS 44.62.

Sec. 46.17.100. VIOLATION OF THIS CHAPTER IS A MISDEMEANOR. A person who knowingly violates a provision of this chapter, or knowingly violates the terms of an approval, order, regulation, or requirement of the commissioner made under this chapter, or knowingly obstructs, hinders, or prevents the commissioner's agents or employees from performing duties under this chapter, is guilty of a class A misdemeanor; upon conviction, the person is punishable by imprisonment under AS 12.55.135(a), or by a fine of not more than $10,000, or by both. Each day that a violation continues constitutes a separate offense.

Sec. 46.17.110. OTHER GOVERNMENT AGENCIES. (a) A municipal corporation organized under AS 29 may not regulate, supervise, inspect, or provide for the regulation, supervision, or inspection of a dam or reservoir in this state, or provide for the construction, maintenance, operation, or removal or abandonment of them, or limit the size of a dam or reservoir or the amount of water that may be stored in them, if its action would conflict with the powers and duties vested in the commissioner. The commissioner may enter into cooperative agreements with municipal corporations and other state and federal agencies to effectuate the purpose of this chapter.

(b) This chapter does not apply to a federally owned or operated dam or reservoir.

(c) Nothing in this chapter affects the powers of the Department of Environmental Conservation or the Department of Fish and Game.

Sec. 46.17.120. ACTION AGAINST STATE FOR DAMAGES. A person may not bring an action against the state, the commissioner, or agents or

Move to 57 and other wording —

employees of the state, for the recovery of damages caused by the partial or total failure of a dam or reservoir, or by the operation of a dam or reservoir, or by an act or omission in connection with any of the following:

(1) approval of the construction of a dam or reservoir, or approval of flood-handling plans during or after construction;

(2) issuance or enforcement of orders relating to maintenance or operation of the dam or reservoir;

(3) control or regulation of the dam or reservoir;

(4) measures taken to protect against failure of the dam or reservoir during an emergency; or

(5) investigations or inspections authorized under this chapter.

Sec. 46.17.130. DUTIES OF OWNER. Nothing in this chapter relieves an owner of a dam or reservoir of the duties or liabilities incident to the ownership or operation of the dam or reservoir.

Sec. 46.17.900. DEFINITIONS. In this chapter, unless the context requires otherwise,

(1) "alterations" or "repairs" means only those alterations or repairs that may directly affect the safety of the dam or reservoir, as determined by the commissioner;

(2) "appurtenant works" includes structures such as spillways, either in a dam or separate from it; a reservoir and its rim; low level outlet works; and water conduits such as tunnels, pipelines, or penstocks, whether running through the dam or through its abutments;

(3) "dam" includes any artificial barrier and appurtenant works that may impound or divert water and (A) that has or will have an impounding capacity at maximum water storage elevation of 50 acre-

feet or more, or (B) that is or will be 10 feet or more in height measured from the lowest elevation at the downstream toe of the artificial barrier to the crest elevation of the barrier but excluding any spillway;

(4) "commissioner" means the commissioner of natural resources;

(5) "enlargement" means an alteration to an existing dam or reservoir that raises or is capable of raising the water storage elevation of the water, or that increases the quantity of water impounded by the dam or reservoir;

(6) "owner" means a person who owns, controls, operates, maintains, manages, or proposes to construct a dam or reservoir, and includes the following:

(A) the state and its agencies and political subdivisions;

(B) a public utility; and

(C) the appointed or authorized agents, employees, lessees, receivers or trustees of any owner;

(7) "person" has the meaning given in AS 01.10.060, and, in addition, includes the state and its agencies and political subdivisions;

(8) "reservoir" means a basin appurtenant to a dam that may impound water.

* Sec. 3. This Act takes effect immediately in accordance with AS 01.10.070(c).

RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James O. Smith
Signature of Camera Operator

11/7/89
Date

02-519 (REV 8/78)


SB
97

BILL FILE LOG

BILL # SB97

Need F/N & Position requested - Dept of Law - Roger

* Lisa Nelson testify

Position from Public Safety

3/13 Final Notes received Dept of Law &
Dept of Public Safety

3/19 Bill Passed out w/ Rodey amendment
CSSB 97 (Jud)

Original sponsor: Rules/Governor

IN THE SENATE BY THE JUDICIARY COMMITTEE

CS FOR SENATE BILL NO. 97 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to forfeiture of weapons used to commit a crime."

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

* Section 1. AS 12.36 is amended by adding new sections to read:

Sec. 12.36.050. REMISSION OF FORFEITED PROPERTY. (a) A claimant seeking remission of or remittance of the value of the claimant's interest in a weapon ordered forfeited under AS 12.55.015 is required to prove to the court by a preponderance of evidence that the claimant

(1) has a valid interest in the weapon, acquired in good faith;

(2) did not knowingly participate in the commission of the crime in which the weapon was used; and

(3) did not know or have reasonable cause to believe that the weapon was used or would be used to commit a crime.

(b) Upon a showing that a claimant is entitled to relief under (a) of this section, the order of the court shall provide that

(1) the weapon to which the claimant is entitled shall be delivered to the claimant within 60 days after the final disposition of the case; or

(2) if the claimant is entitled to remittance of some value less than the total value of the weapon, the claimant is entitled to the claimant's choice of either the value of the claimant's interest or, upon payment by the claimant of the difference in value, the weapon.

Sec. 12.36.060. DISPOSAL OF FORFEITED DEADLY WEAPONS. (a) A deadly weapon forfeited under AS 12.55.015, unless remitted under AS 12.36.050, shall be disposed of at the discretion of the commissioner of public safety. The commissioner of public safety shall dispose of all firearms suitable for sporting purposes by public auction. Those firearms suitable for law enforcement purposes, ballistics testing, or training may be retained by the Department of Public Safety. Firearms that are unsafe or unlawful may be destroyed.

(b) The Department of Public Safety shall adopt regulations necessary to carry out the provisions of this section.

* Sec. 2. AS 12.55.015(a) is amended to read:

(a) Except as limited by AS 12.55.125 - 12.55.175, the court, in imposing sentence on a defendant convicted of an offense, may singly or in combination

(1) impose a fine when authorized by law and as provided in AS 12.55.035;

(2) order the defendant to be placed on probation under conditions specified by the court which may include provision for active supervision;

(3) impose a definite term of periodic imprisonment;

(4) impose a definite term of continuous imprisonment;

(5) order the defendant to make restitution as provided in AS 12.55.045;

(6) order the defendant to carry out a continuous or periodic program of community work as provided in AS 12.55.055;

(7) suspend execution of all or a portion of the sentence imposed as provided in AS 12.55.080;

(8) suspend imposition of sentence as provided in AS 12.-55.085;

(9) order the forfeiture to the Department of Public Safety of any deadly weapon possessed or used by the defendant during the commission of the offense.

* Sec. 3. AS 12.55.015 is amended by adding a new subsection to read:

(e) In this section "deadly weapon" has the meaning given in AS 11.81.900.

CSSB97 (State Affairs): An Act relating to forfeiture of weapons used to commit a crime."

Amendment #1

Page 2, line 1:

after "weapons." insert (a)

Page 2, line 4:

delete "The commissioner of public safety may destroy the weapon or use the weapon for law enforcement, ballistics testing, or training purposes." and insert "The commissioner of public safety shall dispose of all weapons suitable for sporting purposes by public auction. However, those weapons suitable for law enforcement purposes, ballistics testing or training may be retained by the department of public safety. Those weapons which are unsafe or unlawful may be destroyed."

Page 2, line 6:

add new subsection to read "(b) The Department of Public Safety shall adopt regulations necessary to carry out the provisions of this section."

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 24, 1985

The Honorable Don Bennett
President of the Senate
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Senator Bennett:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that will authorize a court to order the forfeiture to the Department of Public Safety (DPS) of a deadly weapon possessed or used by a defendant during the commission of a crime. As used in the bill, "deadly weapon" means any firearm (including a pistol, revolver, rifle, or shotgun) or anything designed for and capable of causing death or serious physical injury, including a knife, an axe, a club, metal knuckles, or an explosive.

Although current law authorizes the forfeiture of weapons used to commit fish and game offenses (AS 16.05.195) or offenses involving controlled substances (AS 17.30.110), there is no statutory provision that expressly allows a court to order, as part of a defendant's sentence, the forfeiture of a weapon used to commit crimes such as assault, robbery, or murder. AS 11.61.200 prohibits a felon, during the five years immediately following his "unconditional discharge" (i.e., release from custody or parole or probation) for a felony, from knowingly possessing "a firearm capable of being concealed on his person," and AS 12.55.080 gives a court broad powers to determine and impose reasonable probation conditions (such as no possession of firearms during the period of probation); however, neither of these statutes specifically authorizes a court to order the forfeiture of a weapon used to commit a crime.

To address this surprising omission in existing law, sec. 1 of this bill adds a new paragraph to the general sentencing provisions in AS 12.55.015(a) to authorize a court to order the forfeiture of a weapon as part of a defendant's sentence following conviction. Forfeiture would not required in every case, but could be imposed at the court's discretion.

In sec. 2, the bill allows the remission of forfeited weapons to innocent third parties who prove an ownership interest in the weapon. Also, under sec. 2 of the bill, forfeited weapons must either be destroyed or used by DPS for training, ballistics, or other law enforcement purpose.

Passage of this bill will authorize our courts to remove from the hands of a convicted criminal a weapon used to commit a crime. This will at least prevent the convicted person from using that weapon to commit another crime in the future. I urge your prompt and favorable action on this bill.

Sincerely,

Bill Sheffield

Bill Sheffield
Governor

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

REQUEST

Bill/Resolution No.: SB 97

Title: "...forfeiture of weapons used to comit a crime..."

Sponsor: Rules Committee

Requestor: Senate State Affairs

Date of Request: 2-6-85

FISCAL DETAIL

Agency Affected: Public Safety

Program Category Affected: Administration of Justice

BRU, Program or Subprogram(s) Affected: Alaska State Troopers

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER						
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

See attached analysis.

Prepared By: Francis C. Allan F.C.A. Phone: 269-5691

Division: Alaska State Troopers Date: 2/4/85

Approved by Commissioner: R. J. Sundberg Date: 2-6-85

Agency: Department of Public Safety

Distribution (by Agency preparing fiscal note):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

7/1/84

DEPARTMENT OF PUBLIC SAFETY

POSITION PAPER - SB 97

Support

February 4, 1985

SB 97 - "An Act relating to forfeiture of weapons used to commit a crime.

This legislation adds a new paragraph to the general sentencing provisions statute which would authorize a court to order the forfeiture, as part of a defendant's sentence upon conviction, of a deadly weapon which was possessed or used by a defendant during the commission of crime.

It is common to encounter persons who are convicted of violent crimes repeating similar offenses. By being able to hinder such individuals from obtaining the "tools" to commit such crimes, an added degree of safety for the public can thus be provided.

Law enforcement agencies often spend a considerable effort returning knives, clubs, axes, etc. from evidence storage back to individuals who have committed violent crimes. Certainly this effort can be better expended if the weapons can be disposed of at the discretion of the State. Some of the weapons will be used by the Alaska State Troopers Scientific Crime Detection Laboratory for ballistics purposes.

Robert J. Sundberg
Commissioner

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

REQUEST

Bill/Resolution No.: CSSB97(SA)

Title: "An Act relating to forfeiture of weapons used to commit a crime."

Sponsor: Senate Rules/Governor

Requestor: Governor's Ofc./OMB

Date of Request: 12/18/84

FISCAL DETAIL

Agency Affected: Department of Law

Program Category Affected: Administration of Justice

BRU, Program or Subprogram(s) Affected: Prosecution

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

This bill amends AS 12.55.015(a) to give the court the discretionary power to order the forfeiture of a weapon as part of a defendant's sentence following conviction. Although prosecutors will have the added responsibility of advocating forfeiture, when appropriate, this advocacy duty can be accomplished without additional expense.

Prepared By: Richard L. Pegues Richard I. Pegues, Director Phone: 465-3672

Division: Administrative Services Date: 12/19/84

Approved by Commissioner: Richard L. Pegues/Cox Norman C. Gorsuch Date: 12/19/84

Agency: Department of Law

Distribution (by Agency preparing fiscal note):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

7/1/84

DEPARTMENT OF PUBLIC SAFETY

POSITION PAPER -CSSB 97(SA)

Support

March 1, 1985

CSSB 97(SA) - "An Act relating to forfeiture of weapons used to commit a crime.

This legislation adds a new paragraph to the general sentencing provisions statute which would authorize a court to order the forfeiture, as part of a defendant's sentence upon conviction, of a deadly weapon which was possessed or used by a defendant during the commission of crime.

It is common to encounter persons who are convicted of violent crimes repeating similar offenses. By being able to hinder such individuals from obtaining the "tools" to commit such crimes, an added degree of safety for the public can thus be provided.

Law enforcement agencies often spend a considerable effort returning knives, clubs, axes, etc. from evidence storage back to individuals who have committed violent crimes. Certainly this effort can be better expended if the weapons can be disposed of at the discretion of the State. Some of the weapons will be used by the Alaska State Troopers Scientific Crime Detection Laboratory for ballistics purposes.

Robert J. Sundberg
Commissioner

Forfeiture of Weapons Used in a Crime

SENATE BILL NO. 97, (see page 116). Reported back to the Senate on February 25 by State Affairs with a majority of the committee recommending it be replaced with a CS and that it do pass. Concurring: Abood (Chairman), DeVries, Vic Fischer and Kelly. Ray had no recommendation. To Judiciary.

The original version, in Sec. 2, added new sections relating to remission of forfeited property to AS 33.30 (Prison Facilities and Prisoners). Under the State Affairs version, these sections, with one change, are added to AS 12.36 (Disposition of Recovered or Seized Property). Change is as follows:

The State Affairs version requires the state to return a weapon "within 60 days after the final disposition of the case," if it is proven that the person is entitled to keep a forfeited weapon. Under the original, the state would have been required to return the weapon immediately.

Makes a drafting change to the amendment to AS 12.55.015--no change in effect of amendment (Sec. 1 of original).

Child Care Centers (in public buildings)

SENATE BILL NO. 165, (see page 291). Reported back to the Senate on March 1 by Health, Education & Social Services with the majority signing do pass. Concurring: Fahrenkamp (Chmn.), Sturgulewski and Josephson. Paul Fischer signed "do not pass without amendments." DeVries signed "no recommendation." To Finance.

Political Contributions by Minors

SENATE BILL NO. 173, (see page 294). Reported back to the Senate on February 26 by State Affairs with the committee recommending it be replaced with a State Affairs CS and that it do pass. Concurring: Abood (Chmn.), DeVries, Vic Fischer and Kelly. To Finance.

The State Affairs substitutes "individual under the age of 18" for "individual under the age of majority" throughout the bill.

Disaster Relief for St. Paul

SENATE BILL NO. 186, (see page 296). Reported back to the Senate on February 28 by State Affairs with the committee recommending it do pass. Concurring: Abood (Chmn.), Kelly, Vic Fischer and DeVries. To Finance.

Fairbanks Annexation (disapproval)

SENATE JOINT RESOLUTION NO. 17, (see page 299). Reported back to the Senate on March 1 by Community & Regional Affairs with the committee recommending as follows: Sen. DeVries (Chairman), and Sen.Coghill signed "do pass." Sens. Sturgulewski, Ferguson and Vic Fischer signed "do not pass." To Rules.

BILLS PASSED IN THE SENATE

Sewer System Failure (Haines)

CS FOR HOUSE BILL NO. 143 (FINANCE), (see pages 183; 249; 267; 287). Reported back to the Senate on February 26 by Finance with the committee recommending it do pass. Concurring: Faiks (Co-Chairman), Kerttula, Halford, Paul Fischer,

Introduced: 1/25/85
Referred: State Affairs
and Judiciary

IN THE SENATE

BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

SENATE BILL NO. 97

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to forfeiture of weapons used to commit a crime."

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

* Section 1. AS 12.55.015(a) is amended to read:

(a) Except as limited by AS 12.55.125 -- 12.55.175, the court, in imposing sentence on a defendant convicted of an offense, may singly or in combination

(1) impose a fine when authorized by law and as provided in AS 12.55.035;

(2) order the defendant to be placed on probation under conditions specified by the court which may include provision for active supervision;

(3) impose a definite term of periodic imprisonment;

(4) impose a definite term of continuous imprisonment;

(5) order the defendant to make restitution as provided in AS 12.55.045;

(6) order the defendant to carry out a continuous or periodic program of community work as provided in AS 12.55.055;

(7) suspend execution of all or a portion of the sentence imposed as provided in AS 12.55.080;

(8) suspend imposition of sentence as provided in AS 12.-55.085;

(9) order the forfeiture to the Department of Public Safety of any deadly weapon possessed or used by the defendant during the

commission of the offense; as used in this paragraph, deadly weapon means the same as in AS 11.81.900.

* Sec. 2. AS 33.30 is amended by adding new sections to read:

Sec. 33.30.295. REMISSION OF FORFEITED PROPERTY. (a) A claimant seeking remission of or remittance of the value of the claimant's interest in a weapon ordered forfeited under AS 12.55.015(a)(9) must prove to the court by a preponderance of evidence that the claimant

(1) has a valid interest in the weapon, acquired in good faith;

(2) did not knowingly participate in the commission of the crime in which the weapon was used; and

(3) did not know or have reasonable cause to believe that the weapon has been or would be used to commit a crime.

(b) Upon a showing that a claimant is entitled to relief under (a) of this section, the order of the court must provide that

(1) if the claimant is entitled to the weapon, it must be delivered to the claimant immediately; or

(2) if the claimant is entitled to remittance of some value less than the total value of the weapon, the claimant is entitled, at the claimant's choice, to receive either the value of the claimant's interest or, upon payment by the claimant of the difference in value, the weapon.

Sec. 33.30.297. DISPOSAL OF FORFEITED DEADLY WEAPONS. A deadly weapon forfeited under AS 12.55.015(a)(9), unless remitted under AS 33.30.295, must be disposed of at the discretion of the commissioner of public safety. The commissioner of public safety may destroy the weapon or use the weapon for law enforcement, ballistics testing, or training purposes.

Introduced: 1/25/85
Referred: State Affairs
and Judiciary

IN THE SENATE

BY THE RULES COMMITTEE BY REQUEST OF THE GOVERNOR

SENATE BILL NO. 97

IN THE LEGISLATURE OF THE STATE OF ALASKA

FOURTEENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to forfeiture of weapons used to commit a crime."

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

* Section 1. AS 12.55.015(a) is amended to read:

(a) Except as limited by AS 12.55.125 -- 12.55.175, the court, in imposing sentence on a defendant convicted of an offense, may singly or in combination

(1) impose a fine when authorized by law and as provided in AS 12.55.035;

(2) order the defendant to be placed on probation under conditions specified by the court which may include provision for active supervision;

(3) impose a definite term of periodic imprisonment;

(4) impose a definite term of continuous imprisonment;

(5) order the defendant to make restitution as provided in AS 12.55.045;

(6) order the defendant to carry out a continuous or periodic program of community work as provided in AS 12.55.055;

(7) suspend execution of all or a portion of the sentence imposed as provided in AS 12.55.080;

(8) suspend imposition of sentence as provided in AS 12.55.085;

(9) order the forfeiture to the Department of Public Safety of any deadly weapon possessed or used by the defendant during the

commission of the offense; as used in this paragraph, deadly weapon means the same as in AS 11.81.900.

* Sec. 2. AS ~~33.30~~ 12.36 is amended by adding new sections to read:

Chapter 36. Disposition of Recovered[OR], Seized, or Forfeited Property

Sec. ~~33.30.295~~ 12.36.050. REMISSION OF FORFEITED PROPERTY. (a) A claimant seeking remission of or remittance of the value of the claimant's interest in a weapon ordered forfeited under AS 12.55.015(a)(9) must prove to the court by a preponderance of evidence that the claimant

(1) has a valid interest in the weapon, acquired in good faith;

(2) did not knowingly participate in the commission of the crime in which the weapon was used; and

(3) did not know or have reasonable cause to believe that the weapon has been or would be used to commit a crime.

(b) Upon a showing that a claimant is entitled to relief under (a) of this section, the order of the court must provide that

(1) if the claimant is entitled to the weapon, it must be delivered to the claimant ~~immediately, if~~ within 60 days after the final disposition of the case.

(2) if the claimant is entitled to remittance of some value less than the total value of the weapon, the claimant is entitled, at the claimant's choice, to receive either the value of the claimant's interest or, upon payment by the claimant of the difference in value, the weapon.

Sec. ~~33.30.297~~ 12.36.060. DISPOSAL OF FORFEITED DEADLY WEAPONS. A deadly weapon forfeited under AS 12.55.015(a)(9), unless remitted under AS ~~33.30.295~~ 12.36.050, must be disposed of at the discretion of the commissioner of public safety. The commissioner of public safety may destroy the weapon or use the weapon for law enforcement, ballistics testing, or training purposes.

Revision Date:

REQUEST

Bill/~~Resolution No.~~: SB 97

Title: "An Act relating to forfeiture of weapons used to commit a crime."

Sponsor: Senate Rules/Governor

Requestor: Governor's Ofc./OMB

Date of Request: 12/18/84

FISCAL DETAIL

Agency Affected: Department of Law

Program Category Affected: Administration of Justice

BRU, Program or Subprogram(s) Affected: Prosecution

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

This bill amends AS 12.55.015(a) to give the court the discretionary power to order the forfeiture of a weapon as part of a defendant's sentence following conviction. Although prosecutors will have the added responsibility of advocating forfeiture, when appropriate, this advocacy duty can be accomplished without additional expense.

Prepared By: Richard I. Pegues, Director (Richard I. Pegues) Phone: 465-3672

Division: Administrative Services Date: 12/19/84

Approved by Commissioner: Norman C. Gorsuch (Richard I. Pegues/COR) Date: 12/19/84

Agency: Department of Law

Distribution (by Agency preparing fiscal note):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

7/1/84

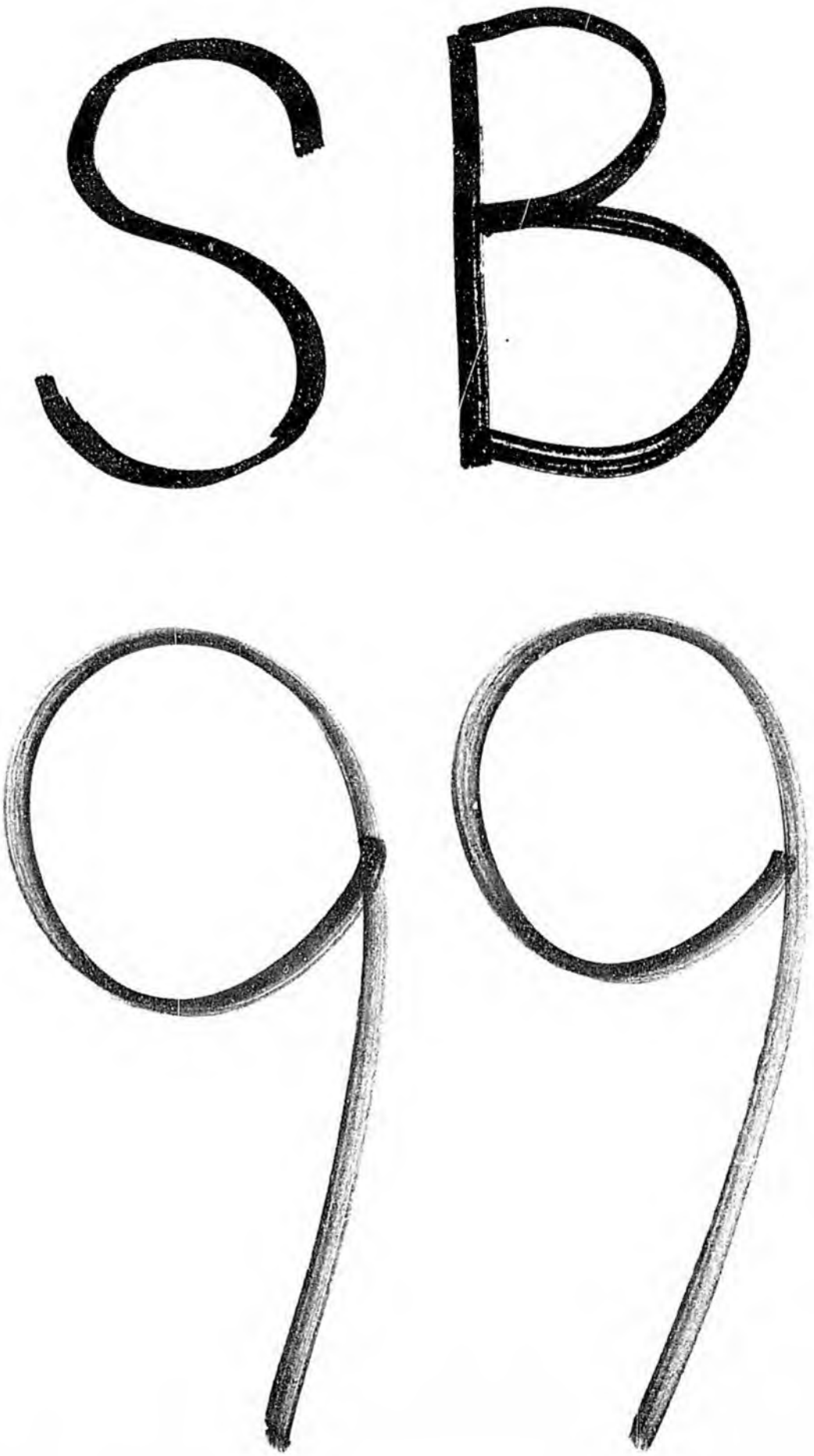
RECORDS CERTIFICATION

I, the undersigned, an employee of the State of Alaska, do hereby certify that the microfilm images on this microform are accurate reproductions of the original records of the State of Alaska as accumulated during the regular course of business, and that it is the established policy and practice of this State to microfilm its records and to dispose of the original records after microfilm reproductions have been made.

James O. Smith
Signature of Camera Operator

11/7/89
Date

02-519 (REV 8/78)


SB
99

BILL FILE LOG

BILL # SB 99

1/25 Original bill - Fiscal Note + Transmittal letter

2/4 ~~Do~~ 1st hearing - held over Gayle Horetski testified - will send further backup

2/18 Back-up received from Horetski

3/15 Per Roger Gayle Horetski will testify.

3/19 Bill passed out.

BILL SHEFFIELD
GOVERNOR

Ch 99

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 25, 1985

The Honorable Don Bennett
President of the Senate
Alaska State Legislature
Pouch V
Juneau, AK 99811

Dear Senator Bennett:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill that will broaden the state's right to appeal in criminal cases. This right was severely restricted by a recent decision of the Alaska Supreme Court, and the Legislative Affairs Agency has recommended legislative action in response to the court decision.

AS 22.07.020 defines the jurisdiction of the state court of appeals; AS 22.10.020 defines the jurisdiction of the superior court. Both statutes provide that the state may appeal from a final decision in a criminal case only on two grounds: 1) to appeal a sentence on the ground that it is too lenient, or 2) to test the sufficiency of the indictment or information. Criminal defendants in the past have argued that to "test the sufficiency" of the indictment or information means to determine its efficacy as a charging document. I.e., does it state an offense, and was the evidence that was submitted to the grand jury adequate? See State v. Michel, 634 P.2d 383, 384 (Alaska App. 1981). Defendants have argued that the statutory language forecloses appeal by the state if the case was dismissed for any other reason, such as an erroneous ruling by the trial court on a point of law not related to the sufficiency of the indictment.

For several years, the state appellate courts refused to construe the statutory language so narrowly, and have allowed the state to appeal a trial court order that dismissed a criminal indictment for any reason, unless retrial would be barred by the double jeopardy provisions in the state and federal constitutions. See State v. Michel, 634 P.2d 383 (Alaska App. 1981), and State v. Shelton, 368 P.2d 817 (Alaska 1962).

This long-standing interpretation was most recently reaffirmed by the Alaska Court of Appeals in State v. Kott, 636 P.2d 622 (Alaska App. 1981). In that case, the trial judge dismissed criminal charges against Kott because Kott's co-defendant had been acquitted at an earlier trial. The court of appeals allowed the state to appeal the dismissal, and reversed the lower court ruling. The appellate court held that the doctrine of collateral estoppel did not prevent trial of Kott after his co-defendant had been acquitted.

The court of appeals decision in the Kott case was appealed to the state supreme court. In an apparent departure from earlier interpretations (see State v. Shelton, 368 P.2d 817 (Alaska 1962)), the supreme court reversed the court of appeals decision regarding the state's ability to appeal the trial court's ruling, although it agreed that the trial court's original order of dismissal had been wrong. Kott v. State, 678 P.2d 386 (Alaska 1984). The supreme court noted that the state might be able to obtain review through filing a "petition" with the appellate court. Acceptance of such a petition is discretionary; there is no "right" to obtain appellate review. Id. at 390-1.

Like all human institutions, our criminal justice system is not perfect. Judges, like the rest of us, sometimes make mistakes. If a mistake is made in favor of the state, the defendant can appeal. A conviction that was wrongfully obtained will be reversed on appeal. That is as it should be; basic justice requires no less. But, if a judge makes a mistake in favor of the defendant, the supreme court's holding in Kott may well prevent appellate review of the erroneous decision. Constitutional prohibitions against double jeopardy do not require that such an erroneous decision stand uncorrected, and our statutes should be changed to allow the state to appeal in these circumstances.

The Legislative Affairs Agency, during its statutorily required annual review of published court decisions, concluded that the supreme court's decision in the Kott case did not appear to conform with the legislative intent behind AS 22.07.020, and recommended legislative review of the statute. See Legislative Affairs Agency, A Report To The Thirteenth State Legislature (October 1984) at 54-5. The language of the proposed amendments in this bill is based upon a comparable provision in federal law:

18 U.S.C.A. sec. 3731. The bill would, in essence, return Alaska's law to the position it was in before the recent supreme court ruling in Kott.

Section 7 of the bill explicitly repeals Rule 202(c) of the Alaska Rules of Appellate Procedure. The language of Rule 202(c) merely tracks the language of the existing statutes. Since Rule 202(c) appears to merely recognize and repeat the language of the statute in existence when the rule was adopted, it may be argued that amendment of the underlying statute would be sufficient, and that a formal change in the court rule is not necessary. To avoid unnecessary litigation on this point, however, the better practice would be to specifically repeal Rule 202(c). This would, of course, require a two-thirds vote in each house.

In order to maintain a criminal justice system that allows for the fullest review of erroneous legal decisions, whether they favor the defendant or the state, I urge you to pass this bill.

Sincerely,

Bill Sheffield
Governor

STATE OF ALASKA 1985 LEGISLATIVE SESSION

FISCAL NOTE

Revision Date:

REQUEST

Bill/~~Resolution~~ No.: SB 99

Title: "An Act relating to the state's right to appeal in crim. cases.."

Sponsor: By Request of the Governor

Requestor: Governor's Ofc./OMB

Date of Request: 12/18/84

FISCAL DETAIL

Agency Affected: Department of Law

Program Category Affected: Administration of Justice

BRU, Program or Subprogram(s) Affected: Prosecution

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 85	FY 86	FY 87	FY 88	FY 89	FY 90
OPERATING						
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 SUPPLIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS						
800 MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: Attach a separate page if necessary

This bill amends Title 22 to broaden the state's right of appeal from a trial court's dismissal of a criminal prosecution. The amendment provided by that bill returns the law to how it was interpreted prior to the Alaska Supreme Court's recent decision in Kott v. State. Consequently, there will not be a fiscal impact.

Richard L. Pegues

Prepared By: Richard I. Pegues, Director Phone: 465-3672

Division: Administrative Services Date: 12/19/84

Richard L. Pegues/For

Approved by Commissioner: Norman C. Gorsuch Date: 12/19/84

Agency: Department of Law

Distribution (by Agency preparing fiscal note):

Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

7/1/84

MEMORANDUM State of Alaska

TO: Sen. Rodey
Chair, Senate
Judic. Comm.

DATE: Feb. 18, 1985

FILE NO:

TELEPHONE NO: X3428

FROM: Dayle Hoetzki
Asst. Atty. Gen.

SUBJECT: State's Right to Appeal in Crim. Cases (SB 99)

You requested last Thursday, at the Judic. Comm. meeting on SB 99, I am sending you copies of Alaska cases regarding interpretation of statutes giving the State the right to appeal from dismissals of criminal cases. The cases show the consistent interpretation given these provisions up to the supreme court's decision in Kott v. State in Jan. 1984.

I've also included a copy of the federal statute we used as a model.

Please give me a call if you have any questions.

STATE of Alaska, Appellant,
v.
Frank Matthew SHELTON, Appellee.
No. 59.

Supreme Court of Alaska.
Jan. 11, 1962.
Rehearing Denied Feb. 28, 1962.

Prosecution for second degree murder. At the close of the State's case, the defendant moved to dismiss the indictment on the ground that it was based on perjured testimony. The Superior Court, State of Alaska, Fourth Judicial District, James A. von der Heydt, J., granted the motion, and the State appealed. The Supreme Court, Dimond, J., held that statement should not have been dismissed as based on perjured testimony even though there was variance in grand jury testimony and trial testimony of decedent's widow as to position of decedent's body when the first two shots were fired, where four other witnesses had been examined by grand jury.

Order dismissing indictment reversed and case remanded for new trial.

1. Indictment and Information ⇐144

Second degree murder indictment should not have been dismissed as based on perjured testimony even though there was variance in grand jury testimony and trial testimony of decedent's widow as to position of decedent's body when the first two shots were fired, where four other witnesses had been examined by grand jury. Const. art. 1, § 8; Rules of Criminal Procedure, rule 7(c).

2. Grand Jury ⇐1

A vital function of grand jury is protection of innocent against oppression and unjust prosecution.

3. Indictment and Information ⇐10.2(6)

There is a presumption that grand jury acted on sufficient evidence when it returned indictment.

4. Criminal Law ⇐1024(2)

Dismissal of indictment as based on perjured testimony raised issue of "sufficiency" of indictment and state could appeal and Supreme Court could review the matter. Laws 1959, c. 50, § 1; A.C.L.A.1949, § 66-9-14.

See publication Words and Phrases, for other judicial constructions and definitions of "Sufficient".

5. Indictment and Information ⇐17

The word "sufficient" in statute setting forth when an indictment is sufficient denotes the concept of adequacy and adaptation to a desired end. A.C.L.A.1949, § 66-9-14.

6. Indictment and Information ⇐1, 17

The purpose of indictment is to require defendant to stand trial for criminal offense with which he is charged, and if indictment is not adequate to answer such purpose it is insufficient, regardless of the fact that it may meet all the formal statutory requisites and have all the appearances of validity. A.C.L.A.1949, § 66-9-14.

7. Criminal Law ⇐1024(2)

When an indictment is dismissed for any reason, the question of its sufficiency may create an issue, and the Supreme Court has the power of review. A.C.L.A.1949, § 66-9-14.

William Taylor, Dist. Atty., Fairbanks, Robert C. Erwin, Dist. Atty, Nome, for appellant.

Charles E. Cole, Fairbanks, for appellee.

Before NESBETT, C. J., and DIMOND and AREND, JJ.

DIMOND, Justice.

[1] Shelton was indicted and went to trial on a charge of second degree murder. At the close of the state's case he moved for a judgment of acquittal on the ground that the evidence was insufficient to sustain a conviction. The motion was denied. He then moved to dismiss the indictment on the ground that it was based on perjured

testimony. This motion was granted, the indictment was dismissed, and the state has appealed.

What has been characterized as "perjured testimony" consisted of inconsistent statements made by Mrs. Joan Nokes, widow of the deceased. Before the grand jury she had testified that Shelton had hit her husband and knocked him down, and then killed him by shooting him four times while he was flat on his back. At the trial she testified that the first two shots were fired, not while her husband was on his back, but while he was on his hands and knees attempting to regain his balance after having been knocked down. Thus, the variance in her testimony had to do only with the position of her husband's body when the first two shots were fired. The witness admitted the inconsistency at the trial. She stated that the first version of the shooting was the one she told the police because it was all she remembered at the time, and thought it was correct. She recalled it was incorrect at the time she appeared before the grand jury, but was reluctant to change her story for fear that they would think she was lying.

The Alaska constitution provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, * * *."[1] This language is identical with a like provision in the Fifth Amendment to the federal constitution. In 1956 the Supreme Court of the United States said that "Neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act", and that "An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits."[2]

That language, literally applied to this case, would mean that the judge should not have dismissed the indictment—there being no showing that the grand jury was not legally qualified nor that it was biased. But the situation here is not apposite to that in Costello v. United States. There the court was considering the single question of whether a defendant should be required to stand trial and a conviction be sustained where only hearsay evidence was presented to the grand jury which indicted him.[3] Here we are considering the question of whether a defendant must stand trial when one of five witnesses, who testified before the grand jury and implicated the defendant in the criminal event, testified at the trial somewhat at variance with the testimony she gave when before the grand jury. The issue here is one of sufficiency of the evidence, and not as in Costello, that of competency.

[2] The state relies heavily on the Costello decision. But the broad declaration made in that case, not considered in relation to the factual situation there presented, would appear to preclude the dismissal of an indictment even where it appeared that "no evidence had been offered that rationally established the facts"[4], or that the indictment was returned "substantially upon evidence which was untrustworthy".[5] We would have serious misgivings about concurring in such a result; for in the extreme and yet conceivable situation it could mean that a defendant would be obliged to stand the expense and humiliation of a public trial where the grand jury had acted either on no evidence at all or

1. Alaska Const. art. I, § 8.
2. Costello v. United States, 350 U.S. 359, 362–363, 76 S.Ct. 406, 408, 100 L.Ed. 397, 401–403 (1956).
3. Costello v. United States, supra note 2, at 359, 76 S.Ct. 406, 409, (100 L.Ed. at 400.).
4. Judge Learned Hand wrote the opinion in the Costello case when it was decided by the United States Court of Appeals for the Second Circuit. He said: "We should be the first to agree that, if it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed; because then the grand jury would have in substance abdicated." United States v. Costello, 221 F.2d 668, 677 (2d Cir. 1955).
5. Note, 62 Harv.L.Rev. 111, 115 (1948).

solely on the basis of evidence that would not support a guilty verdict after trial.[6] This would rob the constitutional right [7] of much of its protective value [8], and would not be in accord with what we have stated to be a vital function of the grand jury—the protection of the innocent against oppression and unjust prosecution.[9]

In this case, however, there is no need to pass final judgment on whether to follow the broad rule suggested by the Supreme Court in Costello. Here it has not been shown that the grand jury did not have substantial or rationally persuasive evidence upon which to base its indictment. The only portion of Mrs. Nokes' testimony which conflicts with her story to the grand jury concerns the position of her husband's body when Shelton fired the shots. The question of which narrative was the correct one was a matter for determination at the trial of the action.[10] We cannot say if the grand jury had heard the later version of the event that it would not have been reasonably persuaded to indict Shelton for second degree murder.

[3] Moreover, the indictment gave the names of four other witnesses who were examined before the grand jury.[11] Each of those persons gave testimony at the trial during the presentation of the state's case. Each was cross-examined by Shelton's counsel, but no attempt was made to ascertain what these witnesses had said when they appeared before the grand jury. We cannot speculate that the testimony they gave there was not sufficient, even apart from Mrs. Nokes' narrative, to justify the grand jury's action. There is a presumption that it acted on sufficient evidence, and Shelton has not sustained his burden of showing that it did not.[12] The indictment should not have been dismissed.

[4] Shelton also questions our right to review this matter, relying upon a law which precludes the state from appealing in criminal cases "except to test the sufficiency of the indictment or information." [13] He argues that the sufficiency of an indictment is to be determined by examination of the instrument itself, that the only tests of sufficiency are those provided by statute [14],

6. See Judge Frank's concurring opinion in United States v. Costello, supra note 4, at 679.

7. Alaska Const. art. I, § 8, supra note 1.

8. See concurring opinion of Justice Burton in Costello v. United States, 350 U.S. 359, 364, 76 S.Ct. 406, 100 L.Ed. 397, 404 (1956).

9. Alaska Grand Jury Handbook, pp. 1–2.

10. United States v. Brandt, 139 F.Supp. 367, 372 (N.D.Ohio 1955), rev'd on other grounds, 256 F.2d 79 (6th Cir. 1958).

11. This was in accordance with Crim.R. 7(c) which requires that "When an indictment is found the names of all witnesses examined before the grand jury must be inserted at the foot of the indictment, or endorsed thereon, before it is presented to the court."

12. United States v. Weber, 197 F.2d 237, 238 (2d Cir. 1952), cert. denied, 344 U.S. 834, 73 S.Ct. 42, 97 L.Ed. 649 (1952); Carrado v. United States, 210 F.2d 712, 717–718 (D.C.Cir.1953), cert. denied, Atkins v. United States, 347 U.S. 1018, 74 S.Ct. 874, 98 L.Ed. 1140 (1954); United States v. Nunan, 236 F.2d 576, 594 (2d Cir. 1956), cert. denied 353 U.S. 912, 77 S.Ct. 661, 1 L.Ed.2d 665 (1957).

13. S.L.A.1959, ch. 50, § 1.

14. Section 66-9-14 A.C.L.A.1949 provides:
"When indictment sufficient. That the indictment is sufficient if it can be understood therefrom:
"First. That it is entitled in a court having authority to receive it, though the name of the court be not accurately stated;
"Second. That it was found by a grand jury of the political division in which the court was held;
"Third. That the defendant is named, or if his name can not be discovered, that he is described by a fictitious name, with the statement that his real name is to the jury unknown;
"Fourth. That the crime was committed within the jurisdiction of the court;
"Fifth. That the crime was committed at some time prior to the finding of the indictment, and within the time limited by law for the commencement of an action therefor;
"Sixth. That the act or omission charged as the crime is clearly and dis-

and that if the indictment meets the statutory requirements, there is no room for appellate review when it is dismissed for any other reason.

[5-7] The word "sufficient" has a larger meaning than that. It denotes the concept of adequacy and adaptation to a desired end.[15] An indictment has a purpose—to require a defendant to stand trial for a criminal offense with which he is charged. If it is not adequate to answer the purpose for which it is intended, then it is insufficient, regardless of the fact that it may meet all the formal statutory requisites and have all the appearances of validity. When an indictment is dismissed for any reason, the question of its sufficiency may create an issue, and this court has the power of review.[16]

The order dismissing the indictment is reversed, and the case is remanded for a new trial.

AREND, Justice, concurs in the result.

tinctly set forth in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended;

"Seventh. That the act or omission charged as the crime is stated with such a degree of certainty as to enable the court to pronounce judgment, upon a conviction, according to the right of the case."

15. Galveston, H. & S. A. Ry. Co. v. Enderle, 170 S.W. 276, 277 (Tex.Civ.App. 1914); Webster, New International Dictionary (unabr.) at 2520 (2d ed. 1960).

16. State v. Linn, No. 122, 363 P.2d 301 (Alaska 1961).

warrant is executed without unreasonable delay.[5]

[3] Statutes of limitation serve to encourage promptness in the prosecution of actions and thus avoid the injustice which may result from the prosecution of stale claims. *Haakanson v. Wakefield Seafoods, Inc.*, 600 P.2d 1087 (Alaska 1979). We fail to see how permitting a bench warrant for failure to appear to stop the running of the limitation period is inconsistent with this general underlying policy. We do not believe that requiring the state to file a complaint for failure to appear and requiring the issuance of a second warrant would serve any useful purpose. We have concluded that there are sufficient safeguards provided in the statutes since the statute of limitations is only tolled for a prosecution based upon the conduct for which a warrant is issued and since the execution of the warrant may not be unreasonably delayed. We therefore find that the running of the statute of limitations was tolled for at least the one year, ten months, and five days necessary to bring prosecution of the offense of failure to appear within the five-year period allowed by the statute.

Accordingly, the judgment of the superior court is AFFIRMED.

STATE of Alaska, Appellant,

v.

Miguel MICHEL, Appellee.

No. 5381.

Court of Appeals of Alaska.

Oct. 8, 1981.

Defendant was indicted for crime of assault with a dangerous weapon. The Superior Court, Third Judicial District, Kodiak, Roy H. Madsen, J., granted mistrial at defendant's request, and entered order dismissing indictment and barring retrial, and State appealed. The Court of Appeals, Singleton, J., held that: (1) State may appeal any adverse final judgment of trial court in criminal action dismissing an indictment for any reason unless retrial would be barred by double jeopardy clauses of State or Federal Constitution, and (2) since it was not clear whether court found prosecutorial misconduct to be merely negligent, grossly negligent or intentional, case had to be remanded for further findings of fact and conclusions of law on double jeopardy issue.

Vacated and remanded.

1. Criminal Law ⇐1024(3)

State may appeal any adverse final judgment of a trial court in a criminal action dismissing an indictment for any reason unless retrial would be barred by the double jeopardy clauses of the State or Federal Constitution. U.S.C.A.Const. Amends. 5, 14; Const. Art. 1, § 9; AS 22.05.010, 22.07.020(d)(2).

2. Criminal Law ⇐1181

Where trial court, in its written decision dismissing indictment, found that mistrial was result of "prejudicial and prosecutorial misconduct" barring retrial, but it was not clear whether court found this conduct to be merely negligent, grossly negligent, or intentional, case had to be remanded for further findings of fact and conclusions of law on double jeopardy issue to determine whether State could appeal. AS 22.07.020(d)(2); U.S.C.A.Const. Amends. 5, 14; Const. Art. 1, § 9.

3. Indictment and Information ⇐144.2

Whenever a judge feels that dismissal of indictment is required, under circum-

5. The trial court found that there was a reasonable basis for delay in executing the warrant to toll the statute of limitations "for a period of at least the one year, ten months and five days necessary to bring prosecution of the offense charged herein within the period allowed by the statute of limitations." This finding has not been challenged on appeal.

stances not determining guilt or innocence, he should make explicit findings of fact and conclusions of law to explain his decision to parties and public and to enable intelligent review of case. AS 22.05.010, 22.07.020(d)(2).

W. H. Hawley, Jr., Asst. Atty. Gen., Anchorage, and Wilson L. Condon, Atty. Gen., Juneau, for appellant.

James G. Robinson and Joel H. Bolger, Alaska Public Defender Agency, Kodiak, and Brian Shortell, Public Defender, Anchorage, fo appellee.

Before BRYNER, C. J., and COATS and SINGLETON, JJ.

OPINION

SINGLETON, Judge.

Miguel Michel was indicted for the crime of assault with a dangerous weapon (former AS 11.15.220). The trial court granted a mistrial at defendant's request and, after hearing argument from the parties, found prosecutorial prejudicial misconduct and entered an order dismissing the indictment and barring retrial. The state has appealed.

The relevant facts are few. During the course of trial, while cross-examining defendant's wife, who was a state's witness, counsel for the state obtained a hearing out of the jury's presence and unsuccessfully sought court permission to impeach her by showing threats by Michel to shoot police officers. The court allowed the state to make an offer of proof by voir diring Mrs. Michel, heard argument, and sustained the defendant's objection to this line of testimony. The jury was recalled and the state resumed cross-examination of Mrs. Michel, during which the state asked her if she had said (during voir dire out of the jury's presence) that she "heard him [defendant] say that he was going to blow somebody's blankety-blank head ...." The defense moved for a mistrial which was granted and later, arguing prosecutorial misconduct, successfully sought dismissal of the indictment on double jeopardy grounds. This appeal followed.

Before proceeding to the merits, it is necessary to resolve Michel's contention that we lack jurisdiction over the state's "appeal." Michel relies on AS 22.07.020(d)(2) which provides:

> (d) An appeal to the court of appeals is a matter of right in all actions and proceedings within its jurisdiction except that ... (2) the state has no right of appeal in criminal cases except to test the sufficiency of the indictment or information or to appeal a sentence on the ground that it is too lenient.

Michel also relies on Alaska Rule of Appellate Procedure 202 which provides in relevant part:

> *Judgments from Which Appeal May Be Taken.*
>
> ....
>
> (c) In criminal cases, the prosecution has a right to appeal only to test the sufficiency of the indictment or on the ground that the sentence is too lenient.

[1] Michel reasons that to "test the sufficiency" of the complaint or indictment is to determine its efficacy as a charging document, *i. e.*, does it state an offense and, by extension, was the evidence submitted to the grand jury or charging authority, resulting in the publication of the indictment or information, adequate? Michel cites cases from other jurisdictions which have strictly construed similar statutory provisions in the manner he suggests. *See, e. g., State v. Garrett*, 228 Or. 1, 363 P.2d 762, 763 (1961); *State v. Ulmer*, 351 S.W.2d 7, 10 (Mo.1961); *State v. Fayle*, 114 Ariz. 219, 560 P.2d 403, 403–04 (1976) (adopting the holding of *State v. Lopez*, 26 Ariz.App. 559, 550 P.2d 113 (1976)).

We reject this interpretation, concluding, after reviewing Alaska law, that the reasons for strictly construing statutes providing for appeals by the government, *i. e.*, to prevent harassment of a defendant by multiple prosecutions draining away his financial resources and subjecting him to the emotional strain of pending proceedings,

are more than adequately answered by the liberal interpretation given the double jeopardy clause of our state constitution. We consider this case as an appeal rather than as a petition for review, *State v. Browder*, 486 P.2d 925 (Alaska 1971), because the judgment herein is unquestionably final, unless reversed. See *Jordan v. Reed*, 544 P.2d 75, 78–79 (Alaska 1975). We therefore conclude that the state may appeal to this court any adverse final judgment of a trial court in a criminal action dismissing an indictment for any reason unless retrial would be barred by the double jeopardy clauses of the state[1] or federal constitutions.[2] We thus construe Alaska law regarding appeals by the government as essentially the same as current federal law. See Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction* § 3919 (1976 and Supp. 1980).

We believe this decision is foreshadowed in a number of our supreme court's decisions. In *State v. Shelton*, 368 P.2d 817 (Alaska 1962) the court rejected the argument that a statute, similar to AS 22.07.020(d)(2), preventing government appeals in criminal cases "except to test the sufficiency of the indictment or information" permitted appeals only where the face of the indictment was found defective. The court reasoned:

> The word "sufficient" has a larger meaning than that. It denotes the concept of adequacy and adaptation to a desired end. An indictment has a purpose—to require a defendant to stand trial for a criminal offense with which he is charged. If it is not adequate to answer the purpose for which it is intended, then it is insufficient, regardless of the fact that it may meet all the formal statutory requisites and have all the appearance of validity. When an indictment is dismissed for any reason, the question of its sufficiency may create an issue, and this court has the power of review. [Footnotes omitted.]

Id. at 820.

In *State v. Keep*, 409 P.2d 321 (Alaska 1965), *aff'g*, *State v. Keep*, 397 P.2d 973 (Alaska 1965), the court refused review of a judgment favoring the accused where the state conceded retrial was barred by double jeopardy but requested an "advisory opinion" on the law.

Further, in *State v. Browder*, 486 P.2d 925 (Alaska 1971), the court rejected a challenge to its jurisdiction to grant petitions for review based upon *Keep* and AS 22.05.010, the statute governing appeals to the supreme court, substantially identical in form to AS 22.07.020(d)(2). The supreme court reasoned:

> [E]rroneous rulings involving important questions of constitutional law will be made during a trial, or at the superior court appellate level, in favor of an accused. How are such mistakes to be corrected? Neither AS 22.05.010 nor Alaska's constitutional prohibition against double jeopardy requires that an erroneous non-final order or decision, favorable to the accused, must stand uncorrected
>
> . . . .

Id. 486 P.2d at 931.

Finally, in *State v. Marathon Oil Co.*, 528 P.2d 293, 295–296 (Alaska 1974), the court permitted a further appeal to it by the state after a defendant obtained an acquittal at the intermediate appellate level, reasoning that AS 22.05.010 was intended to implement constitutional protection for double jeopardy and was not infringed by allowing a subsequent appeal by the state where the defendant prevailed on the first appeal following his conviction.

Read consistently with *Shelton* and *Keep*, we believe that the supreme court in *Browder* and *Marathon Oil* was recognizing the

1. Article 1 § 9 of the state constitution states: "No person shall be put in jeopardy twice for the same offense."

2. The fifth amendment to the United States Constitution provides in pertinent part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." This provision is applicable to the states through the fourteenth amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

fact that some erroneous final orders would bar retrial under the double jeopardy clause, but that erroneous non-final orders would not. Thus, we conclude, reading all of our supreme court cases together, that AS 22.05.010, governing appeals to the supreme court, and AS 22.07.020(d)(2), governing appeals to this court, will bar prosecution appeals only where double jeopardy would bar retrial if the appeal was successful.

Unfortunately, the record is not sufficient to determine the double jeopardy issue. The parties recognize that double jeopardy normally does not preclude retrial where a mistrial is declared at defendant's request. *Piesik v. State*, 572 P.2d 94, 96 (Alaska 1977). They likewise agree that mere negligence on the part of the prosecutor resulting in a mistrial will not bar retrial. *Muller v. State*, 478 P.2d 822, 827 (Alaska 1971). Finally, they agree that where the prosecutor, motivated by a desire to avoid an acquittal in a case which is going badly, engages in purposeful misconduct forcing the defendant to move for and the court to declare a mistrial further prosecution will be barred by double jeopardy. *Piesik v. State*, 572 P.2d at 97; *Torres v. State*, 519 P.2d 788, 791 (Alaska 1974); *Muller v. State*, 478 P.2d at 827.

The parties disagree as to whether "gross negligence" by the prosecutor, resulting in a mistrial, will bar a retrial. Michel cites *United States v. Martin*, 561 F.2d 135 (8th Cir. 1977), for the proposition that it should, while the state cites *United States v. Leonard*, 593 F.2d 951 (10th Cir. 1979), for the proposition that an intent to abort the trial is required before double jeopardy will preclude retrial. Our supreme court expressly reserved the issue in *Piesik v. State*, 572 P.2d at 97 n. 16.

[2, 3] The trial court, in its written decision dismissing the indictment, found that the mistrial was a result of "prejudicial prosecutorial misconduct" barring retrial. It is not clear whether the court found the misconduct to be merely negligent, grossly negligent, or intentional, or in context, what he understood these terms to mean. Therefore, the case must be remanded for further findings of fact and conclusions of law.[3]

The judgment of the superior court is vacated and the case REMANDED for the entry of findings of fact, conclusions of law and a new judgment.

3. Dismissal of a prosecution without a determination of guilt or innocence may be necessary to vindicate constitutional rights. Nevertheless, the community, apart from the state government and its prosecutors, has a substantial interest in seeing the guilty punished. Consequently, whenever a judge feels that a dismissal is required, under circumstances not determining guilt or innocence, he should make explicit findings of fact and conclusions of law to explain his decision to the parties and the public and to enable intelligent review by this court. *Cf.* Civil Rule 52 (findings of fact and conclusions of law required in civil cases).

recent expression of legislative intent is a factor which should be considered in judging Sundberg's sentence.[7] Since this issue was not addressed in the trial court, we believe that a remand for resentencing is the most appropriate procedure.

The case is remanded to the superior court to vacate the conviction and sentence for receiving or concealing stolen property, and for resentencing in accordance with this opinion.

BRYNER, C. J., not participating.

5. AS 11.46.130 reads as follows:

THEFT IN THE SECOND DEGREE. (a) A person commits the crime of theft in the second degree if he commits theft as defined in § 100 of this chapter and

(1) the value of the property or services is $500 or more but less than $25,000;

(2) the property is a firearm or explosive; or

(3) the property is taken from the person of another.

(b) Theft in the second degree is a class C felony.

6. AS 12.55.125(e) reads as follows:

A defendant convicted of a class C felony may be sentenced to a definite term of imprisonment of not more than five years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155—12.55.175:

(1) if the offense is a second felony conviction, two years;

(2) if the offense is a third felony conviction, three years.

7. Another factor which the trial court should consider in imposing Sundberg's sentence is that a sentence "ought not to exceed ten years except in unusual cases and normally should not exceed five years." ABA Standards, Sentencing Alternatives and Procedures § 2.1 at 1 (Approved Draft, 1971); *Pascoe v. State*, 628 P.2d 547 (Alaska, 1980).

STATE of Alaska, Petitioner,

v.

Casimer KOTT, Respondent.

No. 5570.

Court of Appeals of Alaska.

Nov. 19, 1981.

State brought petition for review of summary judgment of acquittal entered by the District Court, Fourth Judicial District, Fairbanks, Monroe Clayton, J., dismissing complaint against defendant on ground that his prosecution was barred by collateral estoppel. The Court of Appeals, Singleton, J., held that: (1) although characterized as judgment of acquittal, trial court's action was in effect order of dismissal entered prior to attachment of jeopardy and therefore did not preclude review under prohibition against placing defendant twice in jeopardy, and (2) judgment in criminal case favorable to codefendant did not bar prosecution of defendant in subsequent proceeding.

Reversed and remanded.

1. Criminal Law ⇐172

Although trial judge termed his judgment an acquittal, where trial judge neither heard all evidence against defendant nor concluded that reasonable jury could not find him guilty beyond reasonable doubt based upon that evidence, but rather, con-

cluded that judgment of acquittal previously entered in favor of codefendant barred trial of defendant under doctrine of collateral estoppel, trial court in effect granted defendant summary judgment, and such ruling prior to attachment of jeopardy through swearing of jury did not preclude appellate review by virtue of prohibition against placing defendant twice in jeopardy. U.S.C.A.Const.Amends. 5, 14; Const. Art. 1, § 9.

2. Criminal Law ⇐190

Double jeopardy clause does not preclude retrial after order of dismissal if order was erroneous. U.S.C.A.Const.Amend. 5; Const.Art. 1, § 9.

3. Judgment ⇐751

While state had as much incentive to prosecute codefendant as it did defendant, and while codefendant's involvement was certainly decided by prior judge, State did not have right to appeal codefendant's acquittal, and consequently, State could not be said to have had full and fair hearing on facts; thus, judgment in criminal case favorable to codefendant did not bar prosecution of defendant, on grounds of collateral estoppel, in subsequent proceeding.

James P. Doogan, Jr., Asst. Dist. Atty., Harry L. Davis, Dist. Atty., Fairbanks, and Wilson L. Condon, Atty. Gen., Juneau, for petitioner.

Lloyd I. Hoppner, Rice, Hoppner, Ingraham & Brown, Fairbanks, for respondent.

Before BRYNER, C. J., SINGLETON, J., and MOORE, Superior Court Judge.*

SINGLETON, Judge.

This is a petition for review of a summary judgment of acquittal entered by the district court dismissing the complaint against defendant on the ground that his prosecution was barred by collateral estoppel. The state first petitioned the superior court for review of the district court's decision. Upon denial by the superior court, the state renewed its petition in this court. Having concluded that the petition challenges a final judgment, we have determined to treat the petition as an appeal. *Jordan v. Reed*, 544 P.2d 75, 78–79 (Alaska 1975).[1]

[1, 2] The trial judge termed his judgment an acquittal. Generally judgments of acquittal are not reviewable on appeal by the state. *See Selman v. State*, 406 P.2d 181 (Alaska 1965). Both the state and federal constitutional prohibitions against placing a defendant twice in jeopardy insulate him from an appeal from a judgment of acquittal however erroneous the trial judge's view of the facts or the law. However, both state and federal courts have held that the reviewing court is not bound by the trial court's characterization of its order but must look to the legal effect of what actually was done. *See United States v. Jorn*, 400 U.S. 470, 478 n.7, 91 S.Ct. 547, 553 n.7, 27 L.Ed.2d 543, 552 (1971) (opinion of Harlan, J.); *Selman v. State*, 406 P.2d at 186. Here the trial judge neither heard all of the evidence against respondent nor concluded that a reasonable jury could not find him guilty beyond reasonable doubt based upon that evidence. Rather, he concluded

* Daniel A. Moore, Superior Court Judge, sitting by assignment made pursuant to article IV, section 16 of the Constitution of Alaska.

1. It is therefore not necessary for us to consider defendant's argument that this court lacks jurisdiction to hear this matter as a petition for review in light of certain limitations found in the district court rules (and in the rules of this court) governing appeals.

Further, we reject defendant's argument that AS 22.07.020(d)(2) which prevents appeals by the state except to test the sufficiency of the indictment, information or, by extention, complaint, precludes consideration of this matter as an appeal. In *State v. Michel*, 634 P.2d 383, (Alaska App., 1981), we relied upon *State v. Shelton*, 368 P.2d 817, 819–20 (Alaska 1962), in construing AS 22.07.020(d)(2) to preclude state appeals only in situations where retrial would be barred by double jeopardy; that is, we consider an indictment or information "insufficient" if it is dismissed for any reason other than a determination by a trier of fact that the defendant is innocent. We will consider the impact of the double jeopardy clauses of the state and federal constitutions hereafter.

that a judgment of acquittal previously entered in favor of a codefendant barred trial of respondent under the doctrine of collateral estoppel. Thus, the trial court in effect granted the defendant summary judgment. Such a pretrial ruling prior to the attachment of jeopardy through the swearing of the jury does not preclude appellate review by virtue of the prohibition against placing a defendant twice in jeopardy. *See Serfass v. United States*, 420 U.S. 377, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975). The United States Supreme Court has held that nothing in the double jeopardy clause of the federal constitution forecloses putting the defendant to trial as an aider and abettor simply because another jury has determined that his principal was not guilty of the offenses charged. *See Standefer v. United States*, 447 U.S. 10, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980). We see no reason to interpret our state constitution's double jeopardy clause differently. Consequently, we conclude that the trial judge's characterization of his decision as a judgment of acquittal was erroneous and that the judgment should have been characterized as a dismissal based upon a plea in bar, *i. e.*, nonmutual collateral estoppel. The double jeopardy clause does not preclude retrial after such an order of dismissal if the order was erroneous, and consequently, the superior court and this court may review the case.[2] *See United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971); Wright, Miller and Cooper, *Federal Practice and Procedure: Jurisdiction*, § 3919, at 675 (1976).

A determination that the constitution does not bar retrial is not dispositive, however, since nonmutual collateral estoppel, if available, might bar retrial as a matter of common law. It was the trial judge's determination that the common law barred retrial which generated the order of dismissal under consideration here.

In order to understand the context in which respondent was granted a judgment of acquittal, it is necessary to review the procedural history of this case. Defendant Kott and codefendant Roland Bonneville are police officers employed by the City of Fairbanks. On January 10, 1979, they were engaged in their duties attempting to videotape an individual whom they suspected of driving while intoxicated. During the videotaping, an altercation occurred resulting in a complaint against Kott and Bonneville charging them with assault of the suspect and erasure of the videotape to cover up evidence of that assault. Kott and Bonneville were initially tried together before District Court Judge Hugh Connelly and a jury on May 17, 1979. Fearing the unconstitutional use of one defendant's statements against the other, Judge Connelly issued a detailed order *in limine* precluding testimony relating admissions of one defendant implicating the other. On May 24, 1979, finding that the state had violated that order *in limine*, Judge Connelly granted a mistrial as to Kott only, and trial against Bonneville continued. Ultimately, Judge Connelly granted Bonneville a judgment of acquittal before submitting the case to the jury. Finally, Judge Connelly determined that the mistrial granted Kott was the result of prosecutorial misconduct and that therefore his retrial was barred. Nevertheless, he stayed entry of his judgment to allow the state to seek review. The state's petition for review was granted

2. The superior court denied review in the apparent belief that it was bound by the trial court's characterization of its decision as a judgment of acquittal. Respondent cites the carefully reasoned opinion of the superior court in *State v. Gardner*, No. 4 FA-78-1876 Cr. (Alaska Super., May 10, 1979), for the proposition that the district court's failure to stay entry of its judgment to permit review in the superior court is binding on the superior court and ousts that court of jurisdiction. For the reasons set out in *State v. Browder*, 486 P.2d 925, 929-31 (Alaska 1971), in support of the view that it is improper to permit a trial court to insulate its own errors from review, *e. g.*, by failing to grant a stay, we refuse to follow *State v. Gardner*. Consequently, we could remand this case to the superior court with directions to exercise its discretion regarding the granting or denial of the petition for review. Under the circumstances, however, we feel that the issue is of sufficient importance to warrant a decision by this court, and consequently, a remand would simply delay the ultimate outcome. We therefore decline to remand the case.

by Superior Court Judge Taylor who reviewed the facts of the case carefully, concluded that the state's actions were not sufficiently egregious to bar retrial, and reversed Judge Connelly's decision and remanded for trial. This decision is not before us at this time and we express no opinion regarding its resolution. The matter was reassigned to Judge Monroe Clayton. Kott then filed a motion to dismiss the complaint on grounds of collateral estoppel. After reviewing the material submitted by the parties, Judge Clayton entered an oral decision on July 15, 1980, granting the defendant's motion to dismiss, finding further prosecution barred by collateral estoppel. The oral decision was supplemented by a written judgment of acquittal filed on July 17, 1980. This petition followed on July 28, 1980.

The remaining issue is therefore: in a criminal case, may a defendant invoke a judgment of acquittal granted a codefendant in a prior case as a bar to his prosecution under the doctrine of collateral estoppel? The issue is one of first impression in this jurisdiction, though our state supreme court has on a number of occasions discussed *res judicata* and collateral estoppel in both civil and criminal cases. We feel that the proper resolution of this case can be gleaned from those earlier cases.

In *State v. Baker*, 393 P.2d 893, 896–97 (Alaska 1964), the supreme court defined the application and purpose of *res judicata* as follows:

> This doctrine bars a second suit between the same parties on the same subject matter resolving the same issues between the parties in the same capacity or quality. It is founded upon the principle that parties ought not to be permitted to litigate the same issue more than once and that when a right or fact has been judicially determined by a court of competent jurisdiction or an opportunity for such trial has been given, the judgment of the court, as long as it remains unreversed, should be conclusive upon the parties and those in privity with them in law or estate. [Footnotes omitted.]

The court said the following about the doctrine of collateral estoppel:

> While the general rule of res judicata applies to repetitious suits involving only the same cause of action it has been employed in situations where the second action between the same parties is upon a different cause or demand. But in the latter event the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. Res judicata is then more accurately referred to as collateral estoppel or estoppel by judgment.

Id. at 879 (footnotes omitted).

In its cases, the supreme court recognized that "mutuality" was normally required before collateral estoppel could be invoked. That is, both the party asserting estoppel and the party against whom estoppel was asserted in the second action had to have been parties to the first action. In *Pennington v. Snow*, 471 P.2d 370, 376–77 (Alaska 1970), the supreme court discussed circumstances under which a requirement of "mutuality" could be relaxed. There the court held that while the mutuality of estoppel requirement would be necessary in some cases, it would not as a rule be necessary for the invocation of *res judicata* or collateral estoppel against a party. Of note in this regard is *Scott v. Robertson*, 583 P.2d 188 (Alaska 1978), where the supreme court permitted a party to use a criminal conviction for driving while intoxicated against a defendant in a subsequent civil proceeding to establish negligence. The court held that three factors must be present before the criminal conviction can be used as conclusive in the civil proceeding: first, the prior conviction must be for a serious offense in order that the accused have the motivation to defend himself fully; second, that the defendant in fact have a full and fair hearing; and third, that the issue in which the judgment is offered must necessarily have been decided in the prior case. *Id.* at 191–92.

Finally, in *DeSacia v. State*, 469 P.2d 369, 379–81 (Alaska 1970), the Alaska Supreme Court, in partial reliance on *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), applied the doctrine of collateral estoppel to criminal cases, but in so doing, held that collateral estoppel would only be applied where it was fair to do so. *See Dapcevich v. State*, 360 P.2d 789, 792–93 (Alaska 1961). Specifically, in *DeSacia*, the court refused to give a defendant the benefit of inconsistent verdicts, one of guilty and one of not guilty, to bar any conviction at all.

[3] Having reviewed these Alaska cases, we have come to the conclusion that a judgment in a criminal case favorable to one defendant should not bar prosecution of a codefendant in a subsequent proceeding. While the state had as much incentive to prosecute Bonneville as it did Kott, and while Bonneville's involvement was certainly decided by Judge Connelly, the state did not have a right to appeal Bonneville's acquittal, and consequently, the state cannot be said to have had a full and fair hearing on the facts. We therefore reject nonmutual collateral estoppel in such criminal cases.[3] In so doing, we adopt the reasoning of the United States Supreme Court in *Standefer v. United States*, 447 U.S. at 22–23, 100 S.Ct. at 2007, 64 L.Ed.2d at 699–700, where the court refused to allow the use of a prior acquittal to bar prosecution against a codefendant and, in justification, said in part:

> First, in a criminal case, the government is often without the kind of "full and fair opportunity to litigate" that is a prerequisite of estoppel. Several aspects of our criminal law make this so: the prosecution's discovery rights in criminal cases are limited, both by rules of court and constitutional privileges; it is prohibited from being granted a directed verdict or from obtaining a judgment notwithstanding the verdict no matter how clear the evidence in support of guilt, compare Fed.Rule Civ.Proc. 50; it cannot secure a new trial on the ground that an acquittal was plainly contrary to the weight of the evidence, compare Fed.Rule Civ.Proc. 59; and it cannot secure appellate review where a defendant has been acquitted. The absence of these remedial procedures in criminal cases permits juries to acquit out of compassion or compromise or because of "their assumption of a power which they had no right to exercise, but to which they were disposed through lenity." It is of course true that verdicts induced by passion and prejudice are not unknown in civil suits. But in civil cases, post-trial motions and appellate review provide an aggrieved litigant a remedy; in a criminal case the government has no similar avenue to correct errors. Under contemporary principles of collateral estoppel, this factor strongly militates against giving an acquittal preclusive effect. [Citations and footnotes omitted.]

We recognize that these arguments might equally be made in any case where double jeopardy is asserted such as where a defendant invokes collateral estoppel in his own behalf based upon a prior acquittal But in such a case, collateral estoppel has been held a matter of constitutional compulsion not reasonable choice; for there, the risk of harassment of a defendant by successive prosecutions is at least possible. As the Supreme Court pointed out in *Standefer*, there is no question of harassment by successive prosecutions of one who is tried but once, though a codefendant might earlier have been tried. Finally, we recognize that in *People v. Taylor*, 12 Cal.2d 686, 117 Cal.Rptr. 70, 527 P.2d 622 (1974), upon which defendant relies, the California Supreme Court has arguably reached a different result. While we believe *Taylor* to be distinguishable on its facts (it involved a situation where one defendant was being prosecuted on a theory of vicarious liability

3. Where the state does have an opportunity to obtain review of an adverse decision, we express no opinion regarding the propriety of a court's application of nonmutual collateral estoppel. *Compare Commonwealth v. Scala*, 8 Mass.App. 202, 392 N.E.2d 869 (1979), *aff'd*, 404 N.E.2d 83 (Mass.1980) (denying nonmutual collateral estoppel effect to an earlier suppression hearing) *with State v. Gonzalez*, 75 N.J. 181, 380 A.2d 1128 (1977) (allowing it).

for the acts of a codefendant previously acquitted), we prefer to reject its holding. We feel the factors cited from *Standefer* are more persuasive than those relied upon by *Taylor, i. e.*, promoting judicial economy by minimizing repetitive litigation, preventing inconsistent judgments which undermine the integrity of the judicial system, and providing repose by preventing a person from being harassed by vexatious litigation. As previously mentioned, we see no harassment when an individual is tried for the first time, and we consider inconsistent judgments in criminal cases a necessary result of permitting jury trials where reasonable men can differ since where reasonable men can differ, they frequently will. Finally, we consider the need to enable the state to have a full and fair adversary proceeding more important than promoting judicial economy by minimizing repetitive litigation. The decision of the district court is REVERSED and this case is REMANDED for trial.

COATS, J., not participating.

Casimer KOTT, Petitioner,

v.

STATE of Alaska, Respondent.

No. 5570.

Supreme Court of Alaska.

Jan. 27, 1984.

State brought petition for review of summary judgment of acquittal entered by the District Court, Fourth Judicial District, Fairbanks, Monroe Clayton, J., dismissing complaint against defendant on ground that his prosecution was barred by collateral estoppel. The Court of Appeals, 636 P.2d 622, reversed and remanded, and defendant petitioned for hearing. The Supreme Court, Burke, C.J., held that: (1) Court of Appeals had jurisdiction to entertain petition; (2) State was not collaterally estopped from relitigating whether assault occurred; and (3) retrial was permissible under double jeopardy clauses of State and Federal Constitutions.

Court of Appeals affirmed.

Matthews, J., concurred with opinion.

1. **Criminal Law ⇐1023(2)**

Judgment of acquittal following grant of motion to dismiss complaint on collateral estoppel grounds was final judgment.

2. **Criminal Law ⇐1024(5)**

State was not entitled to appeal district court's judgment of acquittal following grant of motion to dismiss complaint on collateral estoppel grounds, pursuant to statute that precludes State's right to appeal in criminal cases except to test sufficiency of indictment or information or to appeal sentence on ground that it is too lenient; overruling *State v. Michel*, 634 P.2d 383. AS 22.07.020(d), (d)(2).

3. **Criminal Law ⇐1024(1)**

Statute which precludes State from appealing in criminal cases except to test sufficiency of indictment or information or to appeal sentence on ground that it is too lenient does not merely mimic double jeopardy clause, but more greatly limits State's right to appeal; overruling *State v. Michel*, 634 P.2d 383. 18 U.S.C.A. § 3731; Const. Art. 1, § 9; AS 22.07.020(d)(2); U.S.C.A. Const.Amend. 5.

4. **Indictment and Information ⇐71.2(2, 4)**

As charging document, fundamental purposes of indictment or information are to furnish accused with description of charge against him to enable him to prepare his defense and to permit him to claim double jeopardy in future should he again be charged with same offense, and thus, two basic criteria for determining sufficiency of indictment are whether it contains elements of offense to be charged so as to sufficiently apprise accused of what he must be prepared to meet at trial, and whether offense charged is identified with sufficient particularity so that after judgment the accused may be able to plead judgment in bar of further prosecution for same offense. Const. Art. 1, § 9.

5. **Indictment and Information ⇐71.2(2, 4)**

Indictment is insufficient if it fails to either inform defendant adequately of charges against him or to identify offense with sufficient particularity so that resulting judgment may be pleaded as bar to subsequent prosecutions for same crime.

6. **Indictment and Information ⇐10.1(4), 10.2(1, 2)**

If indictment is dismissed because evidence upon which it rests is perjured or insufficient, or because of some defect in procedures leading to indictment, so that defendant cannot be called to stand trial, then indictment is insufficient, regardless of fact that it may meet all formal statutory requisites and have all appearances of validity.

7. **Criminal Law ⇐1024(3)**

Appellate review from dismissal of criminal indictment based on either consideration of whether there was sufficient, credible evidence to support indictment, or

whether indictment procedures themselves comported with statutory and constitutional requirements, is permissible under statute which permits state to appeal "to test the sufficiency of the indictment or information." AS 22.07.020(d)(2).

See publication Words and Phrases for other judicial constructions and definitions.

8. Criminal Law ⇐1024(1)

Erroneous decision should not go uncorrected, simply because it is favorable to accused, and discretionary review is available, even if lower court ruling is in form of final order, where appellate review is not barred by state and federal double jeopardy guarantees. 18 U.S.C.A. § 3731; AS 22.07.020(d)(2); U.S.C.A. Const.Amend. 5; Rules App.Proc., Rule 402.

9. Criminal Law ⇐1024(5)

Court of Appeals had jurisdiction to hear petition for appellate review of judgment of acquittal, which was final judgment, entered following grant of motion to dismiss criminal complaint against defendant on collateral estoppel grounds; abandoning *State v. Keep*, 397 P.2d 973. 18 U.S.C.A. § 3731; AS 22.07.020(d)(2); U.S.C.A. Const.Amend. 5; Rules App.Proc., Rule 402.

10. Judgment ⇐634

Requirements of collateral estoppel are that issue sought to be relitigated be precisely same as issue in previous litigation, that judgment in prior litigation must have decided issue, and that there be "mutuality" of parties, i.e., collateral estoppel could be invoked only by those who were parties or privies to action in which judgment was rendered.

See publication Words and Phrases for other judicial constructions and definitions.

11. Judgment ⇐751

Collateral estoppel did not preclude State from relitigating, in prosecution of alleged accomplice for assault, whether in fact assault occurred, following acquittal of alleged principal, despite possibility that alleged accomplice might be convicted in face of alleged principal's earlier acquittal, as there was no question of harassment by successive prosecutions and State's need to have full and fair adversary proceeding outweighed interest in promoting judicial economy.

12. Criminal Law ⇐186

Double jeopardy did not bar prosecution of defendant alleged accomplice following reversal of entry of judgment of acquittal, which was granted on collateral estoppel grounds based on alleged codefendant principal's acquittal, as defendant had not been subjected to risk of conviction. Const. Art. 1, § 9; U.S.C.A. Const. Amend. 5.

Roger L. Brunner, and Kenneth P. Ringstad, Rice, Hoppner, Brown & Brunner, Fairbanks, for petitioner.

James P. Doogan, Jr., Asst. Dist. Atty., Fairbanks, Harry L. Davis, Dist. Atty., Fairbanks, and Wilson Condon, Atty. Gen., Juneau, for respondent.

Before BURKE, C.J., RABINOWITZ, MATTHEWS and COMPTON, JJ., and CARPENETI, Superior Court Judge *.

OPINION

BURKE, Chief Justice.

Casimer Kott petitions for hearing from a court of appeals decision reversing a judgment of acquittal entered by the district court on collateral estoppel grounds. We affirm the decision of the court of appeals.

Kott and Roland Bonneville were Fairbanks police officers. On January 10, 1979, they were attempting to videotape an individual whom they suspected of drunk driving. During the videotaping an altercation occurred which led to the filing of a criminal complaint against Kott and Bonne-

* Carpeneti, Superior Court Judge, sitting by assignment made pursuant to Article IV, section 16, of the Constitution of Alaska.

ville, charging them with assault of the suspect and erasure of the videotape to destroy evidence of the assault.

The officers were tried jointly, before a jury, in the district court. After several days of testimony, a mistrial was declared as to Kott, but trial against Bonneville continued. At the close of the case, the trial court granted Bonneville's motion for a judgment of acquittal. After Kott was assigned a new trial date, his attorney filed a motion to dismiss the complaint on collateral estoppel grounds. The motion was granted. The state thereafter petitioned the superior court for review of that decision but the petition was denied. On further petition to the court of appeals, however, the judgment of the district court was reversed, *State v. Kott*, 636 P.2d 622 (Alaska App.1981). This petition, by Kott, followed.

Kott urges in his petition: (1) that AS 22.07.020(d)(2) precludes the state from seeking review; (2) that the state and federal constitutional prohibitions against double jeopardy bar review of the trial court's judgment of acquittal; and (3) that the state is collaterally estopped from relitigating whether in fact an assault occurred. We hold that the court of appeals had jurisdiction to entertain the petition, that the state is not collaterally estopped from relitigating whether an assault occurred, and that a retrial is not impossible under the double jeopardy clauses of the state and federal constitutions.

I. *State's Right to Appeal*

AS 22.07.020(d)(2) provides, in part, that "the state has no right to appeal in criminal cases except to test the sufficiency of the indictment or information or to appeal a sentence on the ground that it is too lenient." [1] Similarly, while Appellate Rule 202 states that an appeal may be taken to the court of appeals from a final judgment entered by the superior or district court, "[i]n criminal cases, the prosecution has a right to appeal only to test the sufficiency of the indictment or on the ground that the sentence is too lenient." Alaska R.App.P. 202(c). The question presented here is whether this language precludes the state from seeking appellate review of the district court's decision to grant a judgment of acquittal.

The case is made to appear more complex than it really is because of its procedural history. Apparently in the belief that it had no right to appeal the decision, because of AS 22.07.020(d)(2) and Appellate Rule 202(c), the state petitioned for review pursuant to Appellate Rule 402. The latter provides, partly: "An aggrieved party, including the state ..., may petition the appellate court ... to review any order or decision of the trial court, not appealable under [Appellate] Rule 202...." Alaska R.App.P. 402(a)(1). The court of appeals elected to treat the petition as an appeal, based upon its determination that the petition challenged a final judgment. *State v. Kott*, 636 P.2d 622, 623 (Alaska App.1981). The court concluded that the state's appeal was not barred by AS 22.07.020(d)(2) and reversed.

[1, 2] We do not quarrel with the court of appeals' decision that the judgment of acquittal was a final judgment.[2] We do, however, take issue with the court's further holding that AS 22.07.020(d)(2) did not preclude an *appeal* by the state. In so holding, the court of appeals relied on its earlier decision in *State v. Michel*, 634 P.2d 383 (Alaska App.1981), where the court held that "the state may appeal ... any adverse final judgment of a trial court in a criminal action ... for any reason unless

1. AS 22.07.020(d) provides:

> An appeal to the court of appeals is a matter of right in all actions and proceedings within its jurisdiction except that (1) the right to appeal to the court of appeals is waived if an appellant chooses to appeal the final decision of the district court to the superior court; and (2) the state has no right to appeal in criminal cases except to test the sufficiency of the indictment or information or to appeal a sentence on the ground that it is too lenient.

2. The judgment below terminated the action against Kott. A more complete example of a final judgment would be hard to imagine. *See generally City & Borough of Juneau v. Thibodeau*, 595 P.2d 626, 631 n. 14 (Alaska 1979); *Jordan v. Reed*, 544 P.2d 75, 78–9 (Alaska 1975).

retrial would be barred by the double jeopardy clauses of the state or federal constitutions." 634 P.2d at 385 (footnotes omitted). The court reasoned that

> the reasons for strictly construing statutes providing for appeals by the government, i.e., to prevent harassment of a defendant by multiple prosecutions draining away his financial resources and subjecting him to the emotional strain of pending proceedings, are more than adequately answered by the liberal interpretation given the double jeopardy clause of our state constitution.

Id. at 384–85.[3]

[3–7] We cannot agree that AS 22.07.020(d)(2) merely mimics the double jeopardy clause. On its face, the statute prohibits appeals except appeals testing the sufficiency of the indictment, information, or by extension, complaint.[4] Numerous other jurisdictions, in interpreting similar statutes, have held that the state's right to appeal is sharply circumscribed. *See State v. Lopez*, 26 Ariz.App. 559, 550 P.2d 113, 114 (1976); *State v. Ulmer*, 351 S.W.2d 7, 9–10 (Mo.1961); *State v. Garrett*, 228 Or. 1, 363 P.2d 762, 763 (1961); *White v. State*, 543 S.W.2d 366, 368–69 (Tex.Cr.App.1976).

We note further that when the legislature enacted AS 22.07.020(d)(2) in 1980, it had the federal analogue to that provision before it. Under federal law, the United States may appeal from an adverse deci-

3. In addition, the court believed that its decision was foreshadowed by decisions of this court, notably *State v. Shelton*, 368 P.2d 817, 820 (Alaska 1962) (where an indictment is dismissed for any reason, the question of its sufficiency may create an issue for review), *State v. Browder*, 486 P.2d 925, 931 (Alaska 1971) (nothing in the Alaska constitution or Alaska statutes requires that an erroneous non-final order, favorable to the accused, stand uncorrected), and *State v. Marathon Oil Co.*, 528 P.2d 293, 296 (Alaska 1974) (state may appeal where defendant has prevailed on the first appeal following his conviction).

4. Our prior cases give some guidance in determining when an appeal tests the sufficiency of an indictment or information. As a charging document, the fundamental purposes of the indictment or information "are to furnish the accused with a description of the charge against him to enable him to prepare his defense and to permit him to claim double jeopardy in the future should he again be charged with the same offense." *Christie v. State*, 580 P.2d 310, 321 (Alaska 1978), *quoting Thomas v. State*, 522 P.2d 528, 530 (Alaska 1974). *See Stewart v. State*, 438 P.2d 387, 390 (Alaska 1968); *Thomas v. State*, 391 P.2d 18, 24 (Alaska 1964). Thus, two of the basic criteria for determining the sufficiency of an indictment are "whether it contains the elements of the offense to be charged so as to sufficiently apprise the accused of what he must be prepared to meet at the trial," and "whether the offense charged is identified with sufficient particularity so that after judgment the accused may be able to plead the judgment in bar of further prosecution for the same offense." *Price v. State*, 437 P.2d 330, 331–32 (Alaska 1968) (footnotes omitted). *Accord, Davenport v. State*, 543 P.2d 1204, 1206 n. 1 (Alaska 1975); *Christian v. State*, 513 P.2d 664, 667 (Alaska 1973); *Roberts v. State*, 458 P.2d 340, 347–48, 348 n. 21 (Alaska 1969); *Adkins v. State*, 389 P.2d 915, 916 (Alaska 1964). An indictment is insufficient if it fails either to inform adequately the defendant of the charges against him or to identify the offense with sufficient particularity so that the resulting judgment may be pleaded as a bar to subsequent prosecutions for the same crime.

We have recognized that the indictment or information has, in addition to its functions as a charging instrument, another purpose: "to require a defendant to stand trial for [the] offense with which he is charged." *State v. Shelton*, 368 P.2d 817, 820 (Alaska 1962); *see State v. Pete*, 420 P.2d 338, 341 (Alaska 1966); *State v. Smith*, 417 P.2d 252, 254 (Alaska 1966). Thus, if the indictment is dismissed because the evidence upon which it rests is perjured or insufficient, *see State v. Johnson*, 525 P.2d 532 (Alaska 1974); *Taggard v. State*, 500 P.2d 238 (Alaska 1972); *State v. Parks*, 437 P.2d 642 (Alaska 1968); *State v. Shelton*, 368 P.2d 817 (Alaska 1962), or because of some defect in the procedures leading to indictment, *see Peterson v. State*, 562 P.2d 1350 (Alaska 1977); *State v. Smith*, 417 P.2d 252 (Alaska 1966); *State v. Pete*, 420 P.2d 338 (Alaska 1966), so that the defendant cannot be called to stand trial, then the indictment is insufficient, "regardless of the fact that it may meet all the formal statutory requisites and have all the appearances of validity." *Shelton*, 368 P.2d at 820. These cases suggest two additional criteria, then, by which the sufficiency of the indictment or information is to be tested: whether there was sufficient, credible evidence to support the indictment, and whether the indictment procedures themselves comported with statutory and constitutional requirements. Appellate review from a dismissal based on either of these considerations is permissible under AS 22.07.020(d)(2) "to test the sufficiency of the indictment or information."

sion, "except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution." 18 U.S.C. § 3731 (as amended 1971). In other words, the federal statute plainly says what the court of appeals interpreted the Alaska statute to mean. But if our legislature intended that the right of appeal be limited by double jeopardy considerations alone, why then did it not simply say so? The adoption of a more restrictive jurisdictional statute, in the face of a federal statute to the contrary, persuades us that the legislature did indeed intend to limit substantively the state's right to appeal.

Finally, the construction urged by the state would mean that the legislature enacted an entirely superfluous statute. The state constitution contains a provision prohibiting the state from twice subjecting a defendant to jeopardy. Alaska Const., art. I, § 9. To read AS 22.07.020(d)(2) as no more than a restatement of this constitutional prohibition renders the statute thoroughly superfluous.

For these reasons, we disagree with the court of appeals' interpretation of AS 22.07.020(d)(2), and its conclusion that the state was entitled to appeal the district court's judgment of acquittal. To the extent that it is contrary to our holding today, the court of appeals' decision in *State v. Michel*, 634 P.2d 383 (Alaska App.1981) is overruled.

The question that remains unanswered is whether the state was entitled to obtain appellate review by other means, namely, by petition for review pursuant to Appellate Rule 402. The court of appeals declined to address this issue, stating: "It is ... not necessary for us to consider defendant's argument that this court lacks jurisdiction to hear this matter as a petition for review ... [given the court's determination that it could treat the petition as an appeal]." *State v. Kott*, 636 P.2d at 623 n. 1. Because of our decision that the state could not obtain review by means of a direct appeal, this question must now be answered.

[8] In *State v. Browder*, 486 P.2d 925 (Alaska 1971), we held that "the limitation placed upon the state's right to appeal in a criminal case ... was intended to apply only to instances where our jurisdiction is sought to be invoked by appeal." 486 P.2d at 930. Although *Browder* involved a non-final order, and is therefore distinguishable, it reflects our belief that an erroneous decision should not go uncorrected, simply because it is favorable to the accused.[5] Discretionary review under Appellate Rule 402 is available from "any order or decision of the trial court, not appealable under Rule 202, and not subject to a petition for hearing under Rule 302, in any action or proceeding, civil or criminal." Alaska R.App.P. 402(a)(1). As noted in *Browder*, if an appellate court does not have the opportunity to review lower court decisions, the lower court becomes the court of final jurisdiction. 486 P.2d at 930–31.

[9] We are aware that some jurisdictions, in addressing this question, have held that the state may not seek relief by peti-

5. Our holding in *Browder*, flowed from two considerations. First, in contrast to appeals, given as a matter of right, the other forms of review authorized by AS 22.05.010 have no limitation placed on them. Second, we noted that article IV, section 2 of the Alaska Constitution provides in part that the "supreme court shall be the highest court of the State, with final appellate jurisdiction."

Browder implicitly overruled *State v. Keep*, 397 P.2d 973, *aff'd on rehearing*, 409 P.2d 321 (Alaska 1965). In *Keep*, we rejected the state's argument that it had the right to petition for review in an instance where appeal was barred. We noted:

> The legislature did not intend that the state should have the right to appeal a criminal case and said so in unambiguous language. If the legislature had intended that the state have some other analogous or related right or remedy with respect to criminal cases [i.e., review by petition] we assume that it would have said so in the same statute in which it prohibited the state from appealing criminal cases.

397 P.2d at 975 (footnote omitted). While the cases are distinguishable, *see State v. Browder*, 486 P.2d at 933, the substance of the *Keep* opinion did not survive *Browder*.

tion in lieu of appeal.[6] Others, however, have held that statutes similar to AS 22.07.020(d)(2) relate exclusively to direct appeals as a matter of right and have no effect on discretionary forms of review, such as constitutional or common-law certiorari.[7] After reviewing this issue, we are convinced that nothing in AS 22.07.020(d)(2) requires that an erroneous ruling favorable to the accused go uncorrected, even if the ruling is in the form of a final order. We thus extend our holding in *Browder* to encompass all non-appealable orders, final or non-final, where appellate review is not barred by the state and federal double jeopardy guarantees. Discretionary review is available to the state under Appellate Rule 402 in such cases, despite the state's inability to bring an appeal as a matter of right. Accordingly, we hold that the court of appeals had jurisdiction to hear the matter.[8]

II. *Collateral Estoppel*

The trial court determined that common law principles of collateral estoppel barred the state from relitigating whether in fact an assault occurred. The facts giving rise to that court's application of collateral estoppel are set forth in the opinion below and need not be restated here. Suffice it to say that the judge acquitted Bonneville, the principal in the alleged assault, and Kott attempted to use this acquittal to bar his subsequent prosecution.[9] *State v. Kott*, 636 P.2d 622, 624 (Alaska App.1981).

[10] The narrow issue facing this court is whether, in a criminal case, a defendant may invoke a judgment of acquittal granted to a co-defendant in a prior case as a bar to his prosecution under the collateral estoppel doctrine. The traditional requirements of collateral estoppel are threefold: (1) the issue sought to be relitigated must be precisely the same as the issue in the previous litigation; (2) the judgment in the prior litigation must have decided the issue; and (3) there must be "mutuality" of parties, i.e., collateral estoppel could be invoked "only by those who were parties or privies to the action in which the judgment was rendered." *Pennington v. Snow*, 471

6. *See State v. Paul*, 8 N.M. 746, 461 P.2d 228, 229 (N.M.1969) (the state should not be permitted to accomplish by certiorari what it cannot do by appeal); *White v. State*, 543 S.W.2d 366, 368–69 (Tex.Cr.App.1976) (to say that review by certiorari does not constitute an appeal is to make a distinction without substance).

7. *See State v. Lopez*, 26 Ariz.App. 559, 550 P.2d 113, 115 (1976) (may review by way of order where appeal precluded by statute); *State v. Williams*, 227 So.2d 253, 257 (Fla.App.1969) (statute barring appeals has no effect on common law or constitutional certiorari).

8. We are aware that the criteria expressed in Rule 402(b) for the granting of review are directed toward the propriety of allowing interlocutory review in a given case. Rule 402(b) states that review "will be granted only where the sound policy behind the rule requiring appeals to be taken from final judgments is outweighed." Such a balancing process is not appropriate in all cases where review is made available under Rule 402(a)(1). It is apparent that other considerations must be applied in an appellate court's consideration of whether to grant review from final orders in criminal cases.

In view of the fact that today's decision renders incomplete the criteria for reviewability set forth in Rule 402(b) we will submit the subject of modification of Appellate Rule 402 to our Standing Advisory Committee on Criminal Rules.

9. There is no question that Kott can be convicted even though Bonneville, the principal in the alleged assault, was acquitted. Former AS 12.15.010 provided:

> The distinction between an accessory before the fact and a principal, and between principals in the first and second degree is abrogated; and all persons concerned in the commission of a crime, whether they directly commit the act constituting the crime or, though not present, aid and abet in its commission, shall be prosecuted, tried, and punished as principals.

AS 11.16.120(a)(2)(A), which became effective January 1, 1980, provides that in a criminal prosecution in which legal accountability is based on the conduct of another person it is *not* a defense that "the other person has not been prosecuted for or convicted of an offense based upon the conduct in question or has been convicted of a different offense or degree of offense." In its Commentary on the Alaska Revised Criminal Code, the Senate Judiciary Committee stated that the provision "eliminates the accessory's common law defense that the principal has not been convicted." 1978 Senate Journal Supplement No. 47 at 3.

P.2d 370, 374–75 (Alaska 1970); *see generally* 9 A.L.R.3d 203 (1966). In *Pennington*, we followed *Bernhard v. Bank of America*, 19 Cal.2d 807, 122 P.2d 892 (1942) and held that "mutuality of estoppel will not as a rule be necessary for the invocation of res judicata or collateral estoppel against a party." 471 P.2d at 377. Kott, who was neither a party nor privy to the action against Bonneville, asks that we extend *Pennington* and abandon the mutuality rule in the criminal context.

The defendant relies primarily on *People v. Taylor*, 12 Cal.3d 686, 117 Cal.Rptr. 70, 527 P.2d 622 (1974) and *People v. Jackson*, 44 Cal.App.3d 494, 118 Cal.Rptr. 702 (1975). In *Taylor*, the California Supreme Court concluded that the lack of identity of the parties did not preclude application of the doctrine of collateral estoppel "where an accused's guilt must be predicated on his vicarious liability for the acts of a previously acquitted confederate." 527 P.2d at 630–31. The *Taylor* court found the application of collateral estoppel to be mandated by three important policy considerations:

> (1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and (3) to provide repose by preventing a person from being harassed by vexatious litigation.

527 P.2d at 628.

In *Jackson*, the California Court of Appeal extended the use of nonmutual collateral estoppel to criminal cases involving "interdependent or joint responsibility." 118 Cal.Rptr. at 706–07. Defendant Jackson and two others had been charged with conspiracy. Following the acquittal of the others, the court held that the state was barred by collateral estoppel from prosecuting Jackson:

> In *Taylor* the defendant could not have committed the alleged crime *unless* the previously acquitted perpetrator had committed said crime. Similarly, *unless* [Jackson's alleged co-conspirators] engaged in a conspiracy with Jackson (which it has been determined they did not do) the latter cannot, by definition, have committed the criminal act charged. As in *Taylor*, it is impossible for Jackson to have committed the crime charged alone.

118 Cal.Rptr. at 707 (emphasis in original).

In contrast to these cases, the United States Supreme Court recently upheld the requirement of mutuality in the criminal area. *See Standefer v. United States*, 447 U.S. 10, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980). Criminal cases, said the Court, present considerations different from those in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971), or *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979). First, the government is often without the kind of "full and fair opportunity to litigate" that is the hallmark of estoppel:

> [T]he prosecution's discovery rights in criminal cases are limited, both by rules of court and constitutional privileges; it is prohibited from being granted a directed verdict or from obtaining a judgment notwithstanding the verdict no matter how clear the evidence in support of guilt, cf. Fed.Rule Civ.Proc. 50; it cannot secure a new trial on the ground that an acquittal was plainly contrary to the weight of the evidence, cf. Fed.Rule Civ. Proc. 59; and it cannot secure appellate review where a defendant has been acquitted. See *United States v. Ball*, 163 U.S. 662, 671 [16 S.Ct. 1192, 1195] 41 L.Ed. 300 (1896).

Standefer, 447 U.S. at 22, 100 S.Ct. at 2007, 64 L.Ed.2d at 699. Secondly, the application of nonmutual estoppel in criminal cases is made problematical by the existence of rules of evidence and exclusion unique to the criminal law. Finally, criminal prosecutions involve considerations wholly absent in civil litigation: the important public interest in effective law enforcement.

> [T]he purpose of a criminal court is not to provide a forum for the ascertainment of private rights. Rather it is to vindi-